

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T CORPORATION and AT&T
COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC.,

Complainants,

vs.

QWEST CORPORATION,

Respondent.

Docket No. UT-041394

QWEST CORPORATION'S MOTION TO
COMPEL

I. INTRODUCTION

I Respondent Qwest Corporation (“Qwest”) respectfully requests that the Commission compel Complainants AT&T Corporation (“AT&T Corp.”) and AT&T Communications of the Pacific Northwest, Inc. (“AT&T PNW”) (collectively, the “AT&T entities” or “Complainants”) to respond immediately to the following Qwest data requests: 6(c); 12; 13; 14; 15; 16; 17; 18; and 19 (collectively, the “subject DRs”). Each of these data requests attempts to explore the less-than-transparent relationship between the Complainants in the context of their operations in Washington and, more specifically, in the context of their respective use of Qwest conduit in Washington.

2 The Complainants, as their counterparts have done in the ongoing Utah proceeding,¹ have interposed
overreaching objections and have refused to respond to the substance of these data requests. Qwest,
having met and conferred with the Complainants,² requests an order compelling the Complainants to
fully respond immediately to the subject DRs.³

II. BACKGROUND

3 This docket involves AT&T Corp.'s purchase of conduit from Qwest under a July 11, 1988
agreement (the "1988 agreement") entitled "General License Agreement for Conduit Occupancy
Between Pacific Northwest Bell Telephone Company and The American Telephone and Telegraph
Company for the State of Washington"⁴ and multiple associated license agreements.⁵ Pacific
Northwest Bell Telephone Company is now known as Qwest,⁶ and The American Telephone and
Telegraph Company is now known as AT&T Corp.⁷

4 The 1988 agreement remains in effect and is set to expire no earlier than October 2008.⁸ The 1988
agreement, which was voluntarily negotiated by the predecessors of Qwest and AT&T Corp.,
provides for conduit rates ranging from \$1.65 to \$3.78 per linear foot per year.⁹ To the best of

¹ See ¶¶8-9 below.

² On November 9, 2004, Qwest counsel Lisa Anderl conferred with AT&T outside counsel Brian Josef. Despite lengthy discussion and several clarifications (discussed below) by Qwest, AT&T refused to alter its responses or back away from its objections.

³ Minutes before this motion was being finalized for service the afternoon of November 18, Qwest counsel received a voice message from Mr. Josef on behalf of the Complainants. Mr. Josef expressed a desire to further discuss whether the parties could reach agreement on additional DRs that the Complainants may be willing to answer without the need for a motion to compel. Given the lateness of the hour, Qwest is filing this motion, as drafted, but will confer with Mr. Josef to determine if the issues in this motion can be narrowed. If that occurs, Qwest will advise the ALJ.

⁴ See *Complaint, Exhibit 4*.

⁵ See *Complaint, Exhibit 5*.

⁶ *Answer of Qwest Corporation to Complaint of AT&T Corporation, and AT&T Communications of the Pacific Northwest, Inc. ("Answer")*, at 3, fn 3.

⁷ *Complainants' Response to Qwest's First Set of Data Requests to AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. ("AT&T DR responses")*, at 7. In response to Qwest DR 2(a), the Complainants answered in part "Subject to and without waiving the foregoing objections, Claimants state that, on April 20, 1994, the 'American Telephone and Telegraph Company' formally amended its Certificate of Incorporation within the State of New York, changing its name to 'AT&T Corp.'"

⁸ *Complaint, Ex. 4, at 3-4 (Article 4); Ex. 5*.

⁹ *Complaint, ¶17; Answer, ¶31*.

Qwest's knowledge, AT&T Corp. currently occupies 223,031 feet of Qwest conduit in Washington under the 1988 agreement.¹⁰ The 1988 agreement contains a non-assignment provision.¹¹ That provision prohibits AT&T Corp. from assigning, transferring or sublicensing its interest under the 1988 agreement or any associated license without Qwest's prior written consent.¹² To the best of Qwest's knowledge, no such consent has been sought or received by AT&T Corp.¹³

5 AT&T PNW has the right under its interconnection agreement to order conduit at the SGAT rate of \$.35 per linear foot per year.¹⁴ Despite the right to order conduit at lower rates than are being charged to AT&T Corp. under the 1988 agreement, Qwest is unaware of AT&T PNW having ever placed such an order with Qwest in Washington.¹⁵ Nevertheless, in the complaint initiating this docket, the Complainants allege that Qwest is overcharging the Complainants by its refusal to price its conduit at SGAT rates.

6 In the complaint, the AT&T entities intentionally blur the line between which AT&T entity's actions or rights are being discussed. In the first sentence of the complaint, AT&T Corp. and AT&T PNW are collectively defined as "AT&T." Thereafter, only the vague identifier "AT&T" is used to discuss which entity is registered with and competitively classified by the Commission (¶1), which entity owns communications facilities that occupy Qwest's conduit (¶5), which entity is competing with Qwest in Washington (¶6), which entity occupies Qwest-owned conduit under the 1988 agreement and the associated licenses and/or under AT&T PNW's 2004 interconnection agreement (¶¶8-10), which entity is being charged \$1.65-\$3.78 per foot to occupy conduit (¶17), which entity attempted to renegotiate the 1988 agreement with Qwest (¶19) and which entity is entitled to relief (¶¶20-26).

¹⁰ *Complaint, ¶10; Answer, ¶24.*

¹¹ *See Complaint, Exhibit 4, at 11-12 (Article 18).*

¹² *Id.*

¹³ *Answer, ¶21.*

¹⁴ *Answer, ¶32.*

¹⁵ *Id.*

Qwest believes this ambiguity is no accident and that the Complainants, in an attempt to confuse or mislead the Commission by blurring which entity is entitled to occupy Qwest conduit and under what terms, have been intentionally vague.

7 Through a series of data requests served on October 19, 2004, Qwest seeks to clear up some of the Complainants' intentional ambiguity and determine exactly which AT&T entity is operating in Washington, has ordered Qwest conduit and is occupying Qwest's conduit in Washington. All of these areas of inquiry are directly probative to determining whether AT&T PNW has invoked its rights to order conduit at SGAT rates under its interconnection agreement and/or whether the 1988 agreement rightfully controls the parties' relationship with regard to Qwest conduit in Washington. Obviously in an attempt to avoid the clarity Qwest seeks, the Complainants have refused to answer the subject DRs. By this motion, Qwest seeks an order compelling the Complainants to fully and immediately respond.

8 In the nearly-identical Utah proceeding initiated by AT&T Corp. and its Utah CLEC affiliate (collectively, "AT&T Utah Complainants"), the AT&T Utah Complainants similarly refused to answer comparable data requests. A copy of Qwest's Utah DRs is attached as Exhibit 3. An ALJ of the Utah Public Service Commission received oral argument on Qwest's motion to compel on November 17, 2004. During the course of that argument and a corresponding conference of parties, the AT&T Utah Complainants agreed to answer many additional DRs, including some that are substantively identical to some of the subject DRs in this motion.

9 Only three DRs were fully argued and the Utah ALJ ruled in Qwest's favor and ordered the AT&T Utah Complainants to answer. Those were Utah DR 13(a) and (b) (equivalent to Washington DRs 12, 12(a) and 12(b)), Utah DRs 14, 14(a) and (b) (equivalent to Washington DRs 13, 13(a) and 13(b)) and Utah DR 17 (subpart 2) (equivalent to Washington DR 15 (subpart 2)). A copy of the

Utah ALJ's order granting Qwest's motion to compel is attached as Exhibit 4.¹⁶

III. DISCUSSION

10 The nine subject DRs, as well as the Complainants' objections and responses thereto, are attached to this motion as Exhibit 1. The subject DRs fit into four categories, each of which will be discussed below. They explore: (1) the extent to which each of the AT&T entities operates or has operated in Washington; (2) the extent to which each of the AT&T entities occupies Qwest conduit in Washington; (3) the extent to which AT&T PNW has ordered Qwest conduit in Washington; and (4) whether AT&T Corp. sought or received consent to assign its interest under the 1988 agreement or associated licenses to AT&T PNW.

11 Across the board, the Complainants refuse to answer the subject DRs, primarily on the basis that Qwest's inquiries are irrelevant to this proceeding. The Complainants are wrong, and their obstructionist tactics provide further support for Qwest's suspicions that they are preoccupied with maintaining a cloud of ambiguity over this case. That the Complainants disagree with Qwest's theory of the case is neither surprising nor a basis for determining that the subject DRs – which are designed to confirm Qwest's understanding of the facts or force to the surface any data that might refute Qwest's understanding – are inappropriate or beyond the scope of this case. Qwest has every right to clear up the intentional confusion overhanging the Complaint and to gather data supportive of its theory of the case. The Commission should grant Qwest's motion to compel. In essence, the Complainants' objections amount to an argument that only data or documents relating to their theory of the case is discoverable. The Commission should not adopt such a narrow view.¹⁷

¹⁶ By the time for reply to the Complainants' response to this motion or oral argument on this motion – if any – Qwest should be in a better position to advise the ALJ which comparable DRs the AT&T Utah Complainants answered in the Utah proceeding. By that time, it is possible that the Complainants will have agreed to answer similarly in Washington. If that occurs, Qwest will advise the ALJ that the issues in this motion have been narrowed.

¹⁷ In the Utah proceeding, the ALJ clearly did not accept the AT&T Utah Complainants' narrow view. In granting Qwest's motion to compel, the ALJ explained, "the Administrative Law Judge determined that the requested information is relevant to defenses which may be reasonably available to Qwest in this docket and therefore granted Qwest's Motion to Compel with respect to these data requests." *Exhibit 4, at 3.*

A. DRs Exploring the Extent to Which Each of the AT&T Entities Operates in Washington (DRs 6(c), 12, 13)

12 In the complaint, the AT&T entities are intentionally vague as to the extent to which each is registered to operate in Washington, actually operates in Washington and owns facilities in Washington.¹⁸ DRs 6(c), 12 and 13 seek to cut through this ambiguity.¹⁹ DRs 6(c), 12, 12(a), 12(b), 13, 13(a) and 13(b) explore what services, if any, AT&T Corp. and the American Telephone and Telegraph Company currently provide or previously provided in Washington. DRs 12(c), 12(d), 13(c) and 13(d) explore the extent to which those same entities are registered to provide services in Washington and/or act as CLECs in Washington. DRs 12(e) and 13(e) seek copies of any interconnection agreements between those entities and Qwest.

13 The Complainants refuse to answer these straightforward questions, and instead interpose four objections. First, they assert that the questions are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. The Complainants are wrong. These questions, many of which Qwest believes it knows the answers to already, are necessitated by the Complainants' intentional ambiguity in the complaint. Qwest and the Commission are entitled to understand the relationship between the two AT&T entities. For example, if AT&T Corp. is not a CLEC and is not providing telecommunications services, it clearly cannot legitimately claim right to SGAT conduit rates provided for under AT&T PNW's interconnection agreement.

14 Second, the Complainants claim that DRs 6(c), 12 and 13 are ambiguous. This objection fails on both procedural and substantive grounds. As a matter of process, the Complainants did not perfect a valid vagueness objection, as they did not timely seek clarification from Qwest.²⁰ As a matter of substance, this objection is disingenuous. The Complainants claim to be befuddled by the use of the

¹⁸ *Complaint*, ¶¶1, 5, 6.

¹⁹ As noted in Section II. above, the ALJ in the Utah proceeding has ordered the AT&T Utah Complainants to answer the Utah equivalents of DRs 12, 12(a), 12(b), 13, 13(a) and 13(b).

²⁰ WAC 480-07-405(5) provides, “[i]f a party to whom a data request is submitted finds the meaning or scope of a request to be unclear the responding party must immediately initiate a clarification call to the requesting party. Lack of clarity is not a basis for objection to a data request unless the responding party has made a good faith effort to obtain clarification.”

term “directly provide telecommunications services” when asked about AT&T Corp. (under its current and former names) in DR 6(c), 12 and 13. Qwest fails to see how that phrase is vague. If service is provided only through an affiliate of AT&T Corp., AT&T Corp. can not be said to be “directly” providing services. If AT&T Corp. itself provides service to end users, it is “directly” providing service. Further, the Complainants had no trouble deciphering the meaning of “provide telecommunications directly to consumers” in response to DR 7(c). A copy of DR 7(c), including the Complainants’ objections and response, is attached to this motion as Exhibit 2. Finally, Qwest counsel “clarified” Qwest’s meaning during the November 9 meet and confer. Mr. Josef reiterated that, notwithstanding the clarification, the Complainants were standing on their objections and would not answer. Clearly, they intend to stonewall Qwest in hopes of preserving the ambiguity of the complaint.

15 Third, the Complainants assert that DRs 12(b) and 13(b) are unduly burdensome and overbroad to the extent they seek “an historic listing of services provided and discontinued.” Qwest disagrees,²¹ but also offered a compromise to the Complainants during the November 9 meet and confer. Qwest agreed to limit its inquiry to July 1997 to the present, the same period covered by the claim for relief in the complaint. This attempt to compromise was to no avail, as the Complainants still refuse to answer.

16 Finally, the Complainants object to DRs 12(e) and 13(e) on the grounds that the information being sought is “already fully within the possession of Qwest and is therefore unduly burdensome and imposed for the purpose of harassment.” Again, this objection has no merit. Qwest certainly believes that it knows the answer to these questions – and that the named entities do not have interconnection agreements with Qwest – but it is certainly entitled to a DR response that either refutes its

²¹ Qwest notes that the Complainants’ objection to this form of discovery is ironic, at best. In their October 28, 2004 data requests to Qwest, the Complainants included the following general direction: “4...Unless otherwise expressly provided, each data request covers any document or information prepared, received, distributed, or in effect during the period of January 1, 1982 to the date of the Commission hearing on this matter, if required, unless otherwise stated.” *Claimants’ First Set of Requests for Data and Production of Documents to Respondent*, at 7.

understanding or that confirms it and simplifies the case by clarifying that the particular fact is undisputed. The Complainants' claim that these DRs are *per se* unduly burdensome because Qwest has access to the information is not well taken. Certainly, Qwest would be entitled to propound a request for admission confirming its belief that these entities do not have interconnection agreements with Qwest. In effect, DRs 12(e) and 13(e) can be viewed as requests for admission which likewise call for the production of documents supporting a denial of the request for admission. In any event, the Complainants should be compelled to answer these straightforward requests. They are in no way burdensome, let alone unduly so.

B. DRs Exploring the Extent to Which Each of the AT&T Entities Occupies Qwest Conduit in Washington (DRs 14, 15, 16, 17(a)-(d))

17 In the complaint, the AT&T entities are also intentionally vague as to the extent to which each occupies Qwest conduit in Washington.²² DRs 14-17(d) seek to clear up this critical ambiguity. DR 14 asks whether any other AT&T affiliates occupy the Qwest conduit. DR 15 asks AT&T to identify which AT&T entity or affiliate occupies each section of conduit with their own facilities for their own use or for the use of another AT&T entity.²³ DR 16 asks the Complainants to specifically identify (by specific conduit, the footage occupied and the AT&T entity occupying) each section of Qwest conduit. DRs 17(a)-(d) ask for historical information with regard to the sections of conduit identified in DRs 15 and 16.²⁴

18 The Complainants again refuse to respond to Qwest's DRs. In addition to the disingenuous vagueness objection relating to the references discussed in footnote 24, the Complainants interpose two objections. First, without explanation, they argue that these questions are irrelevant and not

²² *Complaint*, ¶¶8-10.

²³ As noted in Section II. above, the ALJ in the Utah proceeding has ordered the AT&T Utah Complainants to answer the Utah equivalent of DR 15, subpart (2).

²⁴ DR 17 mistakenly refers to DRs 17 and 18 rather than DRs 15 and 16. Rather than seeking clarification on the reference, the Complainants simply refused to answer. Qwest counsel clarified the reference during the November 9 meet and confer that Qwest intended to refer to DRs 15 and 16. Notwithstanding that clarification, the Complainants persist in their refusal to answer.

reasonably calculated to lead to the discovery of admissible evidence. Qwest simply does not understand how the Complainants can in good faith claim that these questions are outside the scope of this case. AT&T Corp. has a contractual right to order Qwest's conduit at rates between \$1.65 and \$3.78 per foot. AT&T PNW has the right under its interconnection agreement to order conduit at \$.35 per foot, but has not exercised that right to date. The Complainants claim that "they" should receive the conduit at the lower SGAT rate specified in the AT&T PNW interconnection agreement, but refuse to identify whether AT&T PNW is even the party occupying the Qwest conduit. Qwest is fully entitled to explore whether and to what extent AT&T PNW actually occupies the Qwest conduit. The Complainants' relevance objection is nonsensical. The Complainants also argue that DRs 17(a)-(c) are irrelevant insofar as Qwest seeks historical data pre-dating time periods relevant to this case. However, during the November 9 meet and confer, Qwest counsel attempted compromise by limiting the requests to July 1997 and forward. That offer of compromise did not move the Complainants, who still refuse to answer.

19 Second, the Complainants object to DRs 15 and 16 to the extent they call for information that is within Qwest's knowledge and control. In this instance, the Complainants are simply incorrect that Qwest definitively knows the answer to these questions. Qwest certainly believes that the only occupant – at least the only rightful occupant given the non-assignment provision in the 1988 agreement – is AT&T Corp. However, the AT&T entities' vagueness in the complaint renders that an open question, and Qwest is entitled to learn the Complainants' perspective on these critical facts.

C. DR Exploring the Extent to Which AT&T PNW Has Ordered Qwest conduit in Washington (DR 18)

20 The Complainants' claim that they are entitled to the conduit rate set forth in AT&T PNW's interconnection agreement. DR 18 simply asks whether AT&T PNW has ever ordered conduit from Qwest. The Complainants refuse to answer, arguing that the question is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. They also argue that this information is also in Qwest's possession. Again, these objections are without merit. It is certainly relevant whether

AT&T PNW has ever ordered conduit from Qwest under the agreement under which the SGAT rate is available. And, while Qwest believes that AT&T PNW has not ordered conduit under its interconnection agreement, it is entitled to confirmation of that fact. Such a request for confirmation is not burdensome and will eliminate factual disputes in this case. The Complainants should be compelled to answer.

D. DRs Exploring whether AT&T Corp. Sought or Received Consent to Assign its Interest Under the 1988 Agreement or Associated Licenses to AT&T PNW (DRs 17(e), 19))

21 The AT&T entities claim that the AT&T PNW interconnection rate for conduit should apply. They *may* also claim that – but refused to answer whether – AT&T PNW occupies Qwest conduit ordered by it or by AT&T Corp. But, as discussed above, the 1988 agreement requires AT&T Corp. to obtain written consent before assigning its interest under the 1988 agreement or associated licenses. DR 17(e) seeks data and documents regarding notices, if any, provided by AT&T Corp. to Qwest regarding the use of the conduit by any AT&T Corp. affiliate. DR 19 similarly asks for copies of all requests for assignment made by any AT&T entity or affiliate pursuant to Article 18 (the non-assignment provision) of the 1988 agreement.

22 The Complainants refuse to answer either DR for two reasons. First, they argue that it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. As discussed immediately above, if AT&T PNW is physically occupying the Qwest conduit ordered under the 1988 agreement by AT&T Corp., it is highly relevant whether the Complainants have any evidence supporting that Qwest authorized AT&T PNW's occupation. Second, the Complainants object that the DRs are premised on assumptions and legal conclusions (that such notices or requests were required). Again, they are wrong. Qwest is asking a factual question – whether certain notices were given or requests were made. If no such notices or requests exist, the Complainants will have every opportunity to argue that none were required. The motion to compel should be granted.

IV. CONCLUSION

23 For the foregoing reasons, the Commission should compel the Complainants – who brought this case and intentionally injected confusion by their manner of pleading the complaint – to immediately respond to the nine subject DRs.

RESPECTFULLY SUBMITTED this 18th day of November, 2004.

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