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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

AT&T CORP., a New York Corporation;)	
AT&T COMMUNICATIONS OF THE)	
MOUNTAIN STATES, INC., a Colorado)	Case No. ATT-T-04-1
Corporation,)	
)	AT&T'S ANSWER IN OPPOSITION
Complainants,)	TO QWEST'S MOTION TO
vs.)	PROPOUND ADDITIONAL
)	DISCOVERY AND MOTION
QWEST CORPORATION, a Colorado)	REQUESTING PRE-HEARING
Corporation,)	CONFERENCE TO REVISE
)	PROCEDURAL SCHEDULE
Respondent.)	

AT&T Corp., and AT&T Communications of the Mountain States, Inc. (collectively “AT&T”), by and through its attorneys, Holland & Hart, hereby files the following Answer in Opposition to Qwest’s Motion to Propound Additional Discovery and Motion Requesting Pre-Hearing Conference to Revise Procedural Schedule.

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.

In addition, 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 or other virtue. As described in further detail below, all of the factual issues Qwest raises either are 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

As with the Motion to Compel Qwest filed on January 3, 2005, 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 opposes generally 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 "The 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. Although AT&T is entitled to just, reasonable and nondiscriminatory rates under both Washington and Idaho state laws, those laws are not identical. Qwest's cursory explanation fails to explain the relevance of the Washington requests to the Idaho proceeding. Ultimately, Qwest

¹ Motion p. 3.

fails to demonstrate why these requests fit within the Commission's discovery standards or even what issues they will address.

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 proceedings, not to mention before other state commissions. 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.²

More specifically, AT&T cannot respond to Qwest's Motion because Qwest has failed to submit its proposed additional round of discovery or identify the issues or topics on which it seeks further information. It wants *carte blanche* on substance, number and timing of its additional requests. Qwest's statement that it intends "to follow up on some of the topics covered [sic] its earlier discovery in this Idaho case to clarify some of the positions taken by the AT&T Claimants that relate to the disputed facts" offers little clarification, does not explain why such follow up could not be accomplished in the set time frame, and makes anything other than a general opposition to this request impossible. AT&T is concerned that Qwest is requesting that the Commission give it leave to engage in a wide-ranging fishing expedition.

With the exception of Qwest Washington Data Request No. 24, Qwest has made no showing that it could not have propounded these requests previously. For all of the requests, including No. 24, Qwest has made no showing that it was unable to ask these questions in its

² The issues AT&T presented to Qwest in its proposed Joint Stipulation of Facts were issues presented almost verbatim to Qwest in the FCC proceeding well before this Idaho complaint was filed.

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 Washington Data Request No. 24, that request states:

In AT&T's supplemental responses to Qwest Data Requests 17(c), 17(e), and 19, AT&T states that AT&T Communications of the Pacific Northwest, 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 known to Qwest or its predecessors-in-interest from the inception of the General License Agreement for Conduit Occupancy" (Response to 17(e)). 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 Pacific Northwest 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 Pacific Northwest.

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 important, 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

AT&T'S ANSWER IN OPPOSITION TO QWEST'S MOTION TO PROPOUND ADDITIONAL DISCOVERY AND MOTION REQUESTING PRE-HEARING CONFERENCE TO REVISE PROCEDURAL SCHEDULE – Page 4

discovery of admissible evidence.”³ 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 failure to understand which entity occupies the conduit does not alleviate it of that legal responsibility.

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.⁴ 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 Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641 and 47 U.S.C. § 224.

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.

³ I.R.C.P. 26(b); *In The Matter Of The Petition Of IAT Communications, Inc. dba Ntch-Idaho, Inc. Or Clear Talk For Designation As An Eligible Telecommunications Carrier*, 2003 Ida. PUC LEXIS 154 (Oct. 23, 2003).

⁴ 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.

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—Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641—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 a hearing on the Motion for Summary Judgment.⁵ 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 a dispositive motion. 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.

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

⁵ See IDAPA § 31.01.01.254 (The Commission may set and hear oral argument on any matter before it on reasonable notice according to the circumstances).

stipulated facts, or even to determine which facts are indeed in dispute.⁶ 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.

Qwest identifies three categories of facts that it asserts "are or may be in dispute."⁷ AT&T addresses each in turn.

First, Qwest alleges that the issue of "whether Qwest's predecessor had actual knowledge of the true occupant of the conduit" is in dispute.⁸ 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 Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641 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

⁶ On December 29, 2004, AT&T's counsel forwarded to Qwest's counsel a draft Joint Stipulation of Facts. Qwest's only response was to file a Motion to Compel on January 3, 2005 and its Motion requesting an evidentiary hearing. AT&T has not received a proposed stipulation from Qwest or comments on AT&T's draft.

⁷ Qwest Motion ¶ 8, p. 4.

⁸ *Id.*

reasonable rates on a nondiscriminatory basis. Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641; *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 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.⁹ 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 Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641 and 47 U.S.C. § 224.

Second, Qwest alleges that the issue of "how the contract rates were arrived at" is in dispute.¹⁰ Again, this issue is not relevant, and thus not a "material" fact. Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641 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.¹¹ It is irrelevant 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.¹²

⁹ 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.

¹⁰ Qwest Motion ¶ 8, p. 4.

¹¹ Answer ¶ 17, p.12.

¹² Under Article 15 of the conduit agreement, subsequent changes in law were to be adhered to by the parties. (Complaint Exhibit 4, Art. 15).

The issue of relevancy aside, there is no dispute over facts. For example, in discovery AT&T requested information about how Qwest calculated the \$2.75 to \$3.25 per foot rates at issue in this proceeding:¹³

Identify and explain the methodology, formulae, cost accounts, data and/or other bases, if any, used by Qwest in calculating or formulating the conduit rental rates assessed under the individual conduit licenses issued pursuant to the General License Agreement for Conduit Occupancy Between Pacific Northwest Bell Telephone Company and the American Telephone and Telegraph Company for the State of Washington dated May, 28 1988 (the “ General Conduit License Agreement”) in Idaho.¹⁴

Qwest responded that it did not have any such calculations:

The annual occupancy fees specified in conduit license numbers 88-10, 88-11, 88-12, 88-13, 89-10, and 90-2 were individually negotiated between the parties. Qwest has no records showing the methodologies, formulae, cost accounts, data and/or other bases for negotiating these rates.¹⁵

AT&T does not believe that Qwest’s response creates a fact in dispute.

Furthermore, when Qwest posed the same question to AT&T during discovery in the parallel Washington proceeding, AT&T responded that it also had no record of any calculations or formulae used to reach these rates.¹⁶ AT&T fails to see how this creates a dispute of fact. Both Qwest and AT&T agree that no records of calculations or formulae or how the rates were established exist. AT&T believes that Qwest is attempting to fabricate a controversy where none exists—as a deliberate tactic to obscure its refusal to address the issues that legitimately *are* in dispute.

¹³ See Qwest Response to AT&T’s First Set of Data Requests and Request for Production of Documents, Request No. AT&T 01-0111, attached hereto as Exhibit 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See AT&T’s Response to Qwest’s Third Set of Data Requests, Request No. 29 (Washington), attached hereto as Exhibit 2.

Third, Qwest alleges that the issue of “the facts concerning how to perform a proper cost and pricing calculation pursuant to the applicable statutory standard” is in dispute.¹⁷ This is not a material fact in dispute. Again, AT&T is hard-pressed to see the factual dispute over this issue. The issue of what formula, if any, should apply to Qwest’s rates is a question of law. Indeed, in its Answer Qwest admitted that the question of whether Qwest’s rates were just, reasonable and non-discriminatory in accordance with 47 U.S.C. § 224 and Idaho Code § 61-301 is a question of law and *not fact*:

Complaint paragraph 14: Qwest’s published SGAT conduit rate set forth below is “just, reasonable and nondiscriminatory” and consistent with 47 U.S.C. § 224 and Idaho Code § 61-301.

Qwest Answer paragraph 14: The allegations in paragraph 14 of the Complaint set forth legal argument and conclusions to which no response is required.

More important, AT&T is not requesting that the Commission develop or otherwise use a formula to calculate Qwest’s rates. As noted above, Qwest has admitted that its SGAT rates are just and reasonable rates.¹⁸ Moreover, Qwest has admitted that the SGAT rates were calculated using the FCC’s conduit rate formula.¹⁹ In its Complaint, AT&T also has accepted Qwest’s SGAT rate as a just and reasonable rate for purposes of Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641. In other words, the rates themselves are not in dispute. And thus, AT&T simply seeks non-discriminatory access to such rates, which are the same rates that Qwest charges other carriers pursuant to Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514 and 61-641. AT&T’s entitlement to such treatment is a matter of law based on the application of the undisputed, admitted facts in this case.

¹⁷ Qwest Motion ¶ 6.

¹⁸ Answer ¶ 17, p.12.

¹⁹ Answer ¶ 14, p. 12.

In sum, Qwest raises issues that are irrelevant 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.

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.²⁰ 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 overhanging the proceeding. AT&T sees no reason to consume the Commission's and the parties' resources with an evidentiary hearing if the Commission would 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 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.

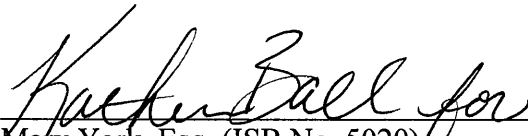
²⁰ Qwest Answer, ¶ 3, pp. 7-8.

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 21st day of January, 2005.

**AT&T CORP. AND AT&T COMMUNICATIONS OF THE
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CERTIFICATE OF SERVICE

I hereby certify that on the 21th day of January, 2005, an original and seven (7) true and correct copies of **AT&T'S ANSWER IN OPPOSITION TO QWEST'S MOTION TO PROPOUND ADDITIONAL DISCOVERY AND MOTION REQUESTING PRE-HEARING CONFERENCE TO REVISE PROCEDURAL SCHEDULE** were delivered to:

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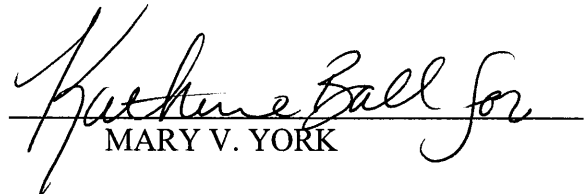
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