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BEFORE THE WASHINGTON

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UTILITIES AND TRANSPORTATION COMMISSION

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AT&T CORP. AND AT&T COMMUNICATIONS)
OF THE PACIFIC NORTHWEST, INC.,) UT-041394
Complainants,) Volume II
v.) Pages 15-31
QWEST CORPORATION,)
Respondent.)
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A pre-hearing conference in the

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above-entitled matter was held at 9:35 a.m. on

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Wednesday, January 19, 2005, at 1300 South Evergreen

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Park Drive, Southwest, Olympia, Washington, before

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Administrative Law Judge C. ROBERT WALLIS.

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The parties present were as follows:

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QWEST CORPORATION, by Lisa Anderl and
Adam Sherr, Attorneys at Law, 1600 Seventh Avenue,
Room 3206, Seattle, Washington 98101.

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AT&T CORPORATION and AT&T COMMUNICATIONS
OF THE PACIFIC NORTHWEST, by Gregory J. Kopta,
Attorney at Law, Davis, Wright, Tremaine, 1501 Fourth
Avenue, Suite 2600, Seattle, Washington 98101, and T.
Scott Thompson, Attorney at Law, Cole, Raywid &
Braverman, LLP, 1919 Pennsylvania Avenue, NW, Second
Floor, Washington, D.C., 20006 (via teleconference
bridge.)

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COMMISSION STAFF, by Gregory Trautman,
Assistant Attorney General, 1400 S. Evergreen Park
Drive, S.W., P.O. Box 40128, Olympia, Washington
98504-0128.

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Barbara L. Nelson, CCR

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Court Reporter

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1 JUDGE WALLIS: All right. Let's be on the
2 record, please. This is a pre-hearing conference in
3 the matter of Commission Docket UT-041394, which is a
4 complaint by AT&T against Qwest Corporation. We set
5 this matter for discussion, pre-hearing conference,
6 because earlier the parties had indicated that they
7 both desired to proceed to have the Commission
8 discuss, resolve matters on the basis of written
9 submissions.

10 In recent days, Qwest has asked leave to
11 submit a revised answer, and leave was granted, and
12 has moved that the matter be taken to hearing.

13 AT&T responded in opposition to that
14 position, and I thought it would be best if the
15 parties had an opportunity to gather and discuss this
16 and we could get a basis for proceeding.

17 Does that fairly state the status of the
18 situation right now?

19 MR. KOPTA: Yes, Your Honor.

20 JUDGE WALLIS: Very well.

21 MS. ANDERL: Yes, Your Honor, although, as
22 of yesterday, we -- Qwest did file a second motion to
23 amend its answer and appended a second amended answer
24 to that motion. It was filed electronically at the
25 Records Center around 2:00 or 2:30 yesterday

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1 afternoon.

2 JUDGE WALLIS: I have not received a copy.

3 Do you know if I was copied on the distribution list?

4 MS. ANDERL: We don't know right at this
5 moment.

6 JUDGE WALLIS: Does that change --

7 MS. ANDERL: I could go to the Records
8 Center and obtain one of the hard copies that we've
9 filed this morning. Actually, I can provide you my
10 file copy for today.

11 JUDGE WALLIS: Is that material to our
12 discussions?

13 MR. KOPTA: It will be to the extent that we
14 were discussing scheduling issues.

15 JUDGE WALLIS: Very well.

16 MS. ANDERL: Yes, Your Honor. We've done a
17 couple of things, one of which could somewhat expand
18 the proceeding and one of which could somewhat
19 contract the proceeding, so I think it's neutral in
20 the overall effect, but if I may, I'll give you my
21 copy of this. There's the two-page motion and then
22 the amended answer.

23 JUDGE WALLIS: Thank you. Well, it appears
24 to me that Qwest is basically the moving party at
25 this point. Ms. Anderl, I wonder if you'd like to

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1 begin with a brief summary of your client's position
2 and why it reached that point.

3 MR. KOPTA: Your Honor, if I may interrupt.
4 Do we want to take appearances before we get into the
5 substance?

6 JUDGE WALLIS: I think that would be a good
7 idea. Thank you, Mr. Kopta. Let's begin with the
8 Complainant, and you need not take -- provide office
9 information if you've provided that previously on the
10 record.

11 MS. ANDERL: Complainant, Complainant?

12 JUDGE WALLIS: You're the Complainant, I
13 think, Mr. Kopta.

14 MR. KOPTA: I'm so used to Ms. Anderl going
15 first that it just threw me off. I was just waiting
16 for her to talk. Gregory J. Kopta, of the Law Firm
17 Davis, Wright, Tremaine, LLP, and Scott Thompson, of
18 Cole, Raywid and Braverman, LLP, on behalf of the
19 Complainants, AT&T and AT&T Communications of the
20 Pacific Northwest.

21 JUDGE WALLIS: Mr. Thompson is appearing on
22 the bridge line; is that correct?

23 MR. KOPTA: That is correct, Your Honor.

24 JUDGE WALLIS: The Respondent?

25 MS. ANDERL: Thank you, Your Honor. Lisa

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1 Anderl and Adam Sherr, in-house attorneys for Qwest,
2 appearing on behalf of the Respondent, Qwest
3 Corporation.

4 MR. TRAUTMAN: Greg Trautman, Assistant
5 Attorney General, for Commission Staff.

6 JUDGE WALLIS: Thank you all. Now, Ms.
7 Anderl.

8 MS. ANDERL: Thank you, Your Honor. We had
9 requested that the schedule be revised in order to
10 set this matter for hearing because we no longer
11 believe that the matter is susceptible of resolution
12 by cross motions for summary determination.

13 We also believe that even if the matter were
14 so susceptible, the Commission is statutorily
15 required to have a hearing before it grants relief
16 under either 80.04.110 or Chapter 80.54 RCW, which
17 are the only statutory provisions implicated in this
18 complaint.

19 So while we feel as though we have good
20 reasons for wanting a hearing, because we believe
21 that there are material disputed facts or legal
22 conclusions that can only be reached with a hearing
23 to determine the facts upon which those conclusions
24 would be based, we don't even believe that one would
25 necessarily have to establish that there were

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1 disputed facts in order to have a mandate that the
2 Commission proceed in the manner set forth in the APA
3 for adjudicative proceedings to have a hearing and
4 require the Complainant basically to make its case.

5 We could, if you wished, talk in some detail
6 about some of the facts that we believe are disputed
7 and that will be relevant to the determinations or
8 outcomes here. I don't know how much detail you
9 really want on that.

10 I would respond briefly, I guess, to the
11 Complainants' allegation that the existence of a
12 Commission rule setting forth procedure for summary
13 determination somehow trumps the statutory
14 requirements for hearing. I think that is an absurd
15 argument.

16 The Commission procedural rules, of course,
17 can only implement the statutes that give the
18 Commission authority to act, and under those
19 circumstances, I think that it's evident that a rule
20 allowing for summary determination can exist and be
21 applied only if the parties agree to that proceeding
22 or in a matter where the case is being heard under
23 statute or other provision that does not require a
24 hearing before relief is granted.

25 And so we think it's -- this is really

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1 actually fairly straightforward, and that we ought to
2 establish a schedule whereby AT&T would file
3 pre-filed testimony, Qwest would respond, AT&T would
4 have rebuttal, and we would establish some dates for
5 hearing later this year.

6 JUDGE WALLIS: Why do you want a hearing?

7 MS. ANDERL: Well, Your Honor, because we're
8 facing a complaint here in which AT&T alleges -- the
9 allegations, if relief is granted, would be a
10 significant financial impact to Qwest. We believe
11 that AT&T, as the Complainant, ought to be required
12 to carry its burden of proof, ought to be required to
13 make its case in chief before any relief can be
14 granted. We feel as though there are statements made
15 by AT&T that we would like to test under
16 cross-examination, the witnesses who AT&T would
17 present in support of its case ought to be
18 identified, and Qwest ought to be allowed to do
19 appropriate discovery and examination during the
20 hearing on the contentions that AT&T will make.

21 JUDGE WALLIS: Very well. Mr. Kopta.

22 MR. KOPTA: Thank you, Your Honor. I think
23 one of the disagreements that we have with Qwest is
24 what does it mean in the statute when it uses the
25 term hearing. To Qwest, that means evidentiary

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1 hearing. We don't think that the statute is quite so
2 narrow. We don't see the Commission's rules with
3 respect to motions for summary determination as at
4 all in conflict with the statute, but in fact
5 perfectly consistent with them and would be in this
6 case.

7 Qwest will have an opportunity for a
8 hearing. If it's not an evidentiary hearing, it
9 still will have an opportunity to present its
10 arguments to the Commission, and therefore the
11 statutory requirements are satisfied, as well as the
12 Commission rules.

13 I think the other dispute that we have with
14 Qwest is the nature of the factual disputes that they
15 believe require some form of evidentiary hearing.
16 While Qwest asserts that those are genuine issues of
17 material fact, we do not believe that that's the
18 case. These are issues that are ancillary to the
19 relief that AT&T requests, are not germane to the
20 issues that AT&T has presented to the Commission for
21 resolution, and therefore are issues that need not be
22 addressed in the form of an evidentiary hearing.

23 And so we have requested that we be able to
24 file motions for summary determination to determine
25 whether, in fact, those are issues of -- genuine

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1 issues of material fact, and in our view, they are
2 not; in Qwest's view, they are, and the Commission
3 can make that determination. But at this point, we
4 don't believe that an evidentiary hearing is
5 necessary.

6 JUDGE WALLIS: Mr. Trautman.

7 MR. TRAUTMAN: Thank you, Your Honor. Staff
8 generally does not take a position on the issue of
9 whether the Commission should schedule an evidentiary
10 hearing, although I would note that this -- the
11 motion to file a second amendment -- amended answer
12 that Ms. Anderl referred to does appear to change the
13 issues in one respect in that it appeared previously
14 that the SGAT rate itself was not at issue, and the
15 second amended answer now alleges that the SGAT
16 conduit rate is not fair, just, reasonable or
17 sufficient, in accordance with RCW 80.54.030.

18 And Staff would simply note that the
19 Commission should take that into account in
20 determining whether an evidentiary hearing is needed,
21 because I don't believe that issue was previously
22 brought in to play or addressed in the pleadings.

23 JUDGE WALLIS: Mr. Kopta.

24 MR. KOPTA: Yes, Your Honor. I know you are
25 at somewhat of a disadvantage, since this -- Qwest's

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1 latest motion was not officially filed until this
2 morning.

3 JUDGE WALLIS: Are you going to oppose that
4 motion?

5 MR. KOPTA: We will be opposing that motion,
6 yes. And to the extent that we need to have a
7 discussion, we can do that now, but just so that you
8 are aware, that is not something that we believe is
9 appropriate. We would ask, at a minimum, that there
10 would be a time set by which we would file our
11 opposition.

12 JUDGE WALLIS: Very well. I think it's been
13 indicated that the parties have not discussed the
14 possibility of agreeing on some facts, if not all; is
15 that correct?

16 MR. KOPTA: There have been some
17 discussions, but they have not been fruitful.

18 JUDGE WALLIS: It hasn't resulted in a
19 statement of agreed facts.

20 MR. KOPTA: That is correct.

21 JUDGE WALLIS: Ms. Anderl, do you just think
22 all of their facts are wrong or are there some to
23 which you could agree?

24 MS. ANDERL: Well, there are probably some
25 to which we could agree, but I think that's probably

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1 the case in every, you know, proceeding, where there
2 are certain baseline facts that are not in dispute.
3 I don't think that there are ones that are not in
4 dispute upon which an order could be issued at this
5 point in the proceeding.

6 JUDGE WALLIS: How long do you think it
7 would take to develop a list of the facts that are
8 not in dispute?

9 MS. ANDERL: Well, I believe that the
10 parties have been required to stipulate to some facts
11 in the parallel proceeding at the FCC. We could
12 probably start there, but -- and look at that list,
13 but, again, I don't think that that's necessarily
14 going to be particularly fruitful.

15 JUDGE WALLIS: Is that a list that's already
16 been developed?

17 MR. KOPTA: Mr. Thompson, do you know about
18 that?

19 MR. THOMPSON: I believe that -- I'd have to
20 defer to my partner, who is more involved in the FCC
21 case. I believe that there was not a final list
22 completed, but I'd have to confirm that.

23 MS. ANDERL: Okay. I wasn't that involved,
24 either, Mr. Thompson, so I thought that there was and
25 we've --

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1 MR. THOMPSON: I could be wrong. There may
2 have been one finalized. I wasn't certain about
3 whether it was finalized or whether -- I know that
4 there were attempts made in the FCC proceeding to
5 come to some agreed-to facts, but I just don't know
6 whether or not that was ever completed. My
7 associate, who I believe may be listening, may know
8 the answer, because she was involved in the FCC
9 proceeding. Let me see what I can find out.

10 Your Honor, I just would like to add, Mr.
11 Kopta certainly stated our position, but we feel very
12 strongly that we're going to oppose their motion to
13 amend. I know you haven't seen it, but effectively
14 what they've done is they're seeking to literally
15 amend answers in which they originally admitted facts
16 in the complaint, and those were facts that we
17 pointed out in our oppositions for their motion for
18 hearing and saying that there are not disputed facts.

19 They've now moved to be allowed to change
20 their positions, and we certainly believe that that
21 is inappropriate at this point to suddenly say, oh,
22 wait a second, we don't like that admission anymore.

23 But I realize this is perhaps a bit
24 premature, since you haven't seen that, but it -- I
25 do think that there are facts upon which the two

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1 parties could agree, and I think they would be highly
2 germane to the real issues in the case, and in that
3 sense would certainly narrow the issues, if nothing
4 else, going forward.

5 JUDGE WALLIS: Thank you, Mr. Thompson. It
6 strikes me that it would be appropriate to go off the
7 record at this point to discuss scheduling, because I
8 think that all parties agree that there are things
9 that must be done, and I think it would be a good
10 idea to develop a plan for how to get them done and
11 in what order. And then, when we have a feel for the
12 scope of what we need to accomplish, we can -- and
13 how to approach it, we can go back on the record with
14 a statement to that effect and the parties will have
15 an opportunity to respond as they choose. Is that
16 acceptable to the parties?

17 MR. KOPTA: Yes, Your Honor.

18 MS. ANDERL: Yes.

19 MR. TRAUTMAN: Yes.

20 JUDGE WALLIS: Very well. Let's be off the
21 record at this point.

22 (Discussion off the record.)

23 JUDGE WALLIS: Let's be back on the record,
24 please. We've engaged in some discussion regarding
25 the procedural schedule from this point forward, and

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1 the following schedule has been agreed.

2 AT&T will answer the second motion to amend
3 the answer to the complaint by a filing no later than
4 January 26th, which is Wednesday, one week hence.
5 Qwest will have the opportunity to reply to that no
6 later than Wednesday, February 2.

7 The parties have agreed that the development
8 of a statement of agreed facts will begin with AT&T's
9 presentation to Qwest no later than Wednesday,
10 January 26th, of a first draft of that document, and
11 the parties have agreed to conclude their discussions
12 and to present to the Commission a completed document
13 on February 23rd of this year.

14 From that point, the parties will be
15 engaging in the presentation of motions and responses
16 for summary determination. AT&T will take the
17 laboring oar and will present its motion no later
18 than March 23rd. Four weeks after that, Qwest may
19 respond and may also provide its motion for summary
20 determination. That would be on April 20th. And
21 AT&T will reply no later than May 18th.

22 There was some discussion about whether to
23 proceed with a tentative schedule on a hearing.
24 However, in the course of discussions on that issue,
25 it was recognized that the ruling on the second

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1 motion to amend the answer could affect the schedule,
2 and consequently, a discussion regarding that matter
3 is deferred until a later time.

4 Upon the entry of an order resolving that
5 question, it would be appropriate to again look at
6 the procedural schedule, and we may either ask for
7 informal telephone conference to resolve that or an
8 exchange of electronic mail on this procedural
9 matter.

10 So is there anything else that we should
11 recognize at this point? There was some discussion
12 about a potential motion to compel one or two answers
13 based on the parties' -- AT&T's review of a response
14 that Qwest presented to a data request. Parties did
15 take the opportunity this morning to discuss that
16 informally, and have concluded that the matter might
17 or might not be resolved. If it is not, then AT&T
18 will explore with Staff here available dates for
19 argument on the motion, and of course with fellow
20 counsel in this matter, and will file that
21 information along with its request for an opportunity
22 to argue the motion to compel.

23 Is there anything further, any corrections
24 that the parties would like to make? Mr. Trautman.

25 MR. TRAUTMAN: Your Honor, I just wanted one

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1 clarification. On the responses to the motion to
2 file a second amended answer, that Staff has the
3 option of filing a response, also, on January 26th.

4 JUDGE WALLIS: Oh, yes. And by merely
5 referring to AT&T and Qwest, we recognize that they
6 are the principal parties in this matter. Commission
7 Staff, of course, is a full party, and would respond
8 to the pleadings that are presented on the schedule
9 for responses to those pleadings.

10 MR. TRAUTMAN: Thank you.

11 MS. ANDERL: And Your Honor, we had
12 considerable discussion off the record, and I think
13 Your Honor and the parties fully understand Qwest's
14 position on the need for a hearing. I don't want,
15 though, since that discussion was not on the record,
16 I don't want there to be any implication by Qwest's
17 agreement to this new schedule set forth that Qwest
18 does, in fact, agree that the matter is subject to
19 resolution in AT&T's favor on a motion for summary
20 determination, consistent with our prior pleadings.

21 JUDGE WALLIS: Very well. That will be a
22 bridge that we will cross, if necessary.

23 MS. ANDERL: I understand that.

24 JUDGE WALLIS: The parties, again, have
25 every opportunity to argue that matter. Very well.

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1 Is there anything else to come before the Commission
2 at this time?

3 MR. KOPTA: No, Your Honor.

4 MS. ANDERL: No.

5 MR. TRAUTMAN: No.

6 JUDGE WALLIS: Very well. Thank you. This
7 pre-hearing conference is adjourned, and an order
8 will be entered expeditiously.

9 MS. ANDERL: Thank you.

10 MR. KOPTA: Thank you, Your Honor.

11 JUDGE WALLIS: Thank you.

12 (Proceedings adjourned at 11:01 a.m.)

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