

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

AT&T COMMUNICATIONS OF THE)	
PACIFIC NORTHWEST, INC., TCG)	DOCKET UT-051682
SEATTLE, AND TCG OREGON)	
)	ORDER 08
v.)	
)	DENYING QWEST’S MOTION
QWEST CORPORATION)	FOR STAY
.....)	

MEMORANDUM

- 1 **NATURE OF PROCEEDING.** This docket initially involved a complaint filed on November 4, 2005, by competitive local exchange carriers AT&T Communications of the Pacific Northwest, Inc., TCG Seattle and TCG Oregon (collectively, AT&T) against Qwest Corporation (Qwest) alleging that Qwest charged the complainants more for certain facilities and services than Qwest charged other competitive local exchange carriers (CLECs) under unfiled agreements with them, and that this practice violated federal and state laws.

- 2 This docket has since evolved into a somewhat different case.

- 3 Qwest answered the original complaint and filed a Motion for Summary Determination on November 28, 2005. AT&T answered in opposition. Qwest filed a reply. A Commission Administrative Law Judge entered an initial order on February 10, 2006, granting Qwest’s motion and denying AT&T’s request to amend its complaint to state a claim for breach of contract.¹

- 4 On June 8, 2006, however, the Commission issued an order agreeing in part and disagreeing in part with the initial order.² The Commission held, in relevant part, that AT&T should be allowed to amend its complaint to assert a breach of contract claim. AT&T filed its amended complaint on June 30, 2006.

¹ *Initial Order Granting Qwest’s Motion for Summary Determination*, Docket UT-051682, Order ¶¶ 24-25, 36 (Feb. 10, 2006).

² *Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal*, Docket UT-051682, Order at ¶¶ 30-31, (June 8, 2006).

5 AT&T asserts Qwest breached its obligations under two interconnection agreements that require Qwest to make available to AT&T the same rates, terms and conditions of service that Qwest makes available under its interconnection agreements with others. With reference to so-called unfiled agreements that Qwest entered into providing discounts to Eschelon and McLeodUSA for some of the same services AT&T contracted for with Qwest, AT&T asks the Commission to enter an order requiring Qwest to reimburse AT&T for alleged overcharges for intrastate telecommunications facilities and services, and to pay AT&T interest with respect to the alleged overcharges. AT&T's claim and request for relief remains before the Commission, following the Commission's Order Affirming Interlocutory Order late in 2006.³

6 **MOTION FOR STAY; ANSWER; REPLY.** Qwest filed its Motion for Stay of Proceeding Pending the Outcome of Case No. 04-cv-909-EWN-MJW (D. Colo.) on February 23, 2007. AT&T answered on March 8, 2007. Qwest sought leave to reply and filed its Reply on March 15, 2007.

7 The federal action began in May 2004, when 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.

8 Shortly after Qwest filed its complaint in the federal district court, AT&T filed an Answer and Counterclaim. On June 10, 2005, the district court issued its 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. AT&T's counterclaims remain pending in the federal district court.

9 Qwest argues that under the "first filed" doctrine, as interpreted and applied by Washington courts, when claims are made or issues raised before different tribunals, the tribunal that first obtained jurisdiction retains jurisdiction, to the exclusion of the other, until the matter is concluded in the first case. Qwest claims it would work a

³ *Order Affirming Interlocutory Order; Allowing Amendment of Complaint; Denying Motion for Summary Determination*, Docket UT-051682, Order ¶¶ 50-66, 75-76 (Dec. 22, 2006).

substantial prejudice against Qwest to be required to defend against the same claims in different proceedings when the relief sought is “virtually the same.” Qwest asserts AT&T would not be prejudiced by a stay here because AT&T chose the first forum “and all, or substantially all of its rights and claims are being adjudicated there.”⁴

- 10 AT&T advances four arguments opposing Qwest’s motion. AT&T argues first that Qwest’s motion is untimely because AT&T brought its petition for relief in this docket more than four months after Qwest initiated the action pending in federal court in Colorado in June 2004. Considering the considerable process in this docket, including the Commission’s consideration and rejection of Qwest’s motion for summary determination, AT&T argues Qwest should be deemed to have waived any right it might have to request a stay on the grounds stated in its motion.⁵
- 11 AT&T’s second argument is that a stay in this proceeding would prejudice AT&T because the federal district court action that Qwest contends should have priority is itself stayed and has been administratively closed pending the disposition of Qwest’s interlocutory appeal to the Tenth Circuit following the district court’s order granting summary judgment for AT&T on all of Qwest’s claims.
- 12 AT&T argues Qwest’s motion is procedurally improper because it seeks “open-ended delay” in contravention of WAC 480-07-385(4), which states that the Commission will grant a continuance “only to a specified date.”
- 13 Finally, AT&T contends that Qwest’s motion fails to meet the requirements of the doctrine on which its motion depends, the so-called first filed or priority of action doctrine. AT&T cites *City of Yakima v. Int’l Ass’n of Fire Fighters*, 117 Wash. 2d 655, 675, 818 P.2d 1076, 1086 (Wash. 1991) for the proposition that the doctrine applies “only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief.” AT&T argues Qwest’s motion should be found to fail on all three bases.
- 14 As to subject matter, AT&T states the dispute here turns on the specific terms of two contracts under which Qwest provides AT&T facilities and services for intrastate

⁴ Qwest’s assertion that AT&T “chose the first forum” is at least technically misleading. Rule 13(a) of the Federal Rules of Civil Procedure makes compulsory “any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.”

⁵ *AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon; and Time Warner Telecom of Washington, LLC v. Qwest Corporation*, Docket UT-051682, Order 04 Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal (June 8, 2006).

telecommunications in Washington. The question, AT&T says, is whether AT&T or the TCG entities are entitled to damages as a result of Qwest's failure to honor the terms of the agreements. The Commission case now has no claims for violation of any state or federal statute, according to AT&T. By contrast, AT&T states that its counterclaims pending in federal court in Colorado have nothing to do with the contracts that are the subject of this docket. Rather, those counterclaims seek damages for violations of unspecified state statutes and federal statutes concerning filing requirements for interconnection agreements and discrimination.

15 As to parties, AT&T argues that two of the complainants in this proceeding – TCG Seattle and TCG Oregon – are not involved in the Colorado litigation at all. Thus, the parties in the two cases are *not* identical.

16 As to relief, it is not at all clear from the pleadings what remedies AT&T seeks via its counterclaims in the Colorado litigation. In this proceeding, AT&T seeks damages for overcharges that arose from Qwest's asserted breaches of its contracts. In Colorado, AT&T seeks damages that arose from Qwest's asserted violations of state and federal statutes.

17 **DISCUSSION AND DETERMINATION.** Whatever the merits of AT&T's first three arguments, they need not be considered because the AT&T's fourth argument is dispositive. As applied in this context, the priority of action doctrine means the court or administrative agency that "first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved." *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wash. 2d 655, 675, 818 P.2d 1076, 1086 (Wash. 1991). The rule applies, however, "only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief." *Id.* That is not the case here.

18 The specific contracts upon which AT&T's action before the Commission turns are not before the federal district court in Colorado. Whatever disposition the federal court makes with respect to the terms of the specific agreements that are the subject matter of the Colorado litigation, it will not resolve AT&T's claims here. Significantly, it is not simply the question of whether Qwest breached its contracts with AT&T that is at the heart of the matter in this docket. Rather, it is the interplay of contractual requirements and state regulatory law and practice that will determine whether AT&T is entitled to any relief in Washington. That is, the Commission must determine both whether Qwest breached the specific contracts at issue and, if so, whether the existence of agreements that Qwest failed to file with the Commission providing certain charges for facilities and services provides a basis for ordering

monetary relief. The second question is peculiarly one for this Commission and is not before the federal district court in Colorado.

- 19 In addition, the requirement for identity of parties does not appear to be met. Even if Qwest is correct that the TCG entities might be entitled to only a small part of any monetary relief that might conceivably be awarded does not mean we can ignore their presence as parties in this proceeding. The TCG entities are not parties in the Colorado litigation. Thus, there is not uniformity in the identity of parties between the two cases.
- 20 Finally, while it is unclear exactly what relief might be forthcoming in the Colorado litigation, it is clear that any relief, if awarded to AT&T by the federal district court, will not include refunds from Qwest to AT&T from any overcharges shown to have occurred in Washington in contravention of the parties' contracts. It does not appear that the two actions are identical in terms of relief.
- 21 In sum, Qwest fails to demonstrate that the requirements of the priority of action doctrine are met. The Commission concludes accordingly that it should not stay these proceedings

ORDER

THE COMMISSION ORDERS that Qwest's Motion for Stay is denied.

Dated at Olympia, Washington, and effective April 5, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge