BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T Communications of the Pacific Northwest, Inc.,	)	DOCKET NO. UT-003120
Complainant,	)	QWEST'S MOTION FOR SUMMARY DETERMINATION
vs.	)	
Qwest Corporation,	)	
Respondent.	)	

I. RELIEF REQUESTED

Qwest Corporation (Qwest) hereby brings this motion for summary determination pursuant to WAC 480-09-426(2). That rule provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor.

In considering a motion made under WAC 480-09-426(2), the Commission will consider the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior Court. CR 56 is the summary judgment rule. CR 56(b) provides that a party against whom a

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claim is asserted may move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof. Summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); see also Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

The Commission must view the evidence in a light most favorable to a non-moving party; however, the non-moving party may not rely upon speculation or on argumentative assertions that unresolved factual issues remain. White v. State, 131 Wn.2d 1, 7, 929 P.2d 396 (1997). A mere scintilla of evidence is not enough to establish the existence of a material fact; rather, a party must set forth specific facts which disclose the existence of a material fact. Id. at 22-23. When there are no factual issues and the dispute can be resolved by answering questions of law, as in the present case, summary judgment is favored as an important part of the process of resolving the dispute. Id. at 6. Qwest asks the Commission to consider the pleadings in this matter together with the exhibits appended hereto in its determination of this motion.

II. STATEMENT OF THE FACTS

Qwest and AT&T Communications of the Pacific Northwest, Inc. (AT&T) are both registered telecommunications companies under Washington law. AT&T filed its formal complaint in this matter on November 6, 2000. At that time, and at all times material to any of the allegations raised in the complaint, the relationship between Qwest and AT&T was governed by an arbitrated Interconnection Agreement dated July 24, 1997. That agreement was effective for a stated term of three years, through July 24, 2000, and continues in effect thereafter on a month-to-month basis. The AT&T agreement is attached hereto as Exhibit A.

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Additionally, AT&T has acquired TCG Seattle (TCG). TCG and Qwest were also parties to an interconnection agreement, and AT&T is apparently conducting its operations under the TCG agreement, as indicated in the letters referred to below as Exhibits C and D. The TCG agreement is dated January 29, 1997, and is also now on a month-to-month basis. The TCG agreement is attached hereto as Exhibit B.

The interconnection agreement(s) currently in effect between Qwest and AT&T do not contain terms and conditions governing access to the building cable in multiple dwelling units (MDUs) as described in AT&T's complaint. No sub-loop elements are identified as separately available in the AT&T Agreement, nor are there prices set forth for sub-loop elements. The AT&T agreement references loops in Attachment 3, Section 8. Unbundling of sub-loop elements is addressed in Section 8.1.1.1, which provides that:

> AT&T may purchase Loop and NID on an unbundled basis. AT&T shall use the BFR process set forth in Part A of this Agreement to request unbundling of Loop Concentrator/Multiplexer, Loop Feeder and Distribution.

Part A of the Agreement, Section 48, contains the arbitrated provisions regarding the BFR (bona fide request) process. The requirements for initiating a BFR are contained in Section 48.3, as follows:

> 48.3 A Request shall be submitted in writing and, at a minimum, shall include: (a) a complete and accurate technical description of each requested Network Element or Interconnection; (b) the desired interface specifications; (c) a statement that the Interconnection or Network Element will be used to provide a Telecommunications Service; (d) the quantity requested; (e) the location(s) requested; and (f) whether AT&T wants the requested item(s) and terms made generally available. AT&T may designate a Request as Confidential.

AT&T has clearly disregarded the BFR provisions of its Agreement, and has not complied with the process set forth in that Agreement with regard to its request for access to MDU building cable.

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The TCG Agreement, under which AT&T is conducting its operations, contains no references whatsoever to the provision of sub-loops or MDU building cable.

It is clear that the agreement(s) contain no provisions regarding access to the building cable in MDUs or the provision of this sub-loop element. However, during the period of time from July 2000 until the filing of the complaint, AT&T and Qwest were engaged in negotiations regarding this issue as required by the Telecommunications Act of 1996. Those negotiations focused on the terms and conditions for access to the sub-loop element which is the MDU building cable, as well as the pricing.

AT&T has acknowledged that the interconnection agreement between the parties must be amended to incorporate terms and conditions for access to sub-loops. On August 22, 2000, AT&T sent Qwest a letter stating that it was willing to amend the TCG interconnection agreement, and proposing an amendment. The letter is attached hereto as Exhibit C.

On August 28, 2000, Qwest responded to AT&T's proposed amendment with a counter proposal. Qwest supplied AT&T with amendments to the interconnection agreement to include new terms and conditions for access to the NID, and to incorporate a new section regarding access to sub-loops. Qwest's letter and proposed amendments are attached hereto as Exhibit D.

AT&T never provided Qwest with a different formal proposal in response to Qwest's August 28 letter. However, the parties did continue to negotiate terms, conditions, and prices until several days before AT&T filed its complaint.

AT&T is aware that amendments must be executed in order to effect changes to interconnection agreements. Indeed, during the same time period that AT&T and Qwest were negotiating the MDU issues, the parties reached agreement on an amendment regarding

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coordinated cutovers for local number portability. That amendment is attached hereto as Exhibit E.

The only difference between the circumstances that resulted in Exhibit E and the situation in this case is that the parties were able to agree on that amendment in Exhibit E, and were not able to agree on an amendment regarding the issues in this complaint. However, that difference does not support the filing of a complaint as AT&T has in this case. Rather, it simply means that on the one hand, the parties reached agreement through negotiation, and on the other hand, an arbitration may have been necessary to resolve the MDU issues. However, in both cases, an amendment to the interconnection agreement in order to reflect new terms and conditions between the parties is required.

Qwest believes that the material facts in this case are not in dispute, as the only facts which are material to a determination of the issue raised by this motion are whether the parties had an interconnection agreement governing the disputed issues. It is clear that they did not, but were attempting to negotiate such an agreement. AT&T has improperly attempted to circumvent the required negotiation process by filing a complaint premised on alleged state law violations. The Commission should reject such attempts, and direct AT&T back to the negotiating table with Qwest on these issues.

III. STATEMENT OF THE ISSUES

1. Does Qwest have any obligation under the January 29 or July 24, 1997 Interconnection Agreement(s) to provide access to building cable within MDUs or the sub-loop?

2. Does Qwest have any obligation under the Telecommunications Act of 1996 to allow access to building cable within MDUs or sub-loops prior to State commission approval of terms for that access in an arbitrated or negotiated interconnection agreement?

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3. Does Qwest's refusal to allow access on the terms and conditions unilaterally dictated by AT&T violate either state or federal law which prohibits undue preference, unreasonable discrimination or anticompetitive behavior?

IV. EVIDENCE RELIED UPON

Qwest relies upon the pleadings in this matter and the exhibits attached hereto.

V. LEGAL AUTHORITY

The complaint, as framed by AT&T, concerns AT&T's access to the inside wire in certain MDUs. As a justification for bringing the complaint before the Commission in the way that it has, AT&T states that its complaint is premised on violations of various Washington statutory provisions. However, the cited statutes do not establish any obligation on Qwest to allow access to sub-loop elements and do not confer any rights on AT&T in this context. Additionally, the allegations regarding violations of state law are a sham to conceal the true basis for the dispute. AT&T's own introduction to the Complaint shows very clearly that it premises its asserted rights in this complaint on the provisions of the Telecommunications Act and various FCC orders. Indeed, in the second sentence of the complaint AT&T admits that it has been attempting to obtain access to MDUs "*as mandated by the Telecommunications Act of 1996 . . . .*" (emphasis added).

The real issue raised by the complaint is the dispute between Qwest and AT&T regarding the terms and conditions, as well as the prices, for sub-loop unbundling. Sub-loop unbundling, as mandated by the FCC in its UNE Remand Order, requires Qwest to allow access to its loop plant at technically feasible points within its network. One of these points may be the building terminal, generally a box on the outside of an MDU. As described in Qwest's Answer to the Complaint, there are certain network configurations where Qwest's loop plant extends all the way into the

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building and terminates inside each individual customer unit. It is those circumstances, i.e., the "Option 3" buildings, in which the issues raised in the complaint arise.

While Qwest does not dispute AT&T's right to access the sub-loop, Qwest does dispute AT&T's claim that it can unilaterally dictate the terms and conditions for that access. AT&T's right to access the sub-loop at the building terminal is based solely on the FCC's UNE Remand Order.[1]

In the Local Competition First Report and Order[2], the FCC declined to require incumbents to unbundle subloops. The FCC revisited this issue in the UNE Remand Order, however, and concluded that where it is technically feasible to do so, the incumbent LECs must provide unbundled access to subloops on a nationwide basis. UNE Remand Order at ¶ 205.

The FCC defined subloops as those portions of the loop that are accessible at terminals in the incumbent's outside plant – i.e., "where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within." Id. at ¶ 206. The Commission further defined such accessible terminals to include: (1) any technically feasible point near the customer premises, such as the pole or pedestal, the NID, or the minimum point of entry to the customer premises ("MPOE"); (2) the feeder distribution interface ("FDI"): which might be located in the utility room in a multi-dwelling unit, in a remote terminal, or in a controlled environment vault "CEV"); and (3) the main distribution frame in the incumbent's central office. Id.

The FCC established a "rebuttable presumption that the subloop can be unbundled at any accessible terminal in the outside loop plant." Id. at ¶ 223. Thus, if the incumbent and CLEC

[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order*, FCC 99-238 (rel. Nov. 5, 1999).

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cannot reach an agreement pursuant to voluntary negotiations about the availability of space or the technical feasibility of subloop unbundling at a given location, then the incumbent will bear the burden of demonstrating to the state, *in the context of a section 252 arbitration proceeding*, that there is no space available or that it is not technically feasible to unbundle the subloop at the requested point (emphasis added). Id.

With respect to multi-unit premises FCC encouraged parties to cooperate in creating a single point of interconnection at such multi-unit premises. Id. at ¶ 225-26. Where the parties cannot agree upon such a single point of interconnection, however, the FCC required the "incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers," regardless of whether the incumbent controls the wiring on the customer premises. Id. at ¶ 226 & n. 442.

Thus, the right to access the sub-loop is clearly premised on the FCC's UNE Remand Order, and in that order the FCC has clearly held that disputes on issues regarding access to the sub-loop must be resolved in the context of a Section 252 arbitration proceeding under the Act. UNE Remand Order at ¶¶ 223, 229.

The Telecommunications Act, in Section 252, establishes a detailed schedule for negotiation and arbitration of terms and conditions in an interconnection agreement. Additionally, it is clear that the terms and conditions under which an incumbent LEC fulfills its requirements under Section 251 of the Act must be contained in such an interconnection agreement. Specifically, Section 251(c)(1) imposes on both carriers the duty to negotiate in good faith the particular *terms* and *conditions* of *agreements* to fulfill the duties described in subsections (b) and

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[2] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325 (rel. Aug. 8, 1996).

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(c) of Section 251. Thus, it is clear that the terms and conditions under which Qwest fulfills its obligation to provide access to unbundled network elements (which is what is specifically at issue in this case) must be contained in an *agreement*.

A. Access to MDUs and Sub-loops.

The complaint is essentially a complaint under the Telecommunications Act of 1996 (the Act), alleging that Qwest's proposed terms and prices for access to a particular unbundled network element (UNE) violate the Act and the FCC's requirements. However, the only proceeding in which AT&T may properly seek to resolve this type of dispute under the Act is through a petition for arbitration under Section 252, or, alternatively, a petition for enforcement of an interconnection agreement if the agreement between the parties already addresses the issues in dispute. Here, it is undisputed that the UNE that AT&T seeks to access is not covered by the interconnection agreement between the parties. Further, AT&T has failed to comply with the requirements of the Act to negotiate the issues in good faith, and has failed to comply with the procedural requirements regarding a petition for arbitration.

The essential allegation in AT&T's complaint is that Qwest's refusal to allow AT&T to access the building cable within MDUs through direct connection to Qwest building terminal boxes as unilaterally mandated by AT&T is a violation of either state and federal law. In addressing this question, Qwest reiterates the arguments set forth in its answer and affirmative defenses of November 28, 2000. There, Qwest argued that because AT&T is asking for relief available to it solely under the Act and FCC rules, it must use the mandated process of negotiating and then arbitrating and agreement under the Federal Telecommunications Act. AT&T cannot rely upon any other process for obtaining access to sub-loop elements.

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Because the agreement(s) that were effective between the parties at all times material to the allegations raised in this complaint did not provide for access to MDU building cable or to these sub-loop elements, Qwest had no obligation to do so. Qwest's obligation to provide carrier-to-carrier services, if such obligation arises under the Telecommunications Act of 1996, is an obligation which becomes effective only upon the effective date of an agreement approved by the State commission.[3]

This Commission considered a similar complaint, almost three years ago, and decided that the rights and obligations of the parties were established by the interconnection agreement in effect between the parties at the time, and that disputes should be resolved by arbitration, not complaint. In *MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc.*, Docket No. UT-971158, the Commission rejected MCI's claim that U S WEST was obligated under state law to accept test orders for UNEs when MCI's interim interconnection agreement did not contain terms and conditions addressing test orders. (Order Granting Motion for Summary Determination, February 19, 1998).

In that proceeding, MCI filed a complaint against U S WEST, alleging, much as AT&T does here, that it had an independent statutory entitlement under various provisions of state law to have U S WEST perform in a certain manner. The Commission noted that its important powers under state law were not diminished by the Commission's policy that the respective rights and obligations of parties seeking interconnection of their networks should be controlled by a contract. The Commission further stated that disagreements over the details of interconnection agreements

[3] See, Section 252(c)(3) requiring an implementation schedule in any arbitrated agreement, and 252(e) requiring Commission approval of agreements.

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should be resolved through arbitration consistent with Section 252 of the Telecom Act. (*See*, Order Granting Motion for Summary Determination, page 7).

The facts in that case were virtually identical to those here. In both cases CLECs have come to the Commission and asked the Commission to circumvent the negotiation and arbitration process carefully laid out by the Act. In the MCI case, the Commission wisely chose to direct the CLEC back to the federally mandated process under Section 252 of the Act. The result should be the same in this case.

B. State and Federal Law

AT&T claims that specific state statutes were violated in this complaint. Qwest believes that the Commission should conclude as a matter of law that no violations have been established in this matter.

AT&T cannot point to any state law authority which would enable it to purchase unbundled network elements absent a specific contract with Qwest to do so. In fact, the Commission recognized, in the original interconnection docket (UT-941464, et al.) that carriers would enter into contracts or agreements with one another for interconnection, and for the purchase of unbundled network elements. At the time that this complaint was filed, Qwest and AT&T were parties to two such agreements which was approved by the Commission and effective in January and July 1997. The agreements did not address sub-loops or access to MDUs, except to direct AT&T to make a bona fide request if access were requested under the AT&T agreement. AT&T never did so, and indeed acknowledged that its TCG agreement should be amended to incorporate terms and conditions for access. Qwest was at all times willing to negotiate terms and conditions for such access. As discussed above, in August 2000, Qwest sent AT&T a proposed amendment to the interconnection agreement which would have established those terms and

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conditions. Qwest was also at all times willing to negotiate specific terms with AT&T. Thus, there can be no suggestion that Qwest was under any obligation, under either state or federal law, to provide AT&T with access to the sub-loop element prior to the effective date of an agreement governing the same.

MCI, in its complaint in Docket No. UT-971158, cited many of the same provisions in support of its claim that AT&T does here, including RCW 80.04.110 (complaints); 80.36.080 (adequate and sufficient facilities); 80.36.140 (Commission may order adequate and sufficient facilities); 80.36.170 (Commission may remedy undue preference or advantage); and 80.36.186 (Commission may order access on equal terms).

AT&T suggests that RCW 80.36.080, which requires adequate and sufficient facilities, and RCW 80.36.140, which allows the Commission to order adequate and sufficient facilities, are violated by Qwest's failure to provide access under the terms and conditions unilaterally mandated by AT&T. Qwest believes that the facts as established in this matter do not show that Qwest has failed to provide adequate and sufficient facilities. The facts simply establish that AT&T has not properly ordered or been entitled to the services it has requested.

AT&T also suggests that RCW 80.36.170, which allows the Commission to remedy an undue preference or advantage, may have been violated in this matter. However, the facts as alleged by AT&T entirely fail to establish that any carrier, including Qwest itself, was given an advantage or preference by Qwest's treatment of AT&T. Qwest has provided service to those customers and carriers who were reasonably entitled thereto, including as a prerequisite the existence of a valid contract for the provision of those services. This same analysis also addresses the argument that Qwest engaged in anticompetitive behavior, a ridiculous argument. Qwest has simply required that carriers ordering services from it be in compliance with the federal

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requirements that an interconnection agreement and an agreement governing access to the UNEs a carrier is requesting be in place prior to fulfilling any orders for those services. This behavior is not anticompetitive, rather, it places all of the competitors on equal ground in requesting services and facilities from Qwest.

VI. CONCLUSION

Based on the evidence presented in this case, Qwest believes that the allegations raised in the complaint fail to state a claim upon which relief can be granted and that Qwest is entitled to a summary determination in this matter and is entitled to judgment as a matter of law.

Specifically, the Commission should determine that absent an approved interconnection agreement providing for access to the sub-loop (specifically at MDUs), Qwest was under no obligation to provide that access. The Commission should dismiss the complaint, and direct AT&T to pursue negotiations with Qwest under the Act.

Respectfully submitted this 11th day of January, 2001.

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