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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| AT&T CORP., a New York Corporation; AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., a Colorado Corporation,<br>Claimant,<br><br>vs.<br><br>QWEST CORPORATION, a Colorado Corporation,<br>Respondent. | Docket No. 04-087-73<br><br>**RESPONSE OF QWEST CORPORATION TO REQUEST FOR AGENCY ACTION OF AT&T CORP., and AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.** |

## I. INTRODUCTION

Qwest Corporation ("Qwest"), by and through its attorneys, and pursuant to Utah Code Ann. § 63-46b-6(1) and Utah Administrative Code R746-100-3.I and 746-100-4.D, hereby responds to the Request for Agency Action of AT&T Corp. ("AT&T Corp"), and AT&T Communications of the Mountain States, Inc., ("AT&T Mountain States") (sometimes

collectively referred to herein as the "AT&T Utah Claimants") in the above captioned proceeding.

This response is organized into the following sections:

1. A brief section recounting the general factual information and procedural history underlying this matter.

2. Qwest's answer to the specific factual allegations of the AT&T Utah Claimants.

3. Qwest's affirmative defenses to the claims asserted by the AT&T Utah Claimants.

4. The relief requested by Qwest.

## II. GENERAL BACKGROUND AND PROCEDURAL HISTORY

On June 14, 2004, the AT&T Utah Claimants filed their Request for Agency Action ("Request") with the Public Service Commission of Utah ("Commission"). The AT&T Utah Claimants filed this Request with the Commission at the same time that two AT&T competitive local exchange carriers ("CLECs"), AT&T Communications of the Midwest, Inc., and AT&T Mountain States (the "AT&T CLECs"), were engaged in a mediation with Qwest in connection with their complaint before the Federal Communications Commission ("FCC") concerning the same or similar issues in nine of the fourteen states in Qwest's territory. *See AT&T Communications of the Midwest, Inc. and AT&T Communications of the Mountain States, Inc. v. Qwest Corporation; Case No EB-03-MD-020.*[1] The Request indicates that it was served by mail on FCC counsel for Qwest, but was not served on Qwest's Utah counsel until a specific request was made to the AT&T Utah Claimants on June 17, 2004. On that day, the Request was also provided electronically to Qwest's FCC counsel.

The background of the federal case sheds light both on the nature of the AT&T Utah Claimants' legal theories in this docket and on their motivation for filing this Request. What is

[1] The FCC docket involves conduit space provided by Qwest in nine of the fourteen states encompassed in Qwest's service territory. The AT&T CLECs filed their complaint before the FCC because the commissions in those nine states, unlike Utah, have not certified to the FCC that they have assumed jurisdiction over poles, ducts and right-of-way issues under section 224(c)(2) of the Communications Act, as amended, 47 U.S.C. § 224(c)(2). As discussed below, Qwest believes that the Commission has not perfected its certification with respect to Utah.

more, the facts underlying the AT&T CLECs' federal complaint are substantially the same as in this docket, although the legal claims differ slightly between the two proceedings.

Both dockets involve a series of conduit license agreements that Qwest's predecessor in interest, The Mountain States Telephone and Telegraph Company, negotiated with the American Telephone & Telegraph Company (later known as AT&T Corp) during the late 1980s.[2] As described in paragraph eight of the Request, AT&T Corp voluntarily negotiated and entered into an agreement titled "General License Agreement for Conduit Occupancy Between The Mountain States Telephone and Telegraph Company and The American Telephone and Telegraph Company for the State of Utah" dated April 10, 1987 (the "Conduit License Agreement"). AT&T Corp also voluntarily negotiated and entered into a series of individual conduit license agreements pursuant to this Conduit License Agreement. Since that time, the Conduit License Agreement in Utah and similar facilities agreements in other states have defined the business relationship by which Qwest has provided AT&T Corp with access to its conduits, and have established the rates and terms under which AT&T Corp has secured this access throughout Qwest's service area.

Under the conduit license agreements, Qwest has for many years sent annual invoices to AT&T Corp charging the negotiated rates established in the license agreements, which have been paid by AT&T Corp. It therefore came as a surprise to Qwest when the AT&T CLECs -- both of whom are separate entities from AT&T Corp -- recently asserted that they are the actual occupants of Qwest's conduits, and that they are the beneficiaries of the agreements. The AT&T CLECs have now made this claim in their federal complaint against Qwest. Tacitly, AT&T Mountain States has also done so in the Request filed with this Commission.

The FCC docket was initiated by the AT&T CLECs after Qwest refused to grant billing discounts to AT&T Corp from the rates established in the license agreements. Specifically, in

[2] Qwest's predecessors, The Mountain States Telephone and Telegraph Company and US WEST Communications, Inc., will generally be referred to in this response as Qwest.

May and June of 2003, the AT&T CLECs approached Qwest about the calculation of its conduit rental rates and the availability of ARMIS data in connection with their internal "audit." Subsequently, they demanded that Qwest "adjust" downward certain invoices it was sending to AT&T Corp to reflect the discrepancy between the invoice rates and the rates established in Qwest's Statements of Generally Available Terms and Conditions ("SGATs"), which Qwest established on a state-by-state basis for use by CLECs. Qwest confirmed to the AT&T CLECs that they were entitled to the SGAT rates in their capacity as CLECs. During these and subsequent discussions, as well as an internal review of records, however, Qwest discovered that the invoices that the AT&T CLECs were referencing were with a different corporate entity from the AT&T CLECs, and that the invoices at issue were under the license agreements with AT&T Corp. It also became clear that, although the SGAT rates were readily available to the AT&T CLECs through the processes that Qwest had established for CLECs with the states, the AT&T CLECs had not previously identified themselves as occupants of Qwest's conduits and had never attempted to place an order for access to Qwest-owned conduit pursuant to the terms of their interconnection agreements or pursuant to the terms of Qwest's SGATs.[3] Given the on-going negotiations between Qwest and the AT&T CLECs to amend their interconnection agreements, during which the parties agreed to expressly reference the SGAT rates, it is inexplicable that the AT&T CLECs were unaware of these processes.

Based upon these facts, Qwest ultimately declined to grant the AT&T CLECs demands for "invoice adjustments" for the conduit leased to AT&T Corp in the 1980s under the AT&T Corp negotiated license agreements. AT&T Corp then unilaterally began withholding payment from Qwest of all but the SGAT rates as if Qwest had in fact agreed to amend the rates in the

[3] Specifically, although the AT&T CLECs are certificated and operate in the nine states at issue in the FCC docket, and although they have interconnection agreements with Qwest in each of these states pursuant to 47 U.S.C. § 251, they have never ordered conduit access from Qwest and have never sought to access the SGAT rates through the processes that were generally available to CLECs, even though the interconnection agreements and processes have been both public and operational for years.

license agreements. Subsequently and separately, the AT&T CLECs filed their FCC complaint against Qwest in December of 2003.

The FCC found the AT&T CLECs' federal complaint to be sufficiently confusing that it ordered two rounds of supplemental briefing to clarify both the facts and the legal claims at issue. Since many of the facts and claims in the FCC docket are relevant to this proceeding, Qwest believes it is necessary to describe the way in which the federal docket has evolved.

The AT&T CLECs' FCC complaint, like the Request here, attempts to intentionally blur the lines between AT&T's corporate entities as if there were no legal or operational distinctions between them. By use of this fiction, the AT&T CLECs attempted to assert that Qwest either knew (or should have known) that Qwest was dealing with these CLECs, even though the conduit license agreements and invoices at issue are all with AT&T Corp. Through the use of this artful pleading, the AT&T CLECs then asserted that Qwest's refusal to "adjust" the invoices that Qwest was sending to AT&T Corp was in fact "discriminatory" against the AT&T CLECs, that Qwest had acted in bad faith, and that Qwest had violated section 224 of the Communications Act of 1934, as amended (the "Act").[4] The AT&T CLECs also claimed, through a novel theory, that Qwest's actions were a violation of an alleged free-standing obligation owed by Qwest to lower its conduit charges under section 224 of the Act, despite the fact that the conduit license agreements with AT&T Corp predate the relevant provisions of, and are expressly excluded from section 224.[5] Further, the AT&T CLECs asserted that Qwest's refusal to grant their requested discounts amounted to both discrimination and anti-competitive conduct against them as CLECs, and was a violation of Qwest's interconnection agreements with them. On these grounds, the AT&T CLECs requested both forward-looking and retroactive

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[4] *See* 47 U.S.C. § 224.

[5] *See TCG Dallas, Inc., v. Texas Utils. Elec. Co.*, 13 F.C.C.R. 7298, 7301 ¶ 7 (1998)("The 1992 Agreement, and its 1994 Amendment, because they concern a utility and a telecommunications provider, and were in effect prior to February 8, 1996, comprise the type of agreement specifically excluded by Congress in section 224, as amended by the [Telecommunications Act of 1996]").

relief, dating back many years. Qwest has denied each of these allegations because the AT&T CLECs have never requested access to conduit under the interconnection agreements, and had never disclosed to Qwest that they were the parties actually using the conduits that were secured through the conduit license agreements between Qwest and AT&T Corp.

The FCC complaint remains pending at this time.

## III. ANSWER

With respect to the specific allegations in the Request, Qwest admits, denies and alleges as follows:

1. As to the allegations in paragraph one of the Request, Qwest admits that the Commission granted AT&T Mountain States a temporary certificate of public convenience in 1983 to provide those services in Utah that The Mountain States Telephone & Telegraph Company was prohibited from providing after the effective date of the Modified Final Judgment. As explained in the subsequent certificate granted to AT&T Mountain States in 1996, the 1983 temporary certificate was limited to "intrastate long distance" services. (Finding of Fact, ¶ 1 of Docket No 96-087-01). The 1996 certificate expanded AT&T Mountain States' authority to provide, for the first time, local exchange service within Utah. Copies of the Commission orders granting these certificates are attached to the Request and those orders speak for themselves. Qwest also admits that AT&T Corp's principal place of business is in New Jersey. Qwest denies any remaining allegations contained in paragraph one of the Request.

2. Qwest admits the allegations contained in paragraph two of the Request.

3. As to the allegations in paragraph three of the Request, the allegations are generally allegations of law to which no response is required. To the extent the allegations may be construed as factual allegations, Qwest admits that the Commission has certified to the FCC that it regulates the rates, terms and conditions for pole attachments in Utah, but Qwest denies that the Commission has jurisdiction to adjudicate this matter. In fact, the AT&T Utah

Claimants admit in paragraph sixteen of the Request that the Commission has not perfected its certification. Pursuant to section 224 of the Act, "a State shall not be considered to regulate the rates, terms, and conditions for pole attachments – (A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments."[6] In Utah, the Commission has never issued or made effective any rules or regulations over the use by one public utility of conduit owned by another public utility. In Utah Admin. Code R746-345-1.B, the Commission has adopted rules and regulations governing attachments by cable television companies to the poles of public utilities but those rules and regulations have no application to this docket. The Utah Legislature has also provided the Commission with authority to issue orders requiring the use by one public utility of the conduits and poles of another public utility when the two public utilities have failed to agree upon such use or the terms and conditions or compensation for the same.[7] However, the Commission has never issued or made effective any specific rules implementing this statutory authority. Moreover, as discussed elsewhere in this Response, Qwest and AT&T Corp have a valid and long standing contract under which AT&T Corp has ordered and used Qwest conduit in Utah. Similarly, Qwest and AT&T Mountain States have a valid and long standing interconnection agreement in Utah under which AT&T Mountain States has always had the ability to place an order for conduit access in Utah, though it has never actually done so. Thus, this is not an instance where the Commission should step in and order a remedy based upon the parties' failure to agree. Based upon these facts, and based upon the admission in paragraph sixteen of the Request, the Commission lacks jurisdiction over this dispute. Finally, based on Utah Code Ann. § 54-7-20, even if the Commission had jurisdiction over this matter, the Commission lacks jurisdiction to grant much of the relief sought in the Request.

4. Qwest admits the allegations in paragraph four of the Request.

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[6] *See* 47 U.S.C. § 224(c)(3)(A)

[7] *See* Utah Code Ann. § 54-4-13(1).

5. As to the allegations in paragraph five of the Request, Qwest states that the AT&T entity legally authorized to occupy Qwest's conduit in Utah that is at issue in this matter is AT&T Corp. However, based upon the AT&T CLECs' comments in both the FCC proceeding and in the Request, Qwest lacks sufficient knowledge and information to admit or deny which of the AT&T entities is the owner of the communication facilities that occupy Qwest's conduit in Utah.

6. As to the allegations in paragraph six of the Request, Qwest admits that it directly competes with both AT&T Corp and with AT&T Mountain States.

7. As to the allegations in paragraph seven of the Request, Qwest admits that it is obligated to provide access to Qwest-owned conduit in Utah under rates, terms and conditions that are just and reasonable. However, that obligation springs from a different source of authority as to each AT&T entity. AT&T Corp is entitled to such access pursuant to the terms of the 1987 Conduit License Agreement, and has continually been granted access by Qwest pursuant to orders placed by AT&T Corp for individual licenses (referred to in paragraph eight of the Request) under that Conduit License Agreement. With respect to that Conduit License Agreement, and the individual licenses, Qwest contends that the rates, terms and conditions, all of which were voluntarily negotiated and adhered to by the parties for many years, are just and reasonable. As for AT&T Mountain States, it requested and was granted access pursuant to Section 251 of the Act under the terms of its negotiated and arbitrated interconnection agreement with Qwest. In addition, AT&T Mountain States is also entitled to access pursuant to Qwest's Utah SGAT or by opting into another CLECs interconnection agreement pursuant to Section 252 of the Act. However, AT&T Mountain States has never placed an actual order with Qwest for access to Qwest-owned conduit in Utah pursuant to its interconnection agreement or by accepting the terms of Qwest's Utah SGAT. It now appears, however, that AT&T Mountain States may be utilizing the communication facilities that occupy Qwest's Utah conduit pursuant

to authorization provided by Qwest to AT&T Corp under the Conduit License Agreement and individual licenses described above that were negotiated between Qwest and AT&T Corp.

8. As to the allegations in paragraph eight of the Request, Qwest admits, based on information and belief, that AT&T Corp and AT&T Mountain States both presently occupy Qwest-owned conduit in Utah pursuant to the terms of the Conduit License Agreement and individual licenses executed thereto between Qwest and AT&T Corp. However, Qwest contends that no AT&T entity has requested occupancy under the terms of Qwest's interconnection agreement with AT&T Mountain States or pursuant to Qwest's Utah SGAT. AT&T Corp also has no certificate to provide local telecommunications services in Utah. And, although it is certificated in Utah, AT&T Mountain States has never placed an order for access to Qwest-owned conduit in Utah pursuant to its interconnection agreement or adopted the terms and conditions of Qwest's Utah SGAT. Although entitled to request such access, AT&T Mountain States has not done so. Accordingly, it has no legal right to occupy Qwest-owned conduit in Utah. If AT&T Mountain States does so, it is entitled to the rates, terms and conditions found in Qwest's SGAT, or in its interconnection agreement with Qwest, only on a prospective basis.

9. Qwest denies the allegations contained in paragraph nine of the Request. As stated above, AT&T Mountain States has never placed an order for access to Qwest-owned conduit in Utah pursuant to the terms of its Utah interconnection agreement with Qwest. Moreover, AT&T Corp is not certificated to provide local services in Utah and has never entered into an interconnection agreement with Qwest, adopted the SGAT, or opted into another interconnection agreement pursuant to Section 252 of the Act.

10. Qwest admits the allegations contained in paragraph ten of the Request.

11. Qwest admits the allegations contained in paragraph eleven of the Request.

12. Qwest admits that the language quoted by the AT&T Utah Claimants in paragraph twelve of the Request is an accurate quotation of language found in Qwest's current Utah

interconnection agreement with AT&T Mountain States. However, the parties have recently negotiated a new provision in their successor agreement. Several terms of the successor agreement were presented to the Commission for arbitration, but the terms and conditions for conduit were not disputed or arbitrated. Notably, the successor agreement provides for negotiated language that expressly adopts the SGAT rates. Qwest denies that AT&T Mountain States has exercised its rights with respect to Qwest-owned conduit in Utah pursuant to the terms of the quoted provision of the interconnection agreement because AT&T Mountain States has never placed an order with Qwest for access to conduit in Utah pursuant to the terms of its interconnection agreement.

13. As to the allegations in paragraph thirteen of the Request, Qwest admits that its Utah SGAT contains a conduit rental rate and that the SGAT is on file with the Commission. However, as set forth above, Qwest denies that its Utah SGAT has any application to this docket.

14. As to the allegations in paragraph fourteen of the Request, Qwest admits that its pole attachment fee and its innerduct occupancy fee are both based on the FCC guidelines. These fees were reviewed and approved by the Commission in Docket No. 00-049-105. Qwest denies any remaining allegations in paragraph fourteen.

15. Qwest admits the allegations in paragraph fifteen of the Request.

16. As to the allegations in paragraph sixteen of the Request, Qwest admits that AT&T Corp made a request for issues relating to conduit access to be included in the current pole attachment proceeding initiated by the Utah Division of Public Utilities (the "Division") in Docket No 04-999-03. However, Qwest contends that the Division determined that issues relating to conduit access would be dealt with in another proceeding. As to the remaining allegations in paragraph sixteen, Qwest agrees with the AT&T Utah Claimants admission that the Commission's certification to the FCC has not been perfected because the Commission has not yet issued any rules or regulations implements its regulatory authority over conduit as

required by section 224(c)(3) of the Act. Thus, the Commission lacks jurisdiction over this matter and it should be dismissed.

17. As to the allegations in paragraph seventeen of the Request, Qwest admits that earlier this year it issued invoices to AT&T Corp pursuant to the terms and conditions of the Conduit License Agreement and individual licenses described above, and that the charges negotiated by the parties in the licenses and contained in those invoices ranged from $2.10 to $2.98 per foot, per year.

18. As to the allegations in paragraph eighteen of the Request, Qwest admits that its SGAT rate for innerduct occupancy is $0.3455 per foot, per year and that this rate is just and reasonable. However, AT&T Mountain States has never adopted the terms of Qwest's Utah SGAT or ordered access to conduit from Qwest in accordance with those terms.

19. As to the allegations contained in paragraph nineteen of the Request, Qwest admits that AT&T Corp has previously requested that Qwest renegotiate the conduit rental rates established by the parties in the Conduit License Agreement and individual licenses negotiated pursuant thereto. However, these agreements predate the 1996 Telecommunications Act and are not subject to section 224 of the Act.[8] Qwest is not legally obligated to renegotiate the terms of those agreements. As for AT&T Mountain States, Qwest has informed this entity that it is entitled to Qwest's SGAT rate for access to Qwest-owned conduit in Utah pursuant to its interconnection agreement or Qwest's Utah SGAT, but AT&T Mountain States has never placed an order for access to such conduit pursuant to its interconnection agreement or adopted the terms of Qwest Utah SGAT. Within the past year AT&T Mountain States and Qwest negotiated, and arbitrated, a successor interconnection agreement. In that agreement the parties agreed to language that expressly adopts the SGAT rates for conduit access. Consequently, Qwest denies

[8] *See* 47 U.S.C. § 224(d)(3). Because Qwest and AT&T Corp are parties to agreements entered into in the 1980s, the agreement is not subject to section 224.

the allegation in paragraph nineteen that disclaim Qwest's negotiations with AT&T Mountain States and the agreement to include SGAT rates in the successor interconnection agreement.

20. The allegations in paragraph twenty of the Request set forth legal argument and conclusions to which no response is required. To the extent any of these allegations may be construed as stating factual allegations, Qwest admits that Utah Code Ann. §54-4-13 permits the Commission to issue an order directing that the use by one public utility of conduit owned by another public utility be permitted in certain limited circumstances, but Qwest denies that this provision of the Utah Code has any application to this action.

21. As to the allegations in paragraph twenty-one of the Request, Qwest admits that it competes with each of the AT&T Utah Claimants but denies that it has acted unjustly or unreasonably with respect to either of these two entities. Further, Qwest denies that is forced AT&T Mountain States to pay any rates above the Qwest Utah SGAT rate on file with the Commission. Qwest contends that these SGAT rates for access to Qwest-owned conduit in Utah have always been, and still are, available to AT&T Mountain States, yet AT&T Mountain States has failed to order such access pursuant to its interconnection agreement or by adopting the terms of Qwest's Utah SGAT.

22. Qwest denies the allegations contained in paragraph twenty-two of the Request.

23. Qwest denies the allegations contained in paragraph twenty-three of the Request. Qwest has fully complied with section 271 of the Act and has never discriminated against the AT&T Utah Claimants.

24. To the extent Qwest has not specifically admitted or denied factual allegations contained in paragraphs one through twenty-three of the Request, Qwest hereby denies those allegations.

## IV. AFFIRMATIVE DEFENSES

### A. First Affirmative Defense

This Commission lacks jurisdiction over the matters set forth in the Request.

**B. Second Affirmative Defense**

The Request fails to state a claim upon which relief can be granted.

**C. Third Affirmative Defense**

The Request is barred by the doctrine of laches.

**D. Fourth Affirmative Defense**

The Request is barred by the doctrine of retroactive ratemaking.

**E. Fifth Affirmative Defense**

The portion of the Request seeking a refund dating back to July 9, 1998 is barred by the application of Utah Code Ann. § 54-7-20 which requires that all claims concerning alleged discriminatory charges be filed with the Commission within one year.

**F. Sixth Affirmative Defense**

Qwest reserves the right to assert any additional affirmative defenses or special defenses that may become known through discovery or further proceedings in this matter or as may be otherwise appropriate.

## V. RELIEF REQUESTED

Based upon the foregoing answer and defenses, Qwest requests the following relief:

1. An order dismissing the AT&T Claimants' Request with prejudice.

2. An award of Qwest's costs and attorney's fees incurred in defending against the claims made in the Request.

3. Such other and further relief as may be within the Commission's jurisdiction and to which the Commission deems appropriate.

RESPECTFULLY SUBMITTED: July 19, 2004.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE OF QWEST CORPORATION TO REQUEST FOR AGENCY ACTION OF AT&T CORP. AND AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.** was served on the following by personal delivery on July 19, 2004:

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