

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

AT&T COMMUNICATIONS OF  
THE PACIFIC NORTHWEST, INC.,  
TCG SEATTLE, AND TCG OREGON;  
AND TIME WARNER TELECOM OF  
WASHINGTON, LLC,

Complainants,

v.

QWEST CORPORATION,

Respondent.

Docket No. UT-051682

AT&T's MOTION FOR LEAVE TO  
FILE AMENDED COMPLAINT  
AND SUBMIT REVISED DIRECT  
TESTIMONY

Plaintiffs/Complainants AT&T Communications of the Pacific Northwest, Inc., TCG Oregon, and TCG Seattle (collectively, "AT&T") respectfully move the Commission for leave to file a second amended complaint and to submit revised direct testimony of Gregory W. Nagrosst. In support of its motion, AT&T states as follows:

1. In this case, AT&T asserts a state law breach of contract claim. In its complaint, AT&T contends that Qwest had secret interconnection agreements with McLeodUSA and Eschelon Telecom that Qwest did not disclose, or make available, to AT&T, as AT&T's interconnection agreements with Qwest required. AT&T further contends that pursuant to those secret interconnection agreements, McLeodUSA and Eschelon Telecom received significant discounts on all services purchased from Qwest, including intrastate and interstate access services. AT&T also contends that had it been given the opportunity to opt into those

agreements, as it had a contractual right to do, AT&T would have received the same discounts and therefore would have paid significantly less than it did for all services purchased from Qwest in Washington during the relevant period, including interstate access services.

2. Mr. Nagrosst's original direct testimony for AT&T did not compute the harm that AT&T contends it suffered in Washington as a result of being denied the opportunity to receive the significant discounts on interstate access charges that it had a contractual right to receive because AT&T's claim to recover for such harm was part of a separate federal court proceeding in Colorado, *Qwest Corp. v. AT&T Corp.*, No. 04-cv-0909-EWN-MJW (D. Colo.).

3. AT&T and Qwest recently entered into a settlement of the Colorado litigation. Prior to that settlement, AT&T had asserted, and intended to pursue, all claims relating to Qwest's improper denial of discounts on interstate access charges in the Colorado action. By the terms of the parties' confidential Settlement Agreement and Release ("Colorado Settlement Agreement"), however, those claims were dismissed from the Colorado action without prejudice, and AT&T accordingly remains free to pursue those claims in other proceedings. Indeed, if it wants to assert and seek recovery on such claims, it *must* pursue them in other proceedings. Colorado Settlement Agreement ¶ 4(a) (appended to this Motion as Confidential Attachment 1).

4. Consistent with its rights under the Colorado Settlement Agreement, AT&T wishes to pursue its right to seek recovery for Qwest's improper denial of discounts for interstate access charges incurred in Washington as part of its state law breach of contract claim here. In fact, under well recognized principles of res judicata, AT&T's choices are only two: pursue the claim for wrongful denial of discounts on interstate access charges incurred here or risk abandoning the claim altogether. This is because if a party asserts a breach of contract claim (as AT&T has), it ordinarily must seek all damages caused by the breach in the original action. A

party typically cannot bring a second action to recover for damages omitted from the first but caused by the same contract violation that formed the basis for the earlier actions. *See Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 441-42, 423 P.2d 624, 627 (1967) (plaintiffs precluded from maintaining a subsequent action for contract damages where that issue could have been determined in the prior proceedings). Accordingly, AT&T respectfully requests leave to amend its complaint and to submit revised direct testimony to include a discussion of Washington-specific figures and lost discounts on interstate access charges. The proposed second amended complaint and revised direct testimony are provided as Attachments 2 and 3 hereto. These documents are redlined to show the proposed modifications.

5. The requested amendment will not change the nature of AT&T's claim, the scope of the proceeding, or even the issues in the proceeding. AT&T's claim remains a state law breach of contract claim – namely, that Qwest denied AT&T the benefits of its secret interconnection agreements with other carriers improperly and in violation of the terms of Qwest's contracts with AT&T. Those secret interconnection agreements covered interstate access service as well as other products and services. The claim therefore still turns on the Commission's construction of the terms of the contracts in light of Qwest's actions and does not in any way require the Commission to regulate interstate services. All that the amendment and revised testimony would do is permit AT&T to seek to recover the lost discounts with respect to interstate access service purchased in Washington during the relevant time period, just as AT&T was already seeking to recover with respect to with all other services purchased from Qwest in Washington during the same relevant period. In short, the only difference will be the amount of money at stake; nothing else will change.

6. Consistent with the foregoing, the *only* change made by the proposed Second Amended Complaint, apart from changing the reference to “Amended Complaint” to “Second Amended Complaint”, appears in the Prayer for Relief. And there the *only* change appears in the first clause of part A., which originally referred “overcharges for intrastate telecommunications services and facilities purchased”, and which AT&T proposes to change to read “overcharges for intrastate and interstate telecommunications services and facilities purchased in Washington.”

7. Under Washington law amendments to complaints are to be liberally permitted. C.R. 15(a) (“leave [to amend] shall be freely given when justice so requires”); *see also Tagliani v. Colwell*, 10 Wn.App. 227, 233-34, 517 P.2d 207, 211-12 (1973) (Granting leave to amend complaint following an oral ruling on summary judgment). Allowing the amendment here will not prejudice or surprise Qwest (which was informed of the proposal well in advance) or significantly delay the proceeding. In view of the pendency and settlement terms of the Colorado litigation, Qwest plainly had notice of AT&T’s contention that it has a right to recovery with respect to its interstate access purchases and cannot legitimately contend that it would suffer prejudice by the assertion of those rights in this action. For its part, AT&T acted reasonably in pursuing its interstate access claims in the Colorado litigation until that case was concluded, and then seeking to pursue its claim in other fora as allowed by the Colorado Settlement Agreement to which Qwest agreed. Moreover, the revised testimony does not raise any new issues or make any new arguments. Rather, it simply provides data on the amount of AT&T’s interstate access purchases from Qwest in Washington during the relevant period and computes the lost discount and the interest on that discount, just as AT&T’s original testimony did with respect to intrastate access services.

WHEREFORE, AT&T respectfully requests that the Commission grant leave to file an amended complaint and to submit revised direct testimony of Gregory W. Nagrosst to include a discussion of Washington-specific figures and lost discounts on interstate access charges.

DATED this 26th day of September, 2007.

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By \_\_\_\_\_  
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