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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 REPLY TO CLAIMANTS' OPPOSITION TO QWEST'S MOTION TO COMPEL** **(Administrative Law Judge Steven F. Goodwill)**

Qwest Corporation ("Qwest") hereby replies to Claimants' Opposition to Qwest's Motion to Compel ("Opposition"). On October 15, 2002, Qwest filed three motions: a motion to compel, a motion to vacate the procedural schedule pending hearing on the motion to compel, and a motion for a discovery conference. On October 21, 2004, the Utah Public Service Commission ("Commission") granted Qwest's motion to vacate the schedule because

Judge Goodwill, the Administrative Law Judge assigned to this case, was unavailable to address the discovery issues at that time. Since then, the AT&T Claimants' have responded to Qwest's motion to compel and a hearing has been set to address these issues on November 17, 2004.

I. AT&T'S CURRENT DISCOVERY APPROACH

In its initial response to Qwest's discovery requests, the AT&T Claimants took the position that Qwest was limited to 25 interrogatories (with each subpart qualifying as a single interrogatory). In their responses, the AT&T Claimants, though often interposing other objections, responded to most of the first 25 subparts—i.e., from data request 1 through data request 7(f)[1]—but refused to respond to any subparts thereafter (though they asserted additional objections in some instances to the other subparts).

In their Opposition, the AT&T Claimants have dropped the 25-subpart objection, and are presently objecting on different grounds to providing responses to most of the additional questions. The claimants justify this position of the ground that the remaining requests "are far afield of the legitimately relevant issues *raised by AT&T's complaint*."[2] More specifically, they characterize Qwest's data requests as concerning two topics—interconnection related matters and the corporate makeup of AT&T—that, in their view, are not relevant to this case.[3] On this basis, they argue that they should not be compelled to respond to Qwest's discovery.

There are two fundamental problems with the AT&T Claimants' arguments.

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[1] Qwest asserts that the responses to requests 2(d), 6(c), 6(i), and 7(d) were inadequate. Qwest will be prepared to address those requests at the November 17 hearing.

[2] Opposition at 3 (emphasis added).

[3] *Id.*

First, the AT&T claimant's position is inconsistent with relevant discovery law. Their belief that the limits of discovery are defined solely by their theory of the case (as espoused in the Complaint) is wrong and is inconsistent with URCP 26(b)(1) and relevant case law. The discovery standard is far broader than that, since it encompasses not just the claimant's theory of the case but also encompasses information that may be relevant to the actual or potential defenses of other parties.

Second, the AT&T Claimants seem to view this motion to compel as the proper time and place for the Commission to rule on and validate their theory of the case to the exclusion of all other theories. Despite law that mandates that parties must have a reasonable opportunity to discover facts that *may* lead to admissible evidence in support of their claims and defenses, the AT&T Claimants have unveiled their theory of the case in their Opposition, have asserted that as a matter of law any other factual or legal theory is wrong, and have thus argued that Qwest should not be allowed to pursue any additional discovery that might be inconsistent with their view of the world.[4] They not only seek the Commission's acceptance of their theory at this time, but they want the Commission to conclude that any alternative view of the facts is not only wrong, but completely unworthy of further inquiry. In other words, the AT&T Claimants want the Commission to reject the merit of defenses Qwest may assert before Qwest has even had an opportunity to the explore the factual basis for those defenses. That approach places the cart before the horse and is inconsistent with the law related to discovery. This is not the time for the Commission to determine whose legal position on liability issues is correct. Rather, this is the time to make sure both parties obtain the information that may be relevant to their cases.

[4] *Id.* at 4-7.

II. THE DISCOVERY STANDARD IN UTAH.

It is remarkable that nowhere in their Opposition do the AT&T Claimants address the discovery standards of Rule 26(b)(1) of the Utah Rules of Civil Procedure ("URCP"), which defines the general scope and limitations on discovery that the Commission has usually applied in its dockets:

> Parties may obtain discovery regarding *any matter*, not privileged, which is *relevant to the subject matter in the pending action,* whether it relates to the *claim or defense* of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence*. (Emphasis added).

Utah courts have always viewed this standard as broad. It is worth repeating the statements of the Utah Supreme Court made shortly after the modern version of the URCP was adopted several decades ago. The Court made is clear that the rules of discovery are for the purpose of assisting the parties in securing a just and inexpensive determination of a case and that discovery should be liberally permitted:

> 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 . . . .[5]

[5] In *State v. Petty*, 17 Utah 2d 382, 412 P.2d 914 (Utah 1966), 17 Utah 2d at 386, 412 P.2d at 917 *quoting* URCP 1(a) (emphasis added).

The Utah Supreme Court elsewhere noted that the URCP's discovery procedures are designed to "remove elements of surprise or trickery so that the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible."[6] In the same decision, the Court stated that the reference to the "subject-matter" of the lawsuit in URCP26(b)(1) is broad: "In considering what is the 'subject matter' of a lawsuit we keep in mind that the ultimate objective of any lawsuit is the determination of the dispute between the parties; and that the earlier and easier this can be accomplished, with justice to both sides, the better for all concerned. *Whatever helps attain that objective is 'relevant' to the lawsuit.*"[7] To that end, the Court noted that the "subject matter" of a lawsuit is a "broader term" than the "issues to be tried" in the case.[8]

A recent federal district court case underlined the breadth of the "relevancy" standard under Rule 26(b)(1) of the federal rules (which is identical to URCP 26(b)(1)):

> Relevancy is broadly construed, and a request for discovery should be considered relevant if there is "any possibility" that the information sought may be relevant to the claim or defense of any party. . . . A request for discovery should be allowed "unless *it is clear* that the information sought can have *no possible* bearing" on the claim or defense of a party.[9]

It is against this legal backdrop that encourages liberal discovery rights that the AT&T Claimants' effort to avoid providing answers to data requests must be judged.

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[6] *Ellis v. Gilbert*, 19 Utah 2d 189, 190, 429 P.2d 39, 40 (Utah 1967).

[7] *Id.* (emphasis added).

[8] 19 Utah 2d at 191, 429 P.2d at 40. The Court also noted that "the court and counsel should have the benefit of all of the material facts bearing upon both the essential aspects of the total lawsuit just mentioned, so that there can be a more realistic and meaningful discussion concerning any prospect of settlement." 19 Utah 2d at 191, 429 P.2d at 40-41.

[9] *Jones v. Rent-A-Center, Inc.*, 2002 U.S. Dist. LEXIS 8181 (D. Kan. 2002) at *4 (citations omitted; emphasis in original).

III. ARGUMENT

Qwest does not intend to address each specific data request to which the AT&T Claimants have objected. Because many of them deal with the same general subject matter (though addressing different aspects of that subject matter), Qwest will address the general categories into which these requests fall and explain why they meet the discovery standards set forth above.

A. Questions Relating to the Identify of the AT&T Entities and Their Actions.

The vast majority of Qwest's data requests represent its attempt to sort out the different AT&T entities, including what each may have done with regard to contractual relations with Qwest and its predecessors, what services they provide, what they are authorized to do in Utah, the interactions of their employees with Qwest which entities actually occupied the conduits that are in question, the time periods associated with these occupancies, and other similar issues. Of the unanswered questions, all but a few (data requests 22-24 and 27) are of this nature.

There is a clear reason why Qwest propounded these questions. The AT&T Claimants refer to themselves in the Complaint generically as "AT&T," even though they are separate entities and even though one of them is plainly a CLEC (while the other apparently is not). This is confusing. And as Qwest pointed out at length in its Amended Answer, the history of dealings between the AT&T entities and Qwest in this matter demonstrates that who is and who is not a CLEC is, from Qwest's perspective, an extremely important issue in this case.[10] One major aspect of Qwest's defense in this case makes it critical to determine which AT&T

[10] See, for example, the introductory portion of the Answer entitled "General Background and Procedural History." Answer at 2-6. The issue of the role of CLECs is also central to other paragraphs of the Answer. See, for example, paragraphs 3, 7-9, 12 of Qwest's Amended Answer.

entity specifically did certain things. Thus, virtually all of the questions in one way or another attempt to sort out the ambiguity in the pleadings created by AT&T's effort to make those issues as opaque as possible. According to the Utah Supreme Court, the rules "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.*"[11] Despite AT&T's efforts to avoid such clarification, the general issue of which AT&T entity did certain things is critical to Qwest's defense in this case. Qwest is therefore entitled to engage in reasonable discovery related to those issues.

Instead of answering these questions, the AT&T Claimants have in effect turned their Opposition to Qwest's motion to compel into a substantive summary judgment argument. They argue that, as a matter of law, Qwest knew that the entity occupying the conduit was AT&T Communications of the Mountain States and that Qwest should therefore be precluded from doing any discovery that might contradict that conclusion. They base this argument on two documents, one from 1987 and the other from 1988[12] (both of which are attached to the Complaint in Exhibit 5). The two documents indeed refer to an entity referred to as AT&T Communications of the Mountain States, Inc. On the basis of the existence of these documents, the AT&T Claimants assert that "Qwest has known for decades that AT&T Communications of the Mountain States and not 'American Telephone and Telegraph Company' occupies the conduit in Utah . . ."[13]

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[11] *State v. Petty, supra,* 17 Utah 2d 386, 412 P.2d at 917.

[12] Opposition at 5-6.

[13] *Id.* at 5.

The documents neither support the conclusion the AT&T Claimants attach to them nor do they support precluding Qwest from engaging in discovery on related issues. First, on their face, the documents relate only to conduit within Salt Lake City. Yet, the vast majority of the conduit covered by the three licenses in question in this case is located elsewhere.[14] Thus, to the extent these two documents can be argued to have placed Qwest on notice (a contention that Qwest denies and which it will address in its legal arguments on summary judgment), it is a quantum leap to conclude (as the AT&T Claimants assert they do) that they somehow communicated to Qwest that *all* of the conduit in Utah was occupied by AT&T Communications of the Mountain States. Second, many of the other documents attached to the Complaint suggest a completely different conclusion. For nearly twenty years Qwest has dealt, not with representatives of AT&T Communications of the Mountain States, but with representatives of The American Telephone and Telegraph Company (and its successor, AT&T Corp.) relating to Utah conduit (indeed, other documentation indicates that Qwest may have been dealing with a third AT&T entity). Billings for the conduit were sent to New Jersey, while changes in conduit arrangements were arranged with AT&T Corp. employees located in Georgia. There is nothing in any of that documentation to indicate that these offices and the employees that staffed them had anything to do with AT&T Communications of the Mountain States. Thus, Qwest propounded questions that go to the identity of certain employees and the identity of their employers (e.g., Data Request 25). Qwest likewise asked

[14] For example, license 87-2 is for conduit between Salt Lake City and Brigham City, while license 87-3 is for conduit between Salt Lake City and Provo. It does not take a degree in geography to conclude that the vast majority of the conduit subject to both licenses in not in Salt Lake City. Because of this ambiguity, Qwest propounded a question that asked the claimants to document the amount of conduit they occupy within Salt Lake City (Data Request No. 22).

questions related to which entities operate certain offices that have been involved in Utah conduit issues (e.g., Data Requests 6(g)-(i), 7(g)-(i), 11).

The AT&T Claimants' assertion that these two documents foreclose Qwest's inquiry into other aspects of the relationship between Qwest and other AT&T entities is premature. In order to prevent Qwest from making these inquiries, the Commission would have to accept the claimants' clearly erroneous interpretation of those documents, a question that is not before the Commission at this point. If the Commission were to reach such a conclusion at this time, it would be a clear violation of the rules of discovery in Utah. Qwest is entitled to a reasonable inquiry into all of these issues in the discovery stage of this case to determine if material factual issues exist and to have an opportunity to assert its position on the nature of any undisputed material facts.

The AT&T Claimants even object to the most fundamental of requests. Data Request 17 asks which AT&T entities currently occupy the conduit. Data Request 19 asks for historical information about which AT&T entities have occupied the conduit. Yet, the AT&T Claimants refuse to provide that information. The claimants respond that "Qwest cannot legitimately make a claim that it does not know what AT&T entity is using the conduit. Yet, Qwest seems to be taking the approach that it can use this discovery to fish for information about AT&T's facilities."[15] These two sentences are utterly contradictory. On the one hand, the AT&T Claimants state that Qwest knows which entity is using the conduit, but they then claim that Qwest is on some sort of fishing expedition to try to find out something it is not entitled to know (i.e, which entity is in the conduit). Either Qwest knows which entity is in the conduit or it is engaging a fishing expedition, but it cannot be doing both at the same time.

[15] Opposition at 17.

The fact is that Qwest is doing neither. Qwest does not know the entities that have been or are currently occupying the conduit, but is entitled to find out under any reasonable view of proper discovery.

The AT&T Claimants refuse to respond to the request for historical information on the ground that "this case does not go back to the original occupation of the conduit."[16] Yet, in their request for production to Qwest, the claimant sought information going back to 1987 for virtually all requests, and even as far back as 1982 in others. For example, the following are production requests propounded by the AT&T Claimants:

> 3. Produce all documents referring to, relating to, or regarding occupation of or access to Qwest-owned conduit or support structures by AT&T Communications of the Mountain States, Inc. **since January 1, 1982 in Utah**.
>
> 4. Produce all documents referring to, relating to, or regarding occupation of or access to Qwest-owned conduit or support structures by The American Telephone and Telegraph Company **since January 1, 1982 in Utah**.
>
> 5. Produce all documents referring to, relating to, or reflecting Qwest's billing of The American Telephone and Telegraph Company, AT&T Corp., or AT&T Communications of the Mountain States, Inc. **since April 1987** for occupancy of conduit or support structures owned by Qwest in Utah.
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> . . .
>
> 9. Produce any agreement referring to, relating to, or reflecting any agreement for occupancy of Qwest conduit or support structures **between January 1, 1982 and April 10, 1987**.[17]

[16] *Id.* at 19.

[17] Claimants' Requests for Data and Production of Documents (September 22, 2004) at 12.l

There is no small irony in contrasting the breadth of these discovery requests by the AT&T Claimants with the objections that they are now making to far more narrowly drawn requests made by Qwest.

The AT&T Claimants should be required to answer all questions related to the individual AT&T entities.

B. Questions Related to Interconnection Agreements and CLEC Status.

Perhaps the most curious ground asserted by the AT&T Claimants for refusing to answer data requests is that Qwest is not entitled to ask anything related to the interconnection agreement or the CLEC status of any party. The AT&T Claimants assert that Qwest cannot ask anything about this subject even though the AT&T Claimants brought the issue up in their Complaint, and even attached a copy of the interconnection agreement as an exhibit. Despite that, the AT&T Claimants now argue that Qwest should not be allowed to receive answers to questions about the interconnection agreement, the parties thereto, the CLEC-status of different entities, the services provided by them, and other related issues. The AT&T Claimants base their position on the following statement: "**This case is NOT a dispute over an interconnection agreement.** And the mere fact that AT&T appended a copy of the interconnection agreement to the Complaint, *in order to submit the SGAT*, does not open the entire interconnection agreement to discovery"[18]

This conclusion is erroneous. It assumes that the proper range of inquiry for discovery is defined by the *claimants'* definition of the issues in the case. That position has no basis in the law. URCP 26(b)(1) allows parties to "obtain discovery regarding *any matter*, not privileged, which is *relevant to the subject matter in the pending action*, whether it relates to

[18] Opposition at 4 (emphasis in original).

the claim or *defense*." In other words, the claimants cannot unilaterally define the limits of discovery. Throughout its Answer, Qwest raised issues related to the interconnection agreement and CLEC-status of parties, including whether any AT&T CLEC entity had ordered conduit pursuant to it, whether any CLEC entities occupy the conduit, and so on. Thus, Qwest's defense makes these factual issues a part of the "subject matter" of the action, and it follows that discovery questions relating to that subject matter are proper.

The AT&T Claimants' position is also inconsistent with its Complaint and its discovery requests. For example, in paragraph 8 of the Complaint, the AT&T Claimants state that they "occup[y] Qwest-owned conduit pursuant to an . . . 'Interconnection Agreement' executed . . . on June 9, 1998." They then appended a copy of the interconnection agreement to the Complaint. In paragraph 12, the AT&T Claimants cite a specific provision of the interconnection agreement relating to access to conduit. Paragraphs 13 and 14 discuss the SGAT rates that are available to CLECs. The SGAT is attached as Exhibit 8. Despite these extensive references to the interconnection agreement and SGAT in the Complaint, the AT&T Claimants now say the only reason the interconnection agreement was appended to the complaint was "*in order to submit the SGAT*."[19] One can only wonder why the claimants would take this position now, particularly given the fact that the SGAT and the interconnection agreement are completely separate exhibits to the Complaint—the AT&T Claimants were not required to file the interconnection agreement in order to submit the SGAT. For reasons known only to the AT&T Claimants, the focus of their claim has changed. While the Complaint gave the interconnection agreement great prominence, they are now attempting to distance themselves from it. The fact of the matter is that they raised issues

[19] Opposition at 4 (emphasis in original).

related to the interconnection agreement in their Complaint and Qwest is entitled to seek discovery on that issue and issues related to it.

Even more important, however, is the fact that issues related to the CLEC status of the AT&T entities and other issues related to the interconnection agreement is an integral element of Qwest's defense.[20] As noted, the proper scope of discovery includes not only the claim but defenses to the claim. As such, all of Qwest's requests related to the CLEC-status of the AT&T entities and other issues related to interconnection agreements are valid requests that fall well within the permissible limits of discovery. The Commission should order the AT&T Claimants to respond to them.[21]

C. Assignment of Rights

Most of the unanswered data requests are discussed in the prior two sections. However, one additional data request bears further discussion. In Data Request 21, Qwest made reference to a specific provision of the General License Agreement (Article 18) that deals with the assignment of rights under the Agreement. The data request simply asks the claimants to provide copies of all requests for assignment under the Agreement. It is hard to conceive of a question more directly related to the issues in this case. However, instead of a response, the AT&T Claimants raise the following intemperate objection:

> Like Qwest's requests above, this request is far afield of the claims in the complaint. AT&T challenges Qwest's conduit rates under statute. *Despite its mock cries of shock and outrage*, Qwest has made no allegation of breach of the conduit agreement by AT&T. And as discussed above in section III.B,

[20] See Qwest's Amended Answer at Section II and ¶¶ 3, 7-9, 12-13.

[21] It is also curious that the AT&T Claimants emphasize this issue to much when, in fact, only a handful of Qwest's discovery request go to this issue. Most of Qwest's discovery questions are straightforward factual inquiries that go to which entity did what and when, all of which is a fair subject for discovery.

> Qwest cannot make such a claim. . . . [T]his response assumes that AT&T was required to request Qwest's approval for some alleged assignment, as if this were a case involving Qwest suing AT&T breach or unauthorized occupancy. There is no good faith basis for Qwest's assertions or this discovery request.[22]

The AT&T Claimants appear to have difficulty distinguishing between a request for documents and a legal argument. Instead of responding to a simple request, they feel compelled to psychoanalyze why Qwest might want the answer to the question and then, having raised a straw man based on this effort at psychoanalysis, they attempt to beat it to death.

The parties will have a complete opportunity, either on summary judgment, or in hearings to argue the meaning or lack thereof related to a variety of issues. But that time is not now. We are still in the discovery phase of this case. The purpose of discovery is for parties to obtain basic information, in this case whether the party to the General License Agreement (a copy of which is attached to the Complaint) ever made a request for an assignment. It is well within any reasonable limits on discovery for Qwest to pose such a question and expect the AT&T Claimants to respond to it.

IV. CONCLUSION

The strident efforts of the AT&T Claimants to, on the one hand, demand several million dollars of refunds and, on the other, to refuse to respond to even the most basic of discovery requests should be rejected by the Commission. The outstanding requests are reasonable and well within the parameters of proper discovery. The original General License Agreement was entered with The American Telephone and Telegraph Company, yet the claimants in this case are two other entities. Thus, questions related to the identity of these

[22] Opposition at 20-21.

entities, what they do in Utah, what they are legally authorized to do, what services they provide, whether and when they have occupied the conduit in question, whether and when they may have provided notice to Qwest and its predecessors regarding conduit occupancy, and other similar questions go to the very heart of this case. Issues related to the CLEC-status of the entities are likewise within the limits of appropriate discovery.

This is allegedly a multi-million dollar case. While it may well be resolved on summary judgment, Qwest is entitled to pursue reasonable discovery in order to prepare its defense in this case. That defense, 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 and to Qwest's ability to prepare for a hearing.

Qwest therefore requests that the Commission order the AT&T Claimants to respond to all outstanding and unanswered requests. Qwest will be prepared to address the specific requests at the hearing on the motion to compel.

RESPECTFULLY SUBMITTED: June 14, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST CORPORATION'S REPLY TO LAIMANTS' OPPOSITION TO QWEST'S MOTION TO COMPEL** was served upon the following by electronic mail and by United States mail, first class postage prepaid, on November 8, 2004:

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