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 REPLY TO COMPLAINANTS' OPPOSITION TO QWEST'S MOTION FOR LEAVE TO FILE A SECOND AMENDED ANSWER, ADDING CROSS-COMPLAINT

I. INTRODUCTION

1 On January 19, 2004, Qwest Corporation ("Qwest") filed with the Commission a Motion for Leave to File a Second Amended Answer, Adding Cross-Complaint. In accordance with the Prehearing Conference Order entered on January 21, 2005, AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. ("AT&T CLEC") (together, the "AT&T Complainants" or the "Complainants") and Commission Staff ("Staff") filed their Oppositions to that Motion on January 26, 2005. In accordance with that same Order, Qwest hereby files its Reply.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

2 Qwest's motion to amend its answer was timely filed, in good faith, to both narrow the contested issues and to bring into the case a matter inextricably related to the Complaint. The motion will not unduly delay the proceedings, and presents no unfair surprise to the AT&T Complainants. As such, the Commission should grant the motion and establish a procedural schedule to accommodate the issues presented.

3 AT&T Complainants accord disproportionate weight to the timing of Qwest's motion, suggesting that Qwest has somehow ambushed them at the last minute with new allegations and that nothing short of excluding the new issues raised by the Second Amended Answer will suffice. This is simply nonsense. As will be explained herein, Qwest's Second Amended Answer will not necessarily delay the proceedings, and does not prejudice the Complainants in any way.

4 No party can legitimately be expected to know all there is to know about a case in the 20 days allowed between the complaint and answer. As this case has proceeded through discovery and internal research, Qwest has clarified its thinking on various issues, and in fairness, has endeavored to advise the Commission and the other parties of any clarifications or changes in its position as soon as reasonably possible.

5 In December, just over three months from the date it filed its answer, Qwest became aware that there were facts in dispute that precluded this matter from being resolved via summary determination. In connection with that, Qwest realized that if it were to seek to change its SGAT conduit rates in the future, the Complainants might claim that Qwest was foreclosed from doing so vis-à-vis the Complainants, since Qwest had not raised the issue in this proceeding, where conduit rates were at issue. Qwest did further analysis on this issue, which to some extent was delayed by the Christmas and New Year holidays, and then filed its motion as soon as feasible thereafter. Indeed, as noted by the Complainants, Qwest gave the Complainants a courtesy "heads up" about this issue two weeks earlier, immediately after the

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

start of the year.

6 Qwest's Second Amended Answer essentially removes one issue (jurisdiction) from the case, and seeks to add an issue by virtue of a cross-complaint. The Complainants had previously contended that the Commission should first resolve the jurisdictional issue raised by Qwest in its answer, and was willing to delay the proceedings and build extra time into the schedule to address that issue.[1] Qwest's motion removes this issue from consideration. However, Qwest does seek to add an issue to the proceeding, and that issue is the appropriate level of SGAT rates for conduit access *if* the Complainants prevail in their claim that AT&T Corp. should be relieved of paying the lawful contractual rates that it voluntarily negotiated.

7 This new issue, presented via cross-complaint which is permissibly added under applicable law, would simply require Qwest to present a prima facie case regarding the level of its rates at the same time that the AT&T Complainants presents their direct case. This need not delay the proceeding. Qwest will not oppose a procedural schedule that assures that the AT&T Complainants will have ample time for discovery and to prepare a responsive case.

II. GRANTING QWEST'S MOTION WOULD PROMOTE FAIR AND JUST RESULTS

8 RCW 80.04.110(2) states that "all matters upon which complaint may be founded may be joined in one hearing. . . ." Qwest believes that this statutory provision contemplates that a cross complaint of this nature be joined for hearing with the original complaint, and that such joinder will promote efficiency in the proceeding. WAC 480-07-395 states that the Commission may allow amendments to pleadings on such terms as promote fair and just results.

9 In this case, where discovery is still ongoing, and where neither party has yet presented any prefiled testimony, an amendment such as that proposed by Qwest will not prejudice the

[1] Complainant's Opposition to Qwest's Motion to Revise the Procedural Schedule, p. 2, Jan. 10, 2005.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Complainants, as the schedule can be set up with ample time for a full airing of all issues. The Complainants' allegations that they have been prejudiced by a lack of discovery on this issue can be cured with additional time to conduct that discovery after Qwest presents its direct evidence in support of its position. Nor will any additional time constitute "undue delay," as an addition of less than a few months to the schedule should be required – the same amount of time that the Complainants were originally willing to spend litigating the jurisdictional issue.

10 Qwest agrees with the Complainants that the applicable case law in Washington regarding amendments to pleadings generally states that leave to amend will be denied when the other party would be prejudiced by the amendment. However, the cases cited by the Complainants actually support allowing Qwest's amendment, not denying it.[2] Furthermore, contrary to the Complainants' allegations, Washington law does not separately consider the timing of the amendment as an independent basis for denial, and does not consider whether the amendment was offered in good faith. Nevertheless, as Qwest can overcome all of the objections posed by the Complainants, Qwest will respond to each in turn.

A. Qwest's Amendment is Offered in Good Faith

11 Qwest categorically denies the allegation that Qwest has not offered its amendment in good faith. When Qwest filed its answer, it did so under the belief that the SGAT rates complied with Section 224, and that such a formula would also be required by the Commission in any rate setting proceeding. Qwest continues to agree that the SGAT rates comport with the FCC formula, and has not withdrawn that admission. It has only withdrawn the admission that the rates are fair, just, reasonable and sufficient under Washington law given the criteria set out by

[2] In *Wilson v. Horsley*, 137 Wn.2d 500 (1999) the court denied the defendant's motion to amend after finding that such a motion would result in actual prejudice to the plaintiff. In that case the motion was submitted almost one year after the original complaint and *after* the matter had proceeded to mandatory arbitration, resulting in a judgment for the plaintiff. The instant case is distinguishable from *Wilson* and in fact *Wilson* supports granting Qwest's motion, as no substantive proceedings have yet been held in this case and Qwest's cross complaint would not operate to prejudice the Complainants.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the legislature in RCW 80.54.040.

12 As the docket has developed, and as Qwest has conducted research and performed various analyses on the issues presented, it became clear that the Washington criteria for a fair, just, reasonable and sufficient rate differ dramatically from the Section 224 formula. It also became clear that the Commission had previously considered whether to adopt the FCC formula for pole attachments, and had rejected that outcome. *Pole Attachment Rulemaking, Docket No. UT-970723*. Finally, as time passed, Qwest had an opportunity to calculate what it believed would be the rate produced by proper application of the RCW 80.54.040 criteria, something it was unable to do prior to the filing of an answer. All of this took time, though not a great deal of time in the overall scheme of things. As soon as Qwest knew in good faith that it might seek to change its SGAT rates on the basis that they did not comport with the Washington statutory criteria, Qwest raised that issue in this case.

13 The Complainants next point to what they allege is the suspicious nature of the timing of Qwest's filing. As explained above, the timing is not suspicious; the Complainants are attempting to turn coincidental timing, and a courtesy call between counsel, into proof of some sort of wrong doing. Nothing could be further from the truth – in fact, Qwest pointed out to the Complainants that there might be a dispute of fact about the appropriateness of the SGAT rates, and that it might be necessary to amend its answer to bring that issue into the case, well in advance of the Complainants' filing which contended that no material facts exist. Furthermore, there are other material facts in dispute, as shown in Qwest's earlier motion, and as borne out by the Complainants' responses to Qwest's discovery. However, the matter of disputed facts can be addressed at a later phase of this proceeding.

B. Granting Qwest's Second Motion would Not Cause Undue Delay and Unfair Surprise, and Would Not Prejudice the Complainants

14 The Complainants can not legitimately claim unfair surprise. Qwest has always opposed

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

AT&T Corp.'s ability to escape from its valid contract. In its motion, Qwest is merely asking the Commission to consider what rates the Complainants are entitled to if the Commission, contrary to Qwest's advocacy, allows AT&T Corp. to escape from its contractual obligations. As in *Caruso*[3] any alleged "surprise" can be cured by a adjusting the schedule as necessary to give the Complainants the time they need.

15 The Complainants claim that the amendment would delay the proceedings, and that they would necessarily have to first present evidence of a just and reasonable rate. They also complain that they would have to re-open discovery and that they might have to hire an expert witness. They are simply wrong as to some of these points, but more importantly, none of these points, alone or together, establishes actual prejudice to the Complainants. As cross complainant, Qwest would present its case in chief at the same time the Complainants provide theirs – in direct testimony. The Complainants could then do discovery and present a responsive case. This would not delay the proceeding or prejudice the Complainants. Looking again to *Caruso* for guidance, the court there held that allegations of the need to do discovery and to present additional evidence do not constitute actual prejudice.[4]

16 Finally, as Qwest suggested in off-the-record discussions with all parties present during the prehearing conference, the schedule in this case could be bifurcated so that rate issues would only be addressed if the Commission ruled in the Complainants' favor on the threshold issue of whether AT&T Corp. should be allowed to escape its lawful contractual obligations.

C. Qwest's Cross Complaint is Permissible Under Applicable Law and Should be Permitted

17 The Complainants next argue that the "last minute" nature of Qwest's motion to amend, standing alone, is grounds for denial of that motion. They are simply wrong as a matter of law. The Complainants cite a federal district court case from New York in support of their

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[3] *Caruso v. Local Union No. 690*, 100 Wn.2d 343 (1983).

[4] *Caruso*, 100 Wn.2d at 351.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

proposition. However, under applicable *Washington* law, delay in filing, excusable or not, is *not* in and of itself grounds for denying a motion to amend.[5] Even if such a criterion were applicable, the delay in filing was relatively brief, and as shown in section A. above, with good cause.

D. This is an Appropriate Docket for Setting the Rates that AT&T CLEC Should Pay

18 The Complainants and Staff both argue that this is not the correct proceeding in which to set conduit rates. Qwest disagrees. The complaint, if granted by the Commission, puts rate levels squarely at issue. The Complainants claim that the rates in the SGAT, which are the same rates that are in AT&T CLEC's interconnection agreement ("ICA"), are the ones that should apply if AT&T Corp. is permitted to escape its contractual obligation.

19 Contrary to Staff's assertion, the SGAT and ICA rate has never been the subject of a Commission cost docket proceeding, nor was the rate level the subject of lengthy review, even in the 271 proceeding. Indeed, Qwest admits that the SGAT rate is a rate that Qwest previously proposed. However, in an administrative rate setting context, a party is not locked into rates forever, and is not estopped from filing to change rates at any time. Both the Commission's rate making statutes, RCW 80.36.110, and Section 252(f) of the Act contemplate that rates may be changed, without limitation as to how the rate was first established or by whom.

20 Furthermore, the Complainants and Staff assert that rates levels in general must be adjudicated only in proceedings where all interested parties have an opportunity to participate. Qwest agrees that some additional process might be necessary in order to transfer new SGAT rates

[5] *See*, *Caruso*, 100 Wn.2d at 349-350, and cases cited therein. There, the court allowed the plaintiff to amend his complaint 5 years and 4 months after the original complaint. The court noted that courts in other cases have allowed amendments 5 or 6 years after the filing of the original complaint. In this case the time elapsed since the complaint was filed has been only 5 or 6 *months*. The court also rejected defendant's claims, similar to the Complainants' here, that it was prejudiced by a lack of opportunity to prepare or conduct discovery. The court found that the trial court below had granted a continuance to alleviate the surprise and allow discovery, and that the defendant had shown no actual prejudice. *Id.* at 351.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

into individual interconnection agreements. However, that does not mean that this issue should not also be included in this proceeding. Even if Qwest were to file to change its SGAT rates, now or in the future, such a change may not flow through automatically to AT&T CLEC's interconnection agreement, unless so ordered by the Commission in that later proceeding. AT&T CLEC's current ICA (Exhibit 7 to the Complaint in this matter) has a provision in Section 2.2 that the Complainants might assert would preclude Qwest from changing the rates in that ICA, even though the rate was changed in the SGAT. Thus, the issue should remain in this docket if only for the purpose of determining that *if* AT&T Corp. is permitted to pay SGAT rates instead of contract rates, and *if* Qwest changes its SGAT, then those changes should flow directly into AT&T CLEC's ICA. Qwest should not be forced to litigate a change to its SGAT in one proceeding, and then initiate another proceeding to have the rate included in the ICA, all because the issue was excluded from this case.

E. Qwest's Withdrawal of its Jurisdictional Challenge

21 AT&T Complainants argue that Qwest's withdrawal of its jurisdictional challenge is incomplete. However, they also contend that it is not necessary to amend the answer to withdraw the jurisdictional challenge, and that Qwest need only state on the record that it has done so. In order that there not be any confusion on this issue, Qwest states that it has withdrawn its challenge to the Commission's jurisdiction to hear this matter, and will so state on the transcript if the Commission believes that step is also necessary.[6]

[6] It should be noted that in withdrawing its challenge to the Commission's jurisdiction, Qwest cannot itself resolve that issue. It is axiomatic that a party's consent does not confer subject matter jurisdiction where none exists. *In re Harbert*, 85 Wn.2d 719, 724 (1975). Thus, it may be that jurisdiction does at some later point in the proceeding become an issue. Qwest only means to state that it is not asking the Commission to resolve the issue of its jurisdiction as a predicate to proceeding with a hearing on the merits.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

III. CONCLUSION

22 For the reasons stated herein, Qwest respectfully requests that the Commission grant Qwest's second motion to amend its answer.

SUBMITTED this _____ day of February, 2005.

QWEST

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Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040