BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,	)	Docket No. UT-003120
Complainant,	)	AT&T'S RESPONSE TO QWEST'S MOTION FOR SUMMARY DETERMINATION
v.	)	
QWEST CORPORATION,	)	
Respondent.	)	

I. INTRODUCTION/SUMMARY OF ARGUMENT

AT&T Communications of the Pacific Northwest, Inc. ("AT&T") hereby responds Qwest Corporation's ("Qwest" also f.k.a." U S WEST") Motion for Summary Determination pursuant to the Prehearing Conference Order entered by Judge Caille in this docket. As articulated in detail below, Qwest's rendition of the "facts" and legal issues in its Motion for Summary Determination misstate the nature and substance of AT&T's claims. Furthermore, Qwest's position in this matter contradicts the Telecommunication Act of 1996, both Federal Communication Commission's ("FCC") and the Washington Utilities and Transportation Commission's ("Washington Commission") mandates as well as Washington statute. Because Qwest has failed to recognize the appropriate precedent, including Washington Commission precedent demonstrating that AT&T has legal recourse as a matter of Washington law, Qwest's motion for summary determination must fail pursuant to WAC 480-09-426(2).

The crux of Qwest's argument in its Motion for Summary Determination is that because the relationship between AT&T and Qwest is governed **exclusively** by an interconnection agreement, and AT&T's access to the Minimum Point of Entry ("MPOE") terminal/Network Interface Device ("NID") is not transcribed in an

interconnection agreement between the parties, Qwest has no obligation to provide access to its MPOE Terminal/NID. *See* Qwest's Motion for Summary Determination at p. 2, l. 20-21; p. 4, l. 15-17; p. 13, l. 10-13. As such, Qwest argues that there is no violation of Washington law and the Washington Commission is not the proper forum to entertain AT&T's claims, unless the parties entertain Sec. 252 of the 1996 Telecommunications Act arbitration. *Id.*

Qwest's position is inconsistent with relevant precedent and its Motion for Summary Determination must be denied. Pursuant to FCC orders, AT&T has a clear right to access the various MPOE Terminals/NIDs at Multiple Dwelling Units ("MDUs")/Multi-Tenant Environments ("MTEs") in order to connect its network to internal customer premises wiring. Furthermore, both the FCC and the Washington Commission allow AT&T to pursue independent state remedies when Qwest has denied AT&T rights afforded to it under the 1996 Telecommunications Act. Finally, under the circumstances present in this case, Qwest has flagrantly violated Washington state statute by attempting to negotiate commercially coercive, anti-competitive terms that are inconsistent with relevant law. Such Qwest actions have harmed AT&T's efforts to offer competitive local service to Washington residents, making this a particularly appropriate case for AT&T to pursue remedy under Washington law.

II. AT&T HAS A CLEAR RIGHT TO ACCESS THE QWEST MPOE TERMINAL/NID

In order to fully comprehend the fallacy of Qwest's argument that Sec. 252 of the 1996 Telecommunications Act providing for negotiation/arbitration of interconnection agreements is the exclusive remedy for this dispute, it is important to view Qwest's Motion for Summary Determination utilizing FCC terminology and legal mandates.

As AT&T articulates in its complaint, Qwest is denying AT&T access to the MPOE Terminal/NID, which AT&T needs to secure customer premises wiring in MDUs/MTEs in order to offer local telecommunications services. As explained in detail below, the FCC considers the device that AT&T is attempting to access to be the NID and as such allows AT&T and other CLECs to utilize this device to connect **its own** loop facilities to the internal customer premises wiring.

In the FCC's Third Report and Order and Fourth Further Notice of Proposed Rulemaking ("FCC Third Order"),[1] the FCC clarified and expanded its definition of the NID. Before the FCC Third Order, the FCC defined the NID "as a cross-connect device used to connect loop facilities to inside wiring."[2] In the FCC Third Order, the FCC broadened that definition "to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[3] The FCC Third Order further defined the NID to include any means of interconnection of "the customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose."[4]

The FCC explained that it expanded the NID definition, in part, because a CLEC's access to the NID is particularly important. Requiring the CLEC to seek alternative access to internal customer premises wiring "would materially diminish a competitor's ability to provide the services it seeks to offer,"[5] and "would materially raise

[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 and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238 (rel. Nov. 5, 1999).
[2] *Id.* at ¶ 230.
[3] *Id.* at ¶ 233.
[4] *Id.*
[5] *Id.* at ¶237.

entry costs, delay broad facilities-based entry, and materially limit the scope and quality of the competitor's service offerings,"[6] precisely the effect that Qwest's actions in blocking AT&T's access to the MPOE Terminal/NID are having. For these reasons, the FCC ruled that "**an incumbent LEC must permit a requesting carrier to connect its own loop facilities to the inside wire of the premises through the incumbent LEC's network interface device, or any other technically feasible point, to access the inside wire subloop network element**."[7] (Emphasis added.) Thus, there is a clear mandate from the FCC to allow AT&T to access the MPOE Terminal/NID, without distinction as to who owns the internal customer premises wiring.[8] This MPOE Terminal/NID access is precisely what AT&T has requested from Qwest, and Qwest has taken illegal action to prohibit such access.

In its Motion for Summary Determination, Qwest ignores the FCC definition of various elements presumably in order to complicate the issue of AT&T's clear access rights. It calls the FCC defined NID a "building terminal" and the FCC defined internal customer premises wiring "intra-building cable." *See* Qwest Motion for Summary Determination at p. 7. In doing so, Qwest ignores any reference to the NID section of the FCC Third Order[9] which specifically and without exception **requires** an incumbent LEC to allow a CLEC "to connect its own loop facilities to the inside wire of the premises."[10] Of course, the NID section of the FCC Third Order does not reference for the need to pursue negotiation or arbitration under Sec. 252 of the 1996 Telecommunications Act,

[6] *Id.*
[7] *Id.*
[8] Of course AT&T would compensate the relevant party for the use of the internal customer premises wiring if such compensation were appropriate.
[9] *See Id.* at ¶ 230-240.
[10] *Id.*

because a CLEC should not have to negotiate a right it is clearly afforded under law.[11]

Stealthfully, by changing terminology, Qwest asserts that AT&T is merely attempting to access the more generic "subloop" which the FCC considers to be much broader than the NID. By contrast, the subloop includes a plethora of loop components.[12] Qwest then relies upon a paragraph in the "subloop" section of the FCC Third Order in an attempt to establish that Sec. 252 negotiation is an exclusive remedy for accessing the subloop.[13] Although the lack of merit in this argument is discussed in detail in Section III below, the language Qwest relies upon actually supports AT&T's argument that Qwest is acting contrary to relevant law. The paragraph in question states that if the parties can not reach an agreement regarding subloop unbundling at an accessible terminal, "the incumbent will have 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 (any subloop access point)."[14] Accordingly, the FCC presumption of CLEC accessibility at each and every accessible terminal is contrary to Qwest's position that AT&T would not be able to directly access **any** of the Qwest MPOE Terminals/NIDs.

As stated above, the FCC mandate is clear: AT&T has the right to access the Qwest MPOE Terminal/NID in order to access the internal customer premises wiring. Qwest has frustrated such access, which is the basis of AT&T's complaint requiring expedited relief from this Commission.

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[11] Obviously AT&T would have continued negotiating the details of MPOE Terminal/NID access such as price if Qwest had been at all lawful in its proposals.
[12] *Id.* at ¶ 206.
[13] *See id.* at ¶ 223.
[14] *Id.*

III. FCC AND THE COMMISSION PRECEDENT SUPPORT AT&T's RIGHT TO PURSUE WASHINGTON STATUTORY REMEDY

Without supporting legal authority, Qwest insinuates that AT&T must approach Qwest's clear violation of both Washington and FCC telecommunications law exclusively through negotiation/arbitration under Section 252 of the 1996 Telecommunications Act. Qwest's position completely ignores relevant FCC precedent.[15] Specifically, the FCC has stated "**nothing** in sections 251 and 252 or (the FCC) implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes or the common law."[16] (Emphasis added.)

Qwest also ignores significant Washington Commission precedent and misconstrues other Washington Commission precedent. The Washington Commission is clear that AT&T has the right to pursue Washington state remedy when there is a perceived violation of rights afforded to it under the 1996 Telecommunications Act regardless of whether there is an interconnection agreement in place on the specific subject. In *MCIMetro Access Transmission v. U.S. West*, Docket No. UT-971063, Qwest, among other misdeeds, refused to allow MCIMetro to connect at its access tandem in violation of the requirements of the 1996 Telecommunications Act.[17] The Washington Commission rejected the same Qwest argument that it makes in the instant action, that a "dispute (involving interconnection rights given to a CLEC) must be resolved in accordance with the rights and obligations of the parties as defined in terms of the …

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[15] *See In The Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, *First Report and Order*, FCC 96-325 (rel. August 8, 1996) ¶ 121-129.

[16] *Id.* at ¶ 129.

[17] *MCIMetro Access Transmission Services, Inc. v. U.S. West Communications, Inc., Order Denying U.S. West's Petition for Reopening the Record, Affirming the Initial Order, in part, and Modifying the Initial Order, in part ("MCIMetro v. U.S. West Order")* , UT-97-1063 (Feb. 10, 1999) at ¶ 117-123.

interconnection agreements between them."[18] The Commission found that Sec. 251 of the 1996 Telecommunications Act and the corresponding FCC orders imposed certain obligations upon Qwest,[19] and Qwest's failure to adhere to those obligations violates Washington state statute regardless of whether the obligations were memorialized in an interconnection agreement between the parties.[20] In light of both FCC and Commission precedent, Qwest's argument that AT&T must pursue negotiation/arbitration pursuant to Sec. 252 of the 1996 Telecommunications Act must fail.

Instead of even addressing the clear FCC and Commission mandates stated above, in its Motion for Summary Determination, Qwest relies exclusively on the Commission's decision in a completely distinguishable matter, *MCIMetro Access Transmission Services, Inc. v. U.S. West Communications, Inc.*, Docket No. UT-971158.[21] In that docket, *MCIMetro* sought relief relating to U.S. WEST's "alleged failure and refusal to allow MCI to test telecommunications services…before MCI offered those services to the general public…"[22] The Commission's Order in that docket makes clear that MCIMetro's Complaint in that matter was based on U.S. WEST's alleged *contractual* obligation to perform testing based on a superceding agreement negotiated by the parties after the dispute at issue arose.[23] Unlike AT&T, MCIMetro never asserted that U S WEST had an independent obligation to provide the testing but instead relied exclusively on a contractual argument.[24] Accordingly, the Commission found that any issue regarding

[18] *Id.* at ¶ 117. *Qwest's Opening Brief in MCImetro (sic.) Access Transmission Services, Inc. v. U.S. West Communications, Inc.* (filed July 17, 1998) at p. 4.
[19] *MCIMetro v. U.S. West Order* at ¶121.
[20] *See id.* at 123.
[21] *MCIMetro Access Transmission Services, Inc. v. U.S. West Communications, Inc. Order Granting Motion for Summary Determination, Docket No. UT-971158* (Feb. 19, 1998).
[22] *Id.* at p.2.
[23] *Id.* at p.6.
[24] *Id.* at p.8.

MCIMetro's independent entitlement to such testing was "not ripe for decision"[25] and that the parties should rely on mediation and arbitration pursuant to federal law to resolve any contractual interconnection disputes.[26] This is hardly the situation faced by AT&T.

Despite Qwest's ignorance of precedent, it is clear that the Washington Commission can consider a violation of Washington statute when Qwest or any other party fails to allow legally mandated access to a CLEC. Accordingly, Qwest is, at best, misinterpreting relevant legal precedent and AT&T's complaint must stand.

IV. THE UNDISPUTED FACTUAL PREDICATE MAKES AT&T's CLAIMS FOR RELIEF UNDER WASHINGTON LAW PARTICULARLY APPROPRIATE

AT&T is not bringing its claims to the Commission simply because negotiation between the parties is at a standstill. To the contrary, AT&T is bringing its claims based on Qwest's anti-competitive practices in denying AT&T access to the MPOE Terminal/NID unless AT&T acquiesces to commercially coercive processes, which directly violate relevant telecommunications law. Documented factual predicate demonstrates why, despite AT&T's attempt at extensive negotiation with Qwest, AT&T has been forced to file this Complaint with the Commission.

Because the FCC articulated a clear right for a CLEC to access the MPOE Terminal/NID in its Third Remand Order and AT&T began seeing a concerted effort by Qwest to deny such right, AT&T alerted Qwest that it was in direct violation of FCC requirements. *See* Exhibit A: July 24, 2000 Correspondence from Mitchell H. Menezes, Esq., AT&T, to Laura Ford, Esq., Qwest. After a two week lapse in which AT&T heard nothing of substance from Qwest, *see* Exhibit B: Undated Correspondence from Laura

[25] *Id.*
[26] *Id.* at p.7-8.

Ford, Esq., Qwest, to Mitchell Menezes, Esq., AT&T. AT&T again contacted Qwest requesting such access. *See* Exhibit C: August 9, 2000 letter from Mitchell H. Menezes, Esq., AT&T, to Laura Ford, Esq., Qwest. Qwest responded that it was blocking access "because AT&T Broadband has not been following the appropriate processes nor placing the appropriate orders. *See* Exhibit D: August 9, 2000 letter from Laura Ford, Esq., Qwest, to Mitchell Menezes, Esq., AT&T." Nowhere in the August 9th, 2000 correspondence did Qwest assert the need to negotiate a protocol pursuant to Sec. 252 of the 1996 Telecommunications Act. Instead, as common in this dispute, Qwest unilaterally mandated the terms of AT&T's access.

As Qwest did nothing to remedy the situation and AT&T began seeing an increasing number of locks on MPOE Terminals/NIDs, after a two week lapse, AT&T again contacted Qwest who **then** indicated that the parties needed to negotiate access into the TCG-U.S. WEST interconnection agreement. Qwest further referred AT&T to Qwest's SGAT, claiming that it contained language which would govern AT&T's right of access, and could be incorporated into AT&T's interconnection agreement. That language, too, clearly ignored access rights granted by the FCC. *See* Exhibit E: Letter from Dominick Sekich, Esq., AT&T, to Laura Ford, Esq., Qwest, with attachment. Although AT&T was suspicious as to Qwest's antics of creating differing reasons on why it would not allow AT&T access to the MPOE Terminal/NID, AT&T forwarded language, which conformed to the FCC Third Remand Order. *Id.*

Qwest again completely ignored FCC precedent and AT&T's proposed language, instead forwarding another proposal, which was still contrary to the FCC Third Remand Order. *See* Exhibit F: August 28, 2000 Letter from Laura Ford, Esq., Qwest, to

Dominick Sekich, Esq., AT&T, with attachments. As an example, Qwest's language construed the NID as being only "the interface between Qwest's Loop facility and the **end user's** inside wire." See Exhibit F, Attachment No. 1, 1.I.1. (Emphasis added.) As discussed in section II above, this is contrary to the FCC's broader definition that the NID is "to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the **customer premises wiring**, regardless of the particular design of the NID mechanism."[27] Thus, Qwest required that any time anyone but the end user owned the inside wire, AT&T would have to go through a "Field Connection Point" ("FCP") procedure where Qwest would build a box that AT&T can connect to the customer premises wiring. *See* Exhibit F, Amendment No. 2, 1.J.7.a. Qwest further demanded that AT&T pay for the "intrabuilding cable" as well as pay a feasibility fee, i*d.* at 1.J.9.b.; a quote preparation fee, *id* at 1.J.9.c.; and a construction fee, *id.* at 1.J.9.d. Furthermore, Qwest required over one hundred and fifty days to complete the process, **far** longer than the Commission or the FCC has ruled is appropriate for the far more complex act of network collocation.[28]

As AT&T explains in greater detail in its Complaint, AT&T still continued to attempt on numerous occasions to negotiate with Qwest to secure its rights as granted by FCC legal mandate. However, these efforts have been fruitless. To this date, Qwest is continuing to block access to its MPOE Terminals/NIDs in numerous properties by padlocking them and disconnecting AT&T conduit. Furthermore, when AT&T requests access to various MPOE Terminals/NIDs, Qwest continues to mandate a FCP procedure,

[27] *Third Report and Order* at ¶233. (Emphasis added.)
[28] *See* WAC 480-120-560.

see Exhibit G: January 11, 2001 e-mail from Mark Miller, Qwest, to Bart Sistek and Larry Thurmond, AT&T re: Access to 3220-3230 Orleans Street; January 10, 2001 e-mail from Mark Miller, Qwest, to Larry Thurmond, AT&T re: 4141 Cory Street. Qwest has even attempted to thwart AT&T's efforts by unsuccessfully attempting to involve the Washington criminal justice system when AT&T is forced to use self-help to gain access to various MPOE Terminals/NIDs. *See* Exhibit H: Bellingham Police Report re: Case No. 01B00962 (January 17, 2001).

By its numerous inconsistent statements, Qwest has also made it clear that they have no sufficient reason why they are blocking AT&T's access to the MPOE Terminal/NID. Qwest has admitted that it knows that it must provide AT&T access to customer premises wiring through their MPOE terminal/NID. *See* Exhibit I: Pizzillo, Ericka, *Padlocked Phone Lines Leave Residents Calling Qwest Unfair,* Bellingham Herald, 1:1 (January 15, 2001). However, Qwest has indicated that it is putting locks on MPOE Terminals/NIDs because AT&T did not inform Qwest of the exact time that AT&T was changing a customer's service to avoid *the possibility* of customer disconnection. *Id.* Two days later, Qwest, through spokesperson Jeff Wilson, told the Bellingham police that Qwest is padlocking the NIDs because they "have spent the money, man power, and equipment into the complexes (and) (b)efore Qwest grants (AT&T) access to their lines they want some kind of compensation." *See* Exhibit H at p.3. Interestingly enough, this is presumably the same Jeff Wilson who signed a "declaration" in "Qwest's Motion to Amend its Answer to Include a Cross-Complaint" where Qwest insinuates that it is padlocking its NIDs because AT&T *had* put customers

out of service. *See* Qwest's Motion to Amend its Answer to Include a Cross-Complaint (December 20, 2000).

In viewing these Qwest inconsistencies in tandem with the factual record existing in this matter, the clear legal entitlement AT&T has to access the MPOE terminal/NID, and the competitive advantage Qwest is gaining (and Washington consumers are losing) by not allowing AT&T its legally entitled direct access, it is completely appropriate for AT&T to assert its rights under Washington State statute. In light of the totality of these circumstances in this matter, it is hardly a stretch to assert that Qwest has violated numerous Washington statutes including but not exclusively RCW 80.36.186 (relating to unreasonable preference or advantage of pricing of or access to non-competitive services), RCW 80.36.170 (relating to prohibition of unreasonable preference), RCW 80.36.090 (relating to failure to furnish suitable and proper connections for telephonic communications), RCW 80.36.080 (relating to failure to render services in a prompt, expeditious and efficient manner), RCW 80.36.186 (relating to giving unlawful preference to any telecommunications company), and RCW 80.36.070 (relating to damage to property). S*ee also* factual predicate in AT&T's Complaint at ¶ 6-43. Accordingly, the Commission should act expeditiously to secure AT&T's rights to access the MPOE Terminal/NID and deny Qwest's Motion for Summary Determination in this matter.

WHEREFORE, AT&T requests that Qwest's Motion for Summary Determination be denied in this matter and any hearing dates be expedited.

RESPECTFULLY submitted this 25th day of January 2001.

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