

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

AT&T COMMUNICATIONS OF THE  
PACIFIC NORTHWEST, INC., TCG  
SEATTLE, AND TCG OREGON;

Complainants,

v.

QWEST CORPORATION,

Respondents

Docket No. UT-051682

QWEST CORPORATION'S MOTION  
FOR STAY OF PROCEEDING  
PENDING THE OUTCOME OF CASE  
NO. 04-cv-909-EWN-MJW (D. Colo.)

**I. INTRODUCTION**

- 1 Qwest Corporation (“Qwest”) files this Motion with the Washington Utilities and Transportation Commission (“Commission”) for a continuance or stay of the proceedings, pending a decision from the Federal District Court in Colorado, where AT&T Communications of the Pacific Northwest, Inc. (“AT&T”) has raised substantially identical claims. A continuance is appropriate under WAC 480-07-385(2), as Qwest demonstrates herein that good cause exists for the continuance and that no party will be prejudiced by it.
- 2 Under the “first filed” doctrine, as interpreted and applied by Washington courts, when claims are made and/or issues raised in two different fora, the tribunal that first obtained jurisdiction over the claim retains jurisdiction, to the exclusion of the other, until the matter is concluded in the first case.

3 In this case, it would work a substantial prejudice against Qwest to be forced to defend against the same claims in two different proceedings, where the relief sought in each is virtually the same. AT&T will not be prejudiced by a stay of this proceeding, as it chose the first forum, and all, or substantially all of its rights and claims are being adjudicated there. The Commission should therefore stay the proceedings in this matter and wait to see what issues, if any, remain after the resolution of the Colorado case.

## II. BACKGROUND/ARGUMENT

4 In May of 2004, Qwest filed a complaint against AT&T in the United States District Court for the District of Colorado, *Qwest Corp. v. AT&T Corp., et al.*, Case No. 04-cv-909-EWN-MJW (D. Colo.), to recover unpaid access charges for AT&T's use of Qwest's telephone network to complete certain long distance telephone calls made by AT&T's customers. Specifically, the complaint alleges that AT&T implemented a fraudulent scheme to avoid access charges by using "Internet protocol" to transport long distance calls over AT&T's network.

5 Shortly after Qwest filed its complaint, AT&T filed an Answer and Counterclaim (attached hereto as Exhibit A) alleging, among other things, counterclaims arising from the same alleged "unfiled interconnection agreements" and the same legal theories that form the basis for AT&T's claims in this proceeding. For example, AT&T's counterclaim alleges that Qwest violated state and federal interconnection agreement filing requirements "by entering into 'secret agreements' with certain carriers that provided those carriers with more favorable terms and prices for all Qwest services, including exchange access services, than it offered to other carriers. Among the favored carriers were Eschelon and McLeod." (AT&T's Counterclaim ¶ 14). AT&T even acknowledged that "State commissions, including Minnesota, Arizona, Colorado, New Mexico, and Washington," had investigated the events alleged in its counterclaims, and that some of those proceedings remained active. (*Id.* ¶ 17; *see id.* ¶¶ 17-25).

6 On June 10, 2005, the district court issued decision granting partial summary judgment in favor of AT&T on all of Qwest's claims for relief. The district court held that a form release executed by the parties to resolve routine billing disputes effected a release of all claims for access charges arising from services provided before the date of the release. The district court *did not* resolve the merits of AT&T's counterclaims in its summary judgment decision. Those counterclaims remain pending in the district court.

7 The district court certified its summary judgment decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on August 4, 2005. In doing so, the district court noted as follows:

[A]s represented by counsel for both parties at a July 29, 2005 hearing on Qwest's motion to modify the June 10, 2005 Order, AT&T's counterclaims are interrelated to Qwest's claims. As represented by Qwest's counsel, Qwest plans to invoke the same release provision as a defense to several of AT&T's counterclaims. Accordingly, the validity of this court's decision on the release issue in the June 10, 2005, Order may impact AT&T's counterclaims as well as Qwest's claims. Thus, a decision by the Tenth Circuit will also materially advance the ultimate termination of AT&T's counterclaims.

8 Qwest moved for expedited review of its appeal; and the Tenth Circuit granted the motion. Qwest's appeal has now been fully briefed, and oral argument was held September 27, 2006. A decision has not yet been issued.

9 Under the circumstances presented in paragraphs 3-7 above, the Commission should stay this action pending a determination of AT&T's counterclaims in federal court. There is substantial, if not total, overlap of the claims asserted there and the claims made in this docket. Under the "first filed" doctrine, as interpreted and applied by Washington courts, when claims are made and/or issues raised in two different fora, the tribunal that first obtained jurisdiction over the claim retains jurisdiction, to the exclusion of the other, until the matter is concluded in

the first case.<sup>1</sup> In this case, AT&T's counterclaims in federal court are at least identical to the claims in this case regarding access charges, and may, in fact, be identical in scope to all of the relief sought in this docket.

10 Thus, until the court rules on these claims, it is possible that the counterclaim broadly covers everything at issue in this case, and a final adjudication of that counterclaim would resolve all of the claims before this Commission. At a minimum, there is substantial overlap in these two proceedings.<sup>2</sup> With the majority of the damages sought here already in dispute in Colorado, judicial economy would dictate that this proceeding should be stayed, if for no other reason than to see what remains after the Colorado court proceeding. This can be done without prejudice to AT&T because AT&T's claims are already being addressed.

11 Furthermore, even though access services and Section 251 services may be severable, and even though AT&T may argue that it did not intend to include Section 251 services in its counterclaims in federal court, the conduct and agreements that allegedly support AT&T's claims for both types of damages arise from the same conduct and documentation. The court that had the case first should sort out the rights and obligations arising out of those documents, and Qwest should not be required to simultaneously defend overlapping actions.

### III. CONCLUSION

12 Therefore, Qwest requests an order of this Commission staying this case pending the outcome of the federal court's decision in *Qwest Corp. v. AT&T Corp., et al.*, Case No. 04-cv-909-EWN-MJW (D. Colo.). Such an action will promote judicial economy, will not prejudice

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<sup>1</sup> When an administrative agency and the courts both have jurisdiction over a subject or controversy, the tribunal which first obtains jurisdiction over a particular proceeding does so to the exclusion of the other tribunal until it has exhausted its power over the proceeding. *Mutual of Enumclaw v. Washington State Human Rights Commission*, 39 Wn. App. 213, 216; 692 P.2d 882, 884 (1984).

<sup>2</sup> Qwest believes that access charges comprise as much as 80% of the billings upon which AT&T bases its request for a 10% reduction in charges.

either party, and will avoid substantial prejudice to Qwest, as set forth herein.

DATED this 23rd day of February, 2007.

QWEST

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