

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	
)	Docket No. UT-033044
QWEST CORPORATION)	
)	
To Initiate a Mass-Market Switching)	AT&T'S MOTION TO STRIKE
and Dedicated Transport Case)	CERTAIN QWEST FILINGS, OR IN
Pursuant to the Triennial Review)	THE ALTERNATIVE, TO EXTEND
Order)	TIME FOR DISCOVERY
_____)	

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T") respectfully request that the Utilities and Transportation Commission strike certain new filings of Qwest Corporation ("Qwest"). If this motion to strike is not granted, AT&T requests that the time to prepare a rebuttal to the new evidence submitted by Qwest be extended from February 2, 2004 to February 20, 2004.

BACKGROUND

The Commission's Prehearing Conference Order (Order No. 02, October 16, 2003) establishes the procedural schedule for this proceeding. Pursuant to this schedule, the Commission required Qwest to file its primary case with its initial testimony and exhibits. Order No. 02 at ¶ 11. Accordingly, Qwest filed its testimony and exhibits related to its primary case on December 22, 2003.

The testimony filed by Qwest on December 22, 2003, included Exhibit RT-9HC containing a lengthy list of carriers who Qwest believes are wholesale or self-provisioning transport trigger candidates, and it documents the transport routes served

by each candidate. In response to the testimony and exhibits filed by Qwest, AT&T researched the putative trigger candidates and filed an additional discovery request on January 7, 2004. *See* AT&T's Third Set Of Discovery Requests To Qwest Corporation (Jan. 7, 2004).

On January 16, 2004, several weeks after the deadline for Qwest's submittal of its primary case, Qwest submitted a revised Exhibit RT-9HC. The revised exhibit contained numerous substantial additions and changes. First, Qwest added four new routes to the exhibit, each with from five to seven carriers, that were not listed on the original exhibit. Qwest also made nineteen changes to the existing routes, including changing a carrier's designation from wholesale to self-provisioned and vice versa, and adding or deleting carriers to routes.

ARGUMENT

I. AT&T is Substantially Prejudiced by Qwest's New and Revised Responses

The Commission's Order recognizes that the issues to be addressed by Qwest in the dedicated transport portion of the proceeding include the self-deployment and wholesale trigger analysis. Order No. 02 at ¶ 10. Because Qwest is primarily pursuing a trigger case for transport, Exhibit RT-9HC is the heart of Qwest's transport case before this Commission.

Accordingly, in its primary case filed on December 22, 2003, Qwest identified numerous routes and wire centers for the transport analysis in this proceeding. *See* Direct Testimony of Rachel Torrence on Behalf of Qwest Corp. at 9-11 (Dec. 22, 2003). At the same time, Qwest stated that it would eventually pursue additional routes beyond

those already identified, but Qwest would “present evidence of more routes that meet the triggers in *future proceedings*.” *Id.* at 12 (emphasis added).

The revised Exhibit RT-9HC does precisely what Qwest asserted it would not do: it attempts to add new routes in *this proceeding*, rather than waiting for a future proceeding to pursue these routes. Qwest’s substantial modification of the exhibit also represents an attempt by Qwest to alter its primary case, in direct violation of this Commission’s prehearing conference order. *See* Order No. 02 at ¶ 11.

This belated attempt by Qwest to add routes and change other routes prejudices AT&T’s ability to adequately respond to Qwest’s primary case. Prior to the revision, AT&T had already conducted discovery and is preparing expert rebuttal testimony based on the routes and carriers identified in the original exhibit. Given that Qwest submitted the revised exhibit on January 16, 2004, AT&T does not have sufficient time to address the revisions before its testimony, due on February 2, 2004, that rebuts this critical exhibit.

Therefore, AT&T requests that the Commission exercise its power to strike the late additions of new routes and changes to many other routes made to Exhibit RT-9HC. While the Commission’s rules do not explicitly refer to striking prejudicial responses, Washington law generally provides for the exclusion of expert testimony. In *Miller v. Peterson*, 714 P.2d 695 (Wash. Ct. App. 1986), the Court upheld a district court decision to exclude certain belatedly-disclosed expert testimony. *Id.* at 699. The Court found that despite a lack of evidence indicating that the late disclosure was willful or

unconscionable, the prejudice to the opposing party was material because it precluded time to prepare cross examination and a rebuttal to the new expert testimony. *Id.*

In the present matter, Qwest's actions directly prejudice AT&T by materially affecting AT&T's ability to prepare a rebuttal to the revised exhibit. This prejudice merits the exclusion of testimony as in the *Miller* decision. Therefore, AT&T requests that the Commission strike the late additions and changes contained in revised Exhibit RT-9HC.¹ Furthermore, this request is consistent with both Qwest's statement regarding the pursuit of additional routes in *future proceedings*, and the Federal Communication Commission's statement in the *Triennial Review Order*² allowing states to consider additional dedicated transport routes after the states complete their initial 9-month review. TRO at ¶¶ 417-18.

II. AT&T Requests Extension of Time to Rebut New Qwest Evidence

If the Commission denies AT&T's motion to strike certain Qwest filings, AT&T requests that the Commission extend the deadline for the submittal of rebuttal testimony from February 2, 2004 to February 20, 2004. The extensive revisions to exhibit RT-9HC require a substantial effort by AT&T to conduct additional discovery, receive responses and prepare a rebuttal, and the extra 18 days will partially remedy the burden placed on AT&T while still maintaining the current hearing schedule.

¹ AT&T has no objections to the changes in revised Exhibit RT-9HC where Qwest deleted carriers from a route. However, to the extent Qwest added carriers to routes and added new routes to the exhibit, thus presenting AT&T with the burden of additional discovery, this motion seeks to strike those changes or extend the time for discovery and rebuttal.

² *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) ("TRO").

Submitted this 27th day of January, 2004.

**AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., AND AT&T
LOCAL SERVICES ON BEHALF OF TCG
SEATTLE AND TCG OREGON**

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