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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, and
AT&T COMMUNICATIONS OF THE
MOUNTAIN STATES, INC., a Colorado
corporation,

Complainants,

vs.

QWEST CORPORATION, a Colorado
corporation,

Respondent.

CASE NO.: ATT-T-04-1

**QWEST'S MOTION FOR LEAVE TO
PROPOUND ADDITIONAL DISCOVERY
AND MOTION REQUESTING A PRE-
HEARING CONFERENCE TO REVISE
PROCEDURAL SCHEDULE**

I. INTRODUCTION

1. Qwest Corporation ("Qwest"), pursuant to Commission Rules of Procedure 211 and 221, I.D.A.P.A, 31.01.01.211; 221, moves the Commission for leave to propound additional discovery to the AT&T Claimants and to schedule a pre-hearing conference in order to discuss revising the schedule in this matter. Qwest asks that the schedule be revised as described herein to allow for the

**QWEST'S MOTION FOR LEAVE TO PROPOUND ADDITIONAL DISCOVERY AND MOTION
REQUESTING A PRE-HEARING CONFERENCE TO REVISE PROCEDURAL SCHEDULE - Page 1**

filing of testimony and the scheduling of a technical hearing. Qwest believes that a hearing is required under several of the statutes relied upon by the AT&T Claimants for the basis of their relief, i.e., Idaho Code §§ 61-502, 61-503 and 61-514. Qwest submits that either a hearing must be held, or the Complaint must be dismissed.¹

2. Qwest has discussed this general issue with counsel for the AT&T Claimants. Claimants have not yet responded to that inquiry. In addition, counsel for Staff has previously been advised that Qwest would be filing this motion. Qwest believes a pre-hearing conference should be convened to discuss scheduling.

II. DISCUSSION

3. The existing schedule² calls for the parties to file cross motions for summary judgment, followed by answers and oral argument. Qwest agreed to that schedule during informal discussions with the AT&T Claimants. At the time, Qwest believed that the case could reasonably be resolved on cross motions for summary judgment as there would be few, if any, disputed facts. Since that time Qwest has come to believe otherwise, and no longer consents to the matter being resolved without a hearing.

4. This complaint proceeding cannot be resolved without a hearing for at least two reasons, each of which independently supports the need for a hearing. First, the discovery process has disclosed that the parties do, in fact, disagree on material facts, thus making an evidentiary hearing necessary. This point was underscored by responses filed by the AT&T Claimants to additional

¹ By reciting the Claimants' contentions as to the basis of the Commission's jurisdiction and authority to grant relief, Qwest does not intend to suggest that it agrees with these contentions or that the Commission could, under any set of facts proven by Claimants, grant the relief requested.

² The schedule provided that these summary motions would be filed in January "if no Motions to Compel are filed." However, on January 3, 2005, Qwest and the AT&T Claimants each filed motions to compel. Hence the deadline for filing such motions has not been established.

discovery in a similar case currently pending before the Washington Utilities and Transportation Commission,³ which disclosed numerous factual contentions in dispute. Second, a hearing is required by some of the key statutory provisions under which the complaint has been brought.

A. Motion for Leave to Propound Discovery.

5. Qwest has learned through discovery that there are material facts in dispute, or potentially in dispute, that can only be resolved through hearing. Disputes relating to substantial issues of fact should be resolved through an evidentiary hearing where issues may be tested with cross-examination.

6. In the Washington docket, Qwest initially propounded discovery requests similar to Qwest's first set of requests in Idaho. On December 2, 2004, Qwest propounded a second set of discovery requests consisting of three additional questions. A copy of Qwest's second set of requests in Washington is attached as **Exhibit A**. On December 16, 2004, the AT&T Claimants in Washington responded to two of those requests, a copy of which response is attached as **Exhibit B**. Qwest also propounded a third set of discovery requests in Washington consisting of five additional questions. A copy of Qwest's third set of discovery requests for the Washington case is attached as **Exhibit C**.

7. 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. Assuming the Commission grants Qwest's motion for leave to propound additional discovery in this case, Qwest intends to prepare discovery similar to that propounded in sets two and three in Washington and to follow up on some of the topics covered its

³ *AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corp.*, Docket No. UT-0451394. ("the Washington docket")

earlier discovery in this Idaho case to clarify some of the positions taken by the AT&T Claimants that relate to the disputed facts issues.

8. The responses in Washington, as well as those already received in Idaho, demonstrate that there are significant issues of material fact in dispute in this case. A few examples of facts that are or may be in dispute include: whether Qwest's predecessor had actual knowledge of the true occupant of the conduit; how the contract rates were developed and agreed upon; and how to perform a proper cost and pricing calculation pursuant to the applicable statutory standards. Based on the responses to the Washington discovery requests, Qwest may also need to ask a few additional questions in Washington and in Idaho to help clarify the issues, if possible.

9. Thus, based on Qwest's review of the Idaho and Washington responses, it is now clear that there are material facts in dispute, or potentially in dispute, that can only be resolved through an evidentiary hearing. Disputes on facts such as these should be tested through the filing of testimony and through cross-examination.

B. A Hearing is Required by Statute.

10. While some cases may be decided by summary judgment whether the parties consent to such a determination or not, there are certain types of cases where the Commission is statutorily obligated to have a hearing before granting relief to the complainant. This is one of those cases.

11. The AT&T Claimants have brought this complaint under Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514, and 61-641.⁴ Several of these statutes provide that the Commission may grant relief only after hearing. Specifically, Idaho Code § 61-502 provides in relevant part as follows:

Whenever the commission, *after a hearing had upon its own motion or upon complaint*, shall find that the rates, fares, tolls, rentals, [or] charges

⁴ See Complaint, ¶ 3.

. . . charged or collected by any public utility for any service or product or commodity. . . are unjust, unreasonable, discriminatory or preferential. . . the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges. . . and shall fix the same by order. . .

(emphasis added).

Similarly, Idaho Code § 61-503 provides in part:

The commission shall have the power, *upon a hearing*, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice . . . and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices . . .

(emphasis added).

Finally, Idaho Code § 61-514 provides in relevant part:

Whenever the commission, *after a hearing had upon its own motion or upon complaint of a public utility affected*, shall find that public convenience and necessity require the use by one (1) public utility of the conduits, subways, tracks, wires, poles, pipes or other equipment, or any part thereof, on, over or under any street or highway, and belonging to another public utility . . . and that such public utilities have failed to agree upon such use or the term and conditions or compensation for the same, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. . .

(emphasis added).


12. Thus, if the Commission is to grant relief under any of these statutes, it may do so only after hearing. Of course Qwest believes that the Commission will ultimately find that no such relief is warranted. However, a full and fair determination of the case requires that the AT&T Claimants present their evidence in a manner subject to cross examination. In addition, while it may be appropriate to decide a case such as this on cross motions for summary determination if both parties so

consent, it is a violation of the applicable statutes to do so when the respondent does not consent to such a determination.

13. Finally, this schedule change will not prejudice the AT&T Claimants. As the Claimants, the AT&T entities are obligated to prove their case by a preponderance of the evidence at hearing, and cannot escape that burden by the filing of a summary motion. Thus, this schedule change places the AT&T Claimants in the position they chose and accepted when they filed a formal complaint.

14. Qwest proposes that the details regarding the timing of pre-filed testimony and the dates of the hearings be discussed and decided at a pre-hearing conference and requests that such conference be scheduled as soon as possible.

RESPECTFULLY SUBMITTED this 7th day of January, 2005.



Mary S. Hobson
Stoel Rives LLP

Adam L. Sherr
Qwest Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2005, I served the foregoing **QWEST'S MOTION FOR LEAVE TO PROPOUND ADDITIONAL DISCOVERY AND MOTION REQUESTING A PRE-HEARING CONFERENCE TO REVISE PROCEDURAL SCHEDULE** upon all parties of record in this matter as follows:

Jean D. Jewell	<u> X </u>	Hand Delivery
Idaho Public Utilities Commission	_____	U. S. Mail
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Weldon Stutzman	<u> X </u>	Hand Delivery
Idaho Public Utilities Commission	_____	U. S. Mail
472 West Washington Street	_____	Overnight Delivery
P.O. Box 83720	_____	Facsimile
Boise, ID 83720-0074	_____	Email
Telephone (208) 334-0300		
Facsimile: (208) 334-3762		
wstutzm@puc.state.id.us		

Meredith R. Harris	_____	Hand Delivery
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Telephone: (908) 532-1850	_____	Email

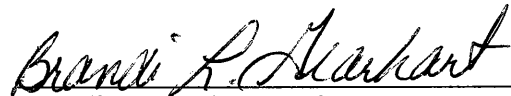
Robert M. Pomeroy	_____	Hand Delivery
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Brandi L. Gearhart, PLS
Legal Assistant to Mary S. Hobson
Stoel Rives LLP

EXHIBIT A

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T CORP. and AT&T
COMMUNICATIONS OF THE PACIFIC
NORTHWEST, INC.,
Complainants,
vs.
QWEST CORPORATION,
Respondent.

Docket No. UT-041394
QWEST'S SECOND SET OF DATA
REQUESTS TO AT&T CORP. AND
AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC.

TO: AT&T CORP. and AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.

Pursuant to WAC 480-07-400 Qwest Corporation ("Qwest") requests that AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. provide responses to the following data requests to the undersigned within ten (10) business days of the date of service of these requests:

DEFINITIONS

As used herein, the following terms have the meaning as set forth below:

1. The terms "AT&T," "you," and "your" shall include AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. and their attorneys, employees, servants, agents and representatives, and any person acting on their behalf for any purpose.
2. "List," "describe," "detail," "explain," "specify," or "state" shall mean to set forth fully, in detail and unambiguously, each and every fact of which you, your company or

1 your agents or representatives have knowledge which is relevant to the answer called for by the
2 data request.

3 3. The terms "document," "documents," or "documentation" as used herein shall
4 include, without limitation, any writings and documentary material of any kind whatsoever,
5 both originals and copies (regardless of origin and whether or not including additional writing
6 thereon or attached thereto), and any and all drafts, preliminary versions, alterations,
7 modifications, revisions, changes and written comments of and concerning such material,
8 including, but not limited to: correspondence, letters, memoranda, internal communications,
9 notes, reports, directions, studies, investigations, questionnaires and surveys, inspections,
10 permits, citizen complaints, studies, papers, files, books, manuals, instructions, records,
11 pamphlets, forms, contracts, contract amendments or supplements, contract offers, tenders,
12 acceptances, counteroffers or negotiating agreements, notices, confirmations, telegrams,
13 communications sent or received, print-outs, diary entries, calendars, tables, compilations,
14 tabulations, charts, graphs, maps, recommendations, ledgers, accounts, worksheets,
15 photographs, tape recordings, movie pictures, videotapes, transcripts, logs, work papers,
16 minutes, summaries, notations and records of any sort (printed, electronic, recorded or
17 otherwise) of any oral communications whether sent or received or neither, and other written
18 records or recordings, in whatever form, stored or contained in or on whatever medium
19 including computerized or digital memory or magnetic media that:

- 20 (a) are now or were formerly in your possession, custody or control; or
21 (b) are known or believed to be responsive to these data requests, regardless of who
22 has or formerly had custody, possession or control.

23 4. The terms "identify" and "identity," when used with reference to a person, mean
24 to state his or her full name, present or last known address, present or last known telephone
25 number, present or last known place of employment, position or business affiliation, his or her
26 position or business affiliation at the time in question, and a general description of the business

1 in which he or she is engaged.

2 5. The terms "identify" and "identity," when used with respect to any other entity,
3 mean to state its full name, the address of its principal place of business, and the name of its
4 chief executive officers.

5 6. The terms "identify" and "identity," with respect to a document, mean to state
6 the name or title of the document, the type of document (e.g., letter, memorandum, telegram,
7 computer input or output, chart, etc.), its date, the person(s) who authored it, the person(s) who
8 signed it, the person(s) to whom it was addressed, the person(s) to whom it was sent, its general
9 subject matter, its present location, and its present custodian. If any such document was but is
10 no longer in the possession of AT&T subject to its control, state what disposition was made of
11 it and explain the circumstances surrounding, and the authorization for, such disposition, and
12 state the date or approximate date of such disposition.

13 7. The terms "identify" and "identity," with respect to any non-written communica-
14 tion, mean to state the identity of the person(s) making and receiving the communication, their
15 respective principals or employers at the time of the communication, the date, manner and place
16 of the communication, and the topic or subject matter of the communication.

17 8. The term to "state the basis" for an allegation, contention, conclusion, position
18 or answer means: (a) to identify and specify the sources therefore; (b) to identify and specify all
19 facts on which you rely or intend to rely in support of the allegation, contention, conclusion,
20 position or answer; and (c) to set forth and explain the nature and application to the relevant
21 facts of all pertinent legal theories upon which you rely for your knowledge, information and/or
22 belief that there are good grounds to support such allegation, contention, conclusion, position or
23 answer.

24 9. The terms "relates to" or "relating to" mean referring to, concerning, responding
25 to, containing, regarding, discussing, describing, reflecting, analyzing, constituting, disclosing,
26 embodying, defining, stating, explaining, summarizing, or in any way pertaining to.

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10. The term "including" means "including, but not limited to."

11. The terms "CLEC" or "competitor" means any competing local exchange carrier not affiliated with Qwest, regardless of whether the carrier is presently providing local telephone exchange services in the State of Washington.

12. The term "carrier" means any provider of telecommunications services.

INSTRUCTIONS

A. These data requests shall be deemed to be continuing. You are obliged to change, supplement, and correct all answers to data requests to conform to available information, including such information as first becomes available to you after the answers and production of documents hereto are filed and made, should additional information become known or should information supplied in the answers or documents prove to be incorrect or incomplete.

B. The response to each data request provided should restate the question asked and also identify the person(s) supplying the information.

C. In answering these data requests, furnish all information that is available to you or may be reasonably ascertained by you, including information in the possession of any of your agents or attorneys, or otherwise subject to your knowledge, possession, custody or control.

D. If in answering these data requests you encounter any ambiguity in construing the request or a definition or instruction relevant to the inquiry contained within the data request, set forth the matter deemed "ambiguous" and set forth the construction chosen or used in answering the data request.

E. If you object to any part of a request, answer all parts of such requests to which you do not object, and as to each part to which you do object, separately set forth the specific basis for the objection.

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DATA REQUESTS

24. 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.

25. Please identify whether AT&T Corp. is in any way authorized to construct attachments upon, along, under, or across the public rights of way. If the answer is in the affirmative, please identify under what provision of law AT&T is so authorized. If AT&T does not rely on a specific provision of the law, please explain AT&T's response.

DATED this ____ day of December, 2004.

QWEST

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Qwest
1600 7th Avenue, Room 3206
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Phone: (206) 398-2500
Attorneys for Qwest

EXHIBIT B

**Before the
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
Olympia, Washington**

AT&T CORP., and AT&T COMMUNICATIONS OF THE)
PACIFIC NORTHWEST, INC.,)

Complainants,)

vs.)

QWEST CORPORATION,)

Respondent.)

) Docket No. UT-041394

) COMPLAINANTS'
) RESPONSE TO QWEST'S
) SECOND SET OF DATA
) REQUESTS TO AT&T CORP.
) AND AT&T
) COMMUNICATIONS OF THE
) PACIFIC NORTHWEST, INC.

AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. (hereinafter "Claimants"), through their attorneys and pursuant to WAC 480-07-405, submit this Response to Qwest Corporation's Second Set of Data Requests to AT&T Corp., and AT&T Communications of the Pacific Northwest, Inc. ("Qwest's Second Data Request") in the above-captioned matter.

I. GENERAL OBJECTIONS

In addition to the specific objections enumerated below, Claimants expressly incorporate by reference the "General Objections" accompanying their initial Response to Qwest's First Data Request, filed November 2, 2004.

II. RESPONSES TO DATA REQUESTS

Qwest Data Request No. 24: 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.

Claimants' Response:

There are at least four major categories of facts that support Claimants' contention, which are set forth under the following sub-headings.

- 1. Qwest's Predecessors Knew of the Relationship With AT&T Communications of the Pacific Northwest, Inc. Involving Use of Conduit From the *Modified Final Judgment Ordering Divestiture and the Accompanying Plan of Reorganization***

Prior to the divestiture of the regional bell operating companies ("RBOCs") from the American Telephone and Telegraph Company, conduit was jointly occupied by the American Telephone and Telegraph Company and its wholly-owned subsidiaries,

WUTC Docket No. UT-041394
AT&T Supplemental Response to Qwest's Second Set Of Data Requests
December 16, 2004

including Qwest's predecessors the Pacific Northwest Bell Telephone Company, the Northwestern Bell Telephone Company and the Mountain States Telephone and Telegraph Company. After entry of the Modification of Final Judgment on August 24, 1982¹ and upon final approval of the Plan of Reorganization on August 5, 1983, the American Telephone and Telegraph Company was divested of its local exchange facilities. As part of the Plan, AT&T Communications of the Pacific Northwest, Inc. was created on September 20, 1983 as a wholly-owned inter-exchange carrier subsidiary of the American Telephone and Telegraph Company. The Plan of Reorganization also called for the Pacific Northwest Bell Telephone Company, the Northwestern Bell Telephone Company, and the Mountain States Telephone and Telegraph Company to be consolidated into the RBOC US West.² On January 1, 1984, U S West, Inc. was officially created.

Pursuant to the Plan of Reorganization, each of the BOCs (*e.g.*, the Pacific Northwest Bell Telephone Company, the Northwestern Bell Telephone Company, and the Mountain States Telephone and Telegraph Company) created wholly-owned subsidiaries to which each of their respective interexchange facilities were transferred.³ In exchange for the transfer of the facilities, the BOCs obtained common stock of the new

¹ See *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983); see also *United States v. Western Electric Co.*, 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S. 1013, 104 S. Ct. 542, 78 L. Ed. 2d 719 (1983).

² See *United States v. American Telephone and Telegraph Co.*, Civil Action No. 82-0192, Plan of Reorganization, (Dec. 16, 1982), p. 5. (hereinafter "Plan of Reorganization").

³ *Consolidated Application of American Telephone and Telegraph Co. and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application*, 96 F.C.C. 2d 18, ¶ 31 (1983) ("*Consolidated Application*").

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AT&T Supplemental Response to Qwest's Second Set Of Data Requests
December 16, 2004

subsidiaries.⁴ The stock was then transferred to the American Telephone and Telegraph Company, divesting the BOCs of their interexchange facilities, in accordance with the terms of the Bell System break-up.⁵ In approving the Plan, the Federal Communications Commission clarified the status the interexchange subsidiaries would hold after divestiture:

The IXC subsidiaries will retain separate corporate status within AT&T and will not be merged into other subsidiaries or departments of AT&T. After divestiture, interexchange carrier functions will be handled by AT&T Communications, which will consist of a national interexchange corporation, an interstate division of AT&T, and 22 regional interexchange corporations. The national interexchange corporation will own no communications assets itself but will manage and direct AT&T's interexchange operations. The 22 regional interexchange corporations will operate the interLATA assets assigned to them at divestiture and, under the direction of the national interexchange corporation, will coordinate with the other interexchange corporations and the interstate division.⁶

AT&T Communications of the Pacific Northwest, Inc. is one of the 22 regional interexchange corporations created as a result of divestiture.

Several years after divestiture, AT&T Communications of the Pacific Northwest, Inc. began entering into agreements in its corporate parent's name. Given the incontrovertible history outlined above, Claimants believe it is clear that Qwest understood that AT&T Communications of the Pacific Northwest, Inc. was the interexchange carrier occupying the conduit at issue in this proceeding.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*, ¶ 32 n.37.

