

ATTACHMENT 2

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE)	
PACIFIC NORTHWEST, INC.,)	Docket No. UT-003120
)	
Complainant,)	QWEST'S MOTION TO AMEND ITS
v.)	ANSWER TO INCLUDE A CROSS-
)	COMPLAINT FOR EMERGENCY
QWEST CORPORATION,)	RELIEF
)	
Respondent)	

Qwest Corporation (Qwest) hereby moves the Commission for leave to amend the answer that Qwest filed on November 28, 2000. Such a motion may be made and granted pursuant to WAC 480-09-425(5), which allows pleadings to be amended at any time upon such terms the Commission finds to be lawful and just. The motion would, if granted, amend the answer and affirmative defenses to include a cross complaint for emergency relief as set forth herein.

1. Request for Emergency Relief – Pursuant to RCW 34.05.479 and WAC 480-09-510, the Commission is authorized to use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare. Qwest asserts that such a

QWEST'S MOTION TO AMEND ANSWER
TO INCLUDE CROSS-COMPLAINT FOR EMERGENCY
RELIEF

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2 situation has been shown to exist by virtue of facts set forth in Qwest's answer, and the additional
3 facts set forth herein, and in the attached Declaration of Jeffrey Wilson.

4 2. As set forth in Qwest's answer to AT&T's complaint, AT&T, and/or AT&T
5 Broadband is seeking access to Qwest's building terminals in order to access the sub-loop in
6 multiple dwelling units (MDUs). Qwest has offered such access on various terms and conditions
7 that, to date, have not been acceptable to AT&T. Some of these building terminal boxes are
8 padlocked, others are not.

9 3. Recently, AT&T has undertaken to access the building terminals without agreement
10 by Qwest, and has undertaken such access on terms and conditions which are not acceptable to
11 Qwest. Most importantly to this complaint, AT&T's actions have jeopardized the integrity of
12 Qwest's network, have jeopardized service to all customers within the MDU, and have placed
13 customers out of service. It is this latter circumstance that Qwest is asking the Commission to act
14 on.

15 4. AT&T's actions have and will continue to put Qwest customers out of service. This
16 occurs when AT&T breaks into Qwest's building terminals and connects a former Qwest customer
17 to AT&T's network. AT&T refuses to follow the Qwest recommended protocol of using a field
18 connection point (FCP) and instead makes a "hard connection" to transfer the customer. This
19 "hard connection", done within the confines of the relatively small, full, terminal box, places all
20 customers at an increased risk of having their service disconnected when and if the AT&T
21 technician cuts the wrong wire, or makes an incorrect connection.

22 5. Qwest believes that such out of service conditions have in fact been caused by
23 AT&T, as set forth in the attached declaration of Jeff Wilson. Qwest believes that AT&T's

24 QWEST'S MOTION TO AMEND ANSWER
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unauthorized access to its terminal boxes is the direct and proximate cause of at least three customers being placed out of service within the past six weeks in Bellingham alone. Such action by AT&T poses a completely unnecessary risk to the public safety and welfare by creating unpredictable service outages for customers.

6. The Commission can and should put a halt to this threat by ordering AT&T to cease and desist its activities at once, unless and until the parties are able to agree upon a reasonable protocol for interim access while the complaint is being resolved.

Respectfully submitted this 20th day of December, 2000.

Qwest Corporation

Lisa A. Anderl, WSBA No. 13236

QWEST'S MOTION TO AMEND ANSWER
TO INCLUDE CROSS-COMPLAINT FOR EMERGENCY
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ATTACHMENT 3

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T Communications of the Pacific)	
Northwest, Inc.,)	DOCKET NO. UT-003120
)	
Complainant,)	QWEST'S MOTION FOR SUMMARY
)	DETERMINATION
vs.)	
)	
Qwest Corporation,)	
)	
Respondent.)	

I. RELIEF REQUESTED

Qwest Corporation (Qwest) hereby brings this motion for summary determination pursuant to WAC 480-09-426(2). That rule provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor.

In considering a motion made under WAC 480-09-426(2), the Commission will consider the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior Court. CR 56 is the summary judgment rule. CR 56(b) provides that a party against whom a

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3 Additionally, AT&T has acquired TCG Seattle (TCG). TCG and Qwest were also parties
4 to an interconnection agreement, and AT&T is apparently conducting its operations under the TCG
5 agreement, as indicated in the letters referred to below as Exhibits C and D. The TCG agreement
6 is dated January 29, 1997, and is also now on a month-to-month basis. The TCG agreement is
7 attached hereto as Exhibit B.

8 The interconnection agreement(s) currently in effect between Qwest and AT&T do not
9 contain terms and conditions governing access to the building cable in multiple dwelling units
10 (MDUs) as described in AT&T's complaint. No sub-loop elements are identified as separately
11 available in the AT&T Agreement, nor are there prices set forth for sub-loop elements. The
12 AT&T agreement references loops in Attachment 3, Section 8. Unbundling of sub-loop elements
13 is addressed in Section 8.1.1.1, which provides that:

14 AT&T may purchase Loop and NID on an unbundled basis. AT&T shall use
15 the BFR process set forth in Part A of this Agreement to request unbundling of Loop
16 Concentrator/Multiplexer, Loop Feeder and Distribution.

17 Part A of the Agreement, Section 48, contains the arbitrated provisions regarding the BFR (bona
18 fide request) process. The requirements for initiating a BFR are contained in Section 48.3, as
19 follows:

20 48.3 A Request shall be submitted in writing and, at a minimum, shall include: (a) a
21 complete and accurate technical description of each requested Network Element or
22 Interconnection; (b) the desired interface specifications; (c) a statement that the
23 Interconnection or Network Element will be used to provide a Telecommunications Service;
24 (d) the quantity requested; (e) the location(s) requested; and (f) whether AT&T wants the
25 requested item(s) and terms made generally available. AT&T may designate a Request as
26 Confidential.

AT&T has clearly disregarded the BFR provisions of its Agreement, and has not complied with the
process set forth in that Agreement with regard to its request for access to MDU building cable.

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2 The TCG Agreement, under which AT&T is conducting its operations, contains no references
3 whatsoever to the provision of sub-loops or MDU building cable.

4 It is clear that the agreement(s) contain no provisions regarding access to the building cable
5 in MDUs or the provision of this sub-loop element. However, during the period of time from July
6 2000 until the filing of the complaint, AT&T and Qwest were engaged in negotiations regarding
7 this issue as required by the Telecommunications Act of 1996. Those negotiations focused on the
8 terms and conditions for access to the sub-loop element which is the MDU building cable, as well
9 as the pricing.

10 AT&T has acknowledged that the interconnection agreement between the parties must be
11 amended to incorporate terms and conditions for access to sub-loops. On August 22, 2000, AT&T
12 sent Qwest a letter stating that it was willing to amend the TCG interconnection agreement, and
13 proposing an amendment. The letter is attached hereto as Exhibit C.

14 On August 28, 2000, Qwest responded to AT&T's proposed amendment with a counter
15 proposal. Qwest supplied AT&T with amendments to the interconnection agreement to include
16 new terms and conditions for access to the NID, and to incorporate a new section regarding access
17 to sub-loops. Qwest's letter and proposed amendments are attached hereto as Exhibit D.

18 AT&T never provided Qwest with a different formal proposal in response to Qwest's
19 August 28 letter. However, the parties did continue to negotiate terms, conditions, and prices until
20 several days before AT&T filed its complaint.

21 AT&T is aware that amendments must be executed in order to effect changes to
22 interconnection agreements. Indeed, during the same time period that AT&T and Qwest were
23 negotiating the MDU issues, the parties reached agreement on an amendment regarding
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2 coordinated cutovers for local number portability. That amendment is attached hereto as
3 Exhibit E.

4 The only difference between the circumstances that resulted in Exhibit E and the situation
5 in this case is that the parties were able to agree on that amendment in Exhibit E, and were not able
6 to agree on an amendment regarding the issues in this complaint. However, that difference does
7 not support the filing of a complaint as AT&T has in this case. Rather, it simply means that on the
8 one hand, the parties reached agreement through negotiation, and on the other hand, an arbitration
9 may have been necessary to resolve the MDU issues. However, in both cases, an amendment to
10 the interconnection agreement in order to reflect new terms and conditions between the parties is
11 required.

12 Qwest believes that the material facts in this case are not in dispute, as the only facts which
13 are material to a determination of the issue raised by this motion are whether the parties had an
14 interconnection agreement governing the disputed issues. It is clear that they did not, but were
15 attempting to negotiate such an agreement. AT&T has improperly attempted to circumvent the
16 required negotiation process by filing a complaint premised on alleged state law violations. The
17 Commission should reject such attempts, and direct AT&T back to the negotiating table with
18 Qwest on these issues.

19 **III. STATEMENT OF THE ISSUES**

- 20 1. Does Qwest have any obligation under the January 29 or July 24, 1997
21 Interconnection Agreement(s) to provide access to building cable within MDUs or the sub-loop?
22 2. Does Qwest have any obligation under the Telecommunications Act of 1996 to
23 allow access to building cable within MDUs or sub-loops prior to State commission approval of
24 terms for that access in an arbitrated or negotiated interconnection agreement?

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3. Does Qwest's refusal to allow access on the terms and conditions unilaterally dictated by AT&T violate either state or federal law which prohibits undue preference, unreasonable discrimination or anticompetitive behavior?

IV. EVIDENCE RELIED UPON

Qwest relies upon the pleadings in this matter and the exhibits attached hereto.

V. LEGAL AUTHORITY

The complaint, as framed by AT&T, concerns AT&T's access to the inside wire in certain MDUs. As a justification for bringing the complaint before the Commission in the way that it has, AT&T states that its complaint is premised on violations of various Washington statutory provisions. However, the cited statutes do not establish any obligation on Qwest to allow access to sub-loop elements and do not confer any rights on AT&T in this context. Additionally, the allegations regarding violations of state law are a sham to conceal the true basis for the dispute. AT&T's own introduction to the Complaint shows very clearly that it premises its asserted rights in this complaint on the provisions of the Telecommunications Act and various FCC orders. Indeed, in the second sentence of the complaint AT&T admits that it has been attempting to obtain access to MDUs "*as mandated by the Telecommunications Act of 1996 . . .*" (emphasis added).

The real issue raised by the complaint is the dispute between Qwest and AT&T regarding the terms and conditions, as well as the prices, for sub-loop unbundling. Sub-loop unbundling, as mandated by the FCC in its UNE Remand Order, requires Qwest to allow access to its loop plant at technically feasible points within its network. One of these points may be the building terminal, generally a box on the outside of an MDU. As described in Qwest's Answer to the Complaint, there are certain network configurations where Qwest's loop plant extends all the way into the

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2 building and terminates inside each individual customer unit. It is those circumstances, i.e., the
3 “Option 3” buildings, in which the issues raised in the complaint arise.

4 While Qwest does not dispute AT&T’s right to access the sub-loop, Qwest does dispute
5 AT&T’s claim that it can unilaterally dictate the terms and conditions for that access. AT&T’s
6 right to access the sub-loop at the building terminal is based solely on the FCC’s UNE Remand
7 Order.¹

8 In the Local Competition First Report and Order², the FCC declined to require incumbents
9 to unbundle subloops. The FCC revisited this issue in the UNE Remand Order, however, and
10 concluded that where it is technically feasible to do so, the incumbent LECs must provide
11 unbundled access to subloops on a nationwide basis. UNE Remand Order at ¶ 205.

12 The FCC defined subloops as those portions of the loop that are accessible at terminals in
13 the incumbent’s outside plant – i.e., “where technicians can access the wire or fiber within the
14 cable without removing a splice case to reach the wire or fiber within.” *Id.* at ¶ 206. The
15 Commission further defined such accessible terminals to include: (1) any technically feasible point
16 near the customer premises, such as the pole or pedestal, the NID, or the minimum point of entry
17 to the customer premises (“MPOE”); (2) the feeder distribution interface (“FDI”): which might be
18 located in the utility room in a multi-dwelling unit, in a remote terminal, or in a controlled
19 environment vault “CEV”); and (3) the main distribution frame in the incumbent’s central office.
20 *Id.*

21 The FCC established a “rebuttable presumption that the subloop can be unbundled at any
22 accessible terminal in the outside loop plant.” *Id.* at ¶ 223. Thus, if the incumbent and CLEC

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24 ¹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC
Docket No. 96-98, *Third Report and Order*, FCC 99-238 (rel. Nov. 5, 1999).

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2 cannot reach an agreement pursuant to voluntary negotiations about the availability of space or the
3 technical feasibility of subloop unbundling at a given location, then the incumbent will bear the
4 burden of demonstrating to the state, *in the context of a section 252 arbitration proceeding*, that
5 there is no space available or that it is not technically feasible to unbundle the subloop at the
6 requested point (emphasis added). *Id.*

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8 With respect to multi-unit premises FCC encouraged parties to cooperate in creating a
9 single point of interconnection at such multi-unit premises. *Id.* at ¶ 225-26. Where the parties
10 cannot agree upon such a single point of interconnection, however, the FCC required the
11 “incumbent to construct a single point of interconnection that will be fully accessible and suitable
12 for use by multiple carriers,” regardless of whether the incumbent controls the wiring on the
13 customer premises. *Id.* at ¶ 226 & n. 442.

14 Thus, the right to access the sub-loop is clearly premised on the FCC’s UNE Remand
15 Order, and in that order the FCC has clearly held that disputes on issues regarding access to the
16 sub-loop must be resolved in the context of a Section 252 arbitration proceeding under the Act.
17 UNE Remand Order at ¶¶ 223, 229.

18 The Telecommunications Act, in Section 252, establishes a detailed schedule for
19 negotiation and arbitration of terms and conditions in an interconnection agreement. Additionally,
20 it is clear that the terms and conditions under which an incumbent LEC fulfills its requirements
21 under Section 251 of the Act must be contained in such an interconnection agreement.
22 Specifically, Section 251(c)(1) imposes on both carriers the duty to negotiate in good faith the
23 particular *terms and conditions of agreements* to fulfill the duties described in subsections (b) and

24 ² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC
Docket No. 96-98, *First Report and Order*, FCC 96-325 (rel. Aug. 8, 1996).

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2 (c) of Section 251. Thus, it is clear that the terms and conditions under which Qwest fulfills its
3 obligation to provide access to unbundled network elements (which is what is specifically at issue
4 in this case) must be contained in an *agreement*.

5 **A. Access to MDUs and Sub-loops.**

6 The complaint is essentially a complaint under the Telecommunications Act of 1996 (the
7 Act), alleging that Qwest's proposed terms and prices for access to a particular unbundled network
8 element (UNE) violate the Act and the FCC's requirements. However, the only proceeding in
9 which AT&T may properly seek to resolve this type of dispute under the Act is through a petition
10 for arbitration under Section 252, or, alternatively, a petition for enforcement of an interconnection
11 agreement if the agreement between the parties already addresses the issues in dispute. Here, it is
12 undisputed that the UNE that AT&T seeks to access is not covered by the interconnection
13 agreement between the parties. Further, AT&T has failed to comply with the requirements of the
14 Act to negotiate the issues in good faith, and has failed to comply with the procedural requirements
15 regarding a petition for arbitration.

16 The essential allegation in AT&T's complaint is that Qwest's refusal to allow AT&T to
17 access the building cable within MDUs through direct connection to Qwest building terminal
18 boxes as unilaterally mandated by AT&T is a violation of either state and federal law. In
19 addressing this question, Qwest reiterates the arguments set forth in its answer and affirmative
20 defenses of November 28, 2000. There, Qwest argued that because AT&T is asking for relief
21 available to it solely under the Act and FCC rules, it must use the mandated process of negotiating
22 and then arbitrating and agreement under the Federal Telecommunications Act. AT&T cannot rely
23 upon any other process for obtaining access to sub-loop elements.

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3 Because the agreement(s) that were effective between the parties at all times material to the
4 allegations raised in this complaint did not provide for access to MDU building cable or to these
5 sub-loop elements, Qwest had no obligation to do so. Qwest's obligation to provide
6 carrier-to-carrier services, if such obligation arises under the Telecommunications Act of 1996, is
7 an obligation which becomes effective only upon the effective date of an agreement approved by
8 the State commission.³

9 This Commission considered a similar complaint, almost three years ago, and decided that
10 the rights and obligations of the parties were established by the interconnection agreement in effect
11 between the parties at the time, and that disputes should be resolved by arbitration, not complaint.
12 In *MCI metro Access Transmission Services, Inc., v. U S WEST Communications, Inc.*, Docket No.
13 UT-971158, the Commission rejected MCI's claim that U S WEST was obligated under state law
14 to accept test orders for UNEs when MCI's interim interconnection agreement did not contain
15 terms and conditions addressing test orders. (Order Granting Motion for Summary Determination,
16 February 19, 1998).

17 In that proceeding, MCI filed a complaint against U S WEST, alleging, much as AT&T
18 does here, that it had an independent statutory entitlement under various provisions of state law to
19 have U S WEST perform in a certain manner. The Commission noted that its important powers
20 under state law were not diminished by the Commission's policy that the respective rights and
21 obligations of parties seeking interconnection of their networks should be controlled by a contract.
22 The Commission further stated that disagreements over the details of interconnection agreements

23 ³ See, Section 252(c)(3) requiring an implementation schedule in any arbitrated agreement, and 252(e) requiring
24 Commission approval of agreements.

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2 should be resolved through arbitration consistent with Section 252 of the Telecom Act. (*See*,
3 Order Granting Motion for Summary Determination, page 7).

4 The facts in that case were virtually identical to those here. In both cases CLECs have
5 come to the Commission and asked the Commission to circumvent the negotiation and arbitration
6 process carefully laid out by the Act. In the MCI case, the Commission wisely chose to direct the
7 CLEC back to the federally mandated process under Section 252 of the Act. The result should be
8 the same in this case.

9 **B. State and Federal Law**

10 AT&T claims that specific state statutes were violated in this complaint. Qwest believes
11 that the Commission should conclude as a matter of law that no violations have been established in
12 this matter.

13 AT&T cannot point to any state law authority which would enable it to purchase
14 unbundled network elements absent a specific contract with Qwest to do so. In fact, the
15 Commission recognized, in the original interconnection docket (UT-941464, et al.) that carriers
16 would enter into contracts or agreements with one another for interconnection, and for the
17 purchase of unbundled network elements. At the time that this complaint was filed, Qwest and
18 AT&T were parties to two such agreements which was approved by the Commission and effective
19 in January and July 1997. The agreements did not address sub-loops or access to MDUs, except to
20 direct AT&T to make a bona fide request if access were requested under the AT&T agreement.
21 AT&T never did so, and indeed acknowledged that its TCG agreement should be amended to
22 incorporate terms and conditions for access. Qwest was at all times willing to negotiate terms and
23 conditions for such access. As discussed above, in August 2000, Qwest sent AT&T a proposed
24 amendment to the interconnection agreement which would have established those terms and

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2 conditions. Qwest was also at all times willing to negotiate specific terms with AT&T. Thus,
3 there can be no suggestion that Qwest was under any obligation, under either state or federal law,
4 to provide AT&T with access to the sub-loop element prior to the effective date of an agreement
5 governing the same.

6 MCI, in its complaint in Docket No. UT-971158, cited many of the same provisions in
7 support of its claim that AT&T does here, including RCW 80.04.110 (complaints); 80.36.080
8 (adequate and sufficient facilities); 80.36.140 (Commission may order adequate and sufficient
9 facilities); 80.36.170 (Commission may remedy undue preference or advantage); and 80.36.186
10 (Commission may order access on equal terms).

11 AT&T suggests that RCW 80.36.080, which requires adequate and sufficient facilities, and
12 RCW 80.36.140, which allows the Commission to order adequate and sufficient facilities, are
13 violated by Qwest's failure to provide access under the terms and conditions unilaterally mandated
14 by AT&T. Qwest believes that the facts as established in this matter do not show that Qwest has
15 failed to provide adequate and sufficient facilities. The facts simply establish that AT&T has not
16 properly ordered or been entitled to the services it has requested.

17 AT&T also suggests that RCW 80.36.170, which allows the Commission to remedy an
18 undue preference or advantage, may have been violated in this matter. However, the facts as
19 alleged by AT&T entirely fail to establish that any carrier, including Qwest itself, was given an
20 advantage or preference by Qwest's treatment of AT&T. Qwest has provided service to those
21 customers and carriers who were reasonably entitled thereto, including as a prerequisite the
22 existence of a valid contract for the provision of those services. This same analysis also addresses
23 the argument that Qwest engaged in anticompetitive behavior, a ridiculous argument. Qwest has
24 simply required that carriers ordering services from it be in compliance with the federal

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2 requirements that an interconnection agreement and an agreement governing access to the UNEs a
3 carrier is requesting be in place prior to fulfilling any orders for those services. This behavior is
4 not anticompetitive, rather, it places all of the competitors on equal ground in requesting services
5 and facilities from Qwest.

6 **VI. CONCLUSION**

7 Based on the evidence presented in this case, Qwest believes that the allegations raised in
8 the complaint fail to state a claim upon which relief can be granted and that Qwest is entitled to a
9 summary determination in this matter and is entitled to judgment as a matter of law.

10 Specifically, the Commission should determine that absent an approved interconnection
11 agreement providing for access to the sub-loop (specifically at MDUs), Qwest was under no
12 obligation to provide that access. The Commission should dismiss the complaint, and direct
13 AT&T to pursue negotiations with Qwest under the Act.

14 Respectfully submitted this 11th day of January, 2001.

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16 Qwest Corporation

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Lisa A. Anderl, WSBA No. 13236

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Comment Filing System, (1) a copy of the **REPLY COMMENTS** to be served, via hand delivery on all parties marked with an asterisk (*), and (2) a copy of the **REPLY COMMENTS** to be served, via First Class United States mail, postage pre-paid, on all other parties listed on the attached service list.

Richard Grozier
Richard Grozier

February 21, 2001

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