BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

I. INTRODUCTION/SUMMARY OF ARGUMENT

Qwest Corporation (Qwest) hereby files this reply to AT&T's Response to Qwest's Motion for Summary Determination. This reply is authorized by a February 7, 2001 notice of the Commission, which established a reply date of February 16, 2001. The date for filing was subsequently extended until February 20, 2001.

On January 11, 2001 Qwest filed a motion for summary determination in this case pursuant to WAC 480-09-426. Qwest asked the Commission to hold, as a matter of law based on undisputed facts, that AT&T does not have a right to pursue the relief it has requested in the form of a complaint under state law, but rather that AT&T must seek negotiation and arbitration under the Telecommunications Act of 1996 (the Act) in order to resolve disputes regarding the terms,

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conditions, and prices for access to the Qwest-owned building cable in multiple dwelling units (MDUs).[1]

AT&T filed its response on January 26, 2001. AT&T makes two arguments in its response, both of which will be addressed herein. First, AT&T argues that the element to which it seeks access is in reality the NID (network interface device) as defined by the FCC, not the sub-loop, and that there is no requirement to negotiate or arbitrate on the issue of AT&T's right to access the NID. Second, AT&T argues that under federal law and applicable Commission precedent, AT&T has a right to relief wholly under state law.

In this reply, Qwest will demonstrate that AT&T is mistaken on both counts. The definition of a NID and the definition of a sub-loop are indeed different, but a careful reading of all of the relevant FCC decisions will clearly demonstrate that the building cable to which AT&T seeks access in this case is a portion of Qwest's network that is properly identified as the sub-loop, and is governed by FCC pronouncements on that element, not the NID. Additionally, AT&T's own witness in the pending New Generic Proceeding (UT-003013, Part B) clearly states in her testimony that the NID is a different element than the building cable that is at issue in both that costing proceeding and this complaint. AT&T's self-servingly inconsistent position in this case should be given no credence.

With regard to the second argument, that AT&T believes it may seek relief wholly under state law, Qwest will show that AT&T has misinterpreted Commission precedent, and has overlooked important provisions of federal law governing this issue. Additionally, AT&T's own

[1] AT&T has begun referring to these buildings as MTEs, for multiple tenant environment. The terms will be used interchangeably in this document.

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actions prior to filing the complaint, and its professed willingness to amend the parties' interconnection agreement are inconsistent with its current position that no interconnection agreement is necessary.

In sum, AT&T's position in this case on the issue of access to Qwest-owned building cable is inconsistent with applicable FCC decisions and its own position in other dockets. AT&T's position in this case on the issue of whether relief under state law is appropriate is inconsistent with applicable FCC decisions and Commission precedent, as well as with AT&T's own admissions prior to filing the complaint.

II. ARGUMENT

A. Definitions of and Access to the NID and the Sub-loop

The NID and the sub-loop have both been discussed by the FCC in a number of decisions. Both elements were first discussed in the Local Competition First Report and Order[2] where the FCC initially declined to order access to the sub-loop, but did order unbundled access to the NID.[3] Subsequently, the FCC did order ILECs to provide CLECs with unbundled access to both the loop and the NID. A review of the relevant FCC decisions will show that AT&T seeks access to the sub-loop in this case, and that its rights are governed by FCC pronouncements on that issue. Further, AT&T has admitted, through both counsel and its witness in another proceeding, that the issue in this case is the sub-loop, not the NID.

[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).
[3] Id. at ¶¶ 390-92.

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1. The UNE Remand Order

In the UNE Remand Order,[4] the FCC ordered incumbent LECs to provide unbundled access to both the sub-loop and the NID. The FCC discussed these elements in separate sections of that order, with paragraphs 202 to 229 devoted to the sub-loop and paragraphs 230 to 240 devoted to the NID. AT&T has latched onto several ambiguous references in the UNE Remand Order to "inside wire" and "customer premises wiring," and seeks to use those references out of context to support its argument in this case. However, consideration of all of the provisions of the Order together lead to the inescapable conclusion that the sub-loop discussion is the one applicable to this case.

AT&T focuses on the paragraphs in the UNE Remand Order discussion of the NID that reference "inside wire" or "customer premises wiring" (see, Response at pages 3 to 5, citing the UNE Remand Order at paragraphs 230, 233, and 237). For example, the Order at paragraph 233 explicitly modifies the definition of the NID to include "all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring." AT&T contends that because the FCC did not specify an owner of the customer premises wiring, the definition as stated must include all "customer premises wiring" whether owned by the ILEC or the building owner.

Qwest disagrees. Reference to several other paragraphs concerning the NID make it clear that such a reading is incorrect. In addition, several other provisions in the discussion of sub-loops are so much more specifically applicable to the facts in this case, that they must govern.

First, under the above definition, the NID is the interface between the ILEC loop distribution plant and customer premises wiring. Thus, the NID is really the point where the loop plant *ends*, and is connected to another element. The building terminals in this case are not

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NIDs, because they are a point wholly within Qwest's loop plant – the loop extends on either of the building terminal in option 3 buildings, because Qwest owns the facilities on either side of the building terminal. The NID itself in those buildings, the place where regulated facilities end and customer-owned facilities begin, is located in each individual apartment unit.[5] Thus, the FCC acknowledged that the NID is the point of interconnection between carrier and customer-controlled facilities.[6] Qwest's Washington tariff specifies that Qwest controls the intra-building cable up to the NID in an option 3 building.[7]

Second, the FCC has specifically held that access to the NID does *not* afford access to the "inside wiring," stating at paragraph 235 that "we reject arguments that we should include inside wiring in the definition of the NID." Thus, even if the Qwest building terminal were a NID, which it is not, the analysis of AT&T's rights could not end there. There would still be the question of the prices, terms and conditions for access to the building cable itself. AT&T acknowledges this, but tries to disguise the importance of this issue by off-handedly mentioning in a footnote that it would be willing to compensate the appropriate party for the building cable if such compensation were appropriate (Response at fn. 8). Further, it is clear that if AT&T purchases the sub-loop element of the building cable, it will have also acquired the functionality of the actual NID at the customer unit.[8]

Finally, the UNE Remand Order provides additional clarity on this issue in its discussion of the sub-loop. There, the FCC defined sub-loops as those portions of the loop that are accessible at terminals in the incumbent's outside plant i.e., "where technicians can access the

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[4] *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).
[5] WN U-40, Section 2.8.1 B.5.c.
[6] UNE Remand Order at 234.
[7] An analysis of Qwest's ownership and control of option 3 intra-building cable, under applicable tariff provisions, is set forth in Qwest's response to an AT&T data request, provided here as Reply Attachment A.
[8] UNE Remand Order at ¶235.

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wire or fiber within the cable without removing a splice case to reach the wire or fiber within."[9] 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.

The FCC clarified that its occasional references to "inside wire" may, in some cases, also be references to the sub-loop element. Using an example very similar to the facts in this case, the FCC describes why access to the sub-loop is important, as follows:

> In particular, a facilities-based provider's ability to offer service in a multi-unit building or campus may be severely impaired if it must install duplicative *inside wiring*. [. . .] Thus, we conclude that access to these *subloop elements* at technically-feasible interconnection points is necessary . . . (emphasis added).[10]

Clearly, this is what AT&T seeks to do in this case. It may be that AT&T also seeks access to the NID, but as will be discussed below, AT&T already has that access, and the NID is only a part of the story in terms of what AT&T seeks in these MTEs.

2. The "Access to Wiring" Order

On October 25, 2000 the FCC released an Order and Further Notice of Proposed Rulemaking addressing, among other things, access to wiring as described in AT&T's

[9] Id. at ¶206.
[10] Id. at ¶216.

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complaint.[11] Several passages in that order also make it clear that where the ILECs network extends into the building, the issue of access to that building cable is indeed the same as access to a sub-loop element.

In the Access to Wiring Order, the FCC first clarifies that the "demarcation point" is the point that marks the end of the wiring under control of the LEC and the beginning of wiring under the control of the property owner or subscriber.[12] This definition is consistent with the definition in Qwest's tariffs, and is also consistent with the fact that Qwest's building terminals in an option 3 building are not a "demarcation point" and that Qwest owns the cable/wire on either side of that terminal.

The FCC goes on to clarify what it meant in the UNE Remand Order when it discussed sub-loop elements and inside wire, as follows:

> In November, 1999, the Commission [FCC] issues the UNE Remand Order, which established as an unbundled network element the "inside wire" sub-loop. That order defined the loop element as terminating at the demarcation point and required incumbents to make available on an unbundled basis any portion of the local loop as a subloop element, including that portion between the property line and the demarcation point [internal footnote omitted].[13]

The sub-loop, which is a portion of the loop between the property line and the demarcation point (i.e., the NID at the actual apartment unit), is precisely the unbundled element that AT&T seeks to access. Thus, there can be no real dispute that the FCC's decisions with regard to sub-loop elements must apply. As discussed below, this includes the decision that disputes with regard to sub-loop access must be resolved through the negotiation and arbitration process.

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[11] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking; In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Fifth Report and Order and Memorandum Opinion and Order*; *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Network, Fourth Report and Order and Memorandum Opinion and Order*, FCC 00-366 (rel. Oct 25, 2000). ("Access to Wiring Order").

[12] Access to Wiring Order at ¶44.

[13] Id. at ¶48

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3. AT&T's Testimony in UT-003013(B)

AT&T has also raised the issue of the appropriate price for building cable in the New Generic Costing Proceeding, Docket No. UT-003013(B). There, AT&T has prefiled the testimony of Natalie J. Baker (ex. JG-1T [sic]), who discusses the issues of the terms, conditions, and prices for access to Qwest-owned building cable. There can be no reasonable dispute that this is the same issue that AT&T has raised in this proceeding.

In that prefiled testimony, which is not yet admitted, but which has not to date been modified, supplemented or withdrawn, the witness discusses the issue of the building entrance terminal, and is then asked: "Is this the same as the NID?" She responds, "No. They are separate network elements. . . ." (Ex. JG-1T at p. 7). The witness goes on to correctly characterize the Qwest-owned building cable as a portion of the sub-loop, as follows, "[t]he FCC's UNE Remand Order provides the underlying logic between access to subloops, hence intrabuilding cable. . . ." (Ex. JG-1T at p. 9). This testimony is on file with the Commission, and the relevant pages are included here as Reply Attachment B.

Thus, in spite of AT&T's representations in its January 26, 2001 Response, it appears clear that AT&T does recognize that the sub-loop is also at issue when it accesses Qwest-owned building cable.

4. AT&T's Characterization of the Issue During Negotiations

AT&T has previously agreed that an amendment to its interconnection agreement would be appropriate in order to recognize and define the parties' rights and obligations with regard to the access it seeks in this complaint, and has agreed that the sub-loop element is one of the items at issue for that amendment. As previously noted, the interconnection agreement(s) between Qwest and AT&T, (attached to Qwest's motion for summary determination), do not contain terms and conditions governing access to the building cable in MDUs. No sub-loop elements are

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identified as separately available in the AT&T Agreement, nor are there prices set forth for sub-loop elements. The agreement does permit AT&T to purchase the NID separately. (See, Attachment 3, Section 81.1.1 of the interconnection agreement, included as Attachment A to Qwest's Motion.)

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 July/August 2000 negotiations, AT&T specifically proposed an amendment to its interconnection agreement to incorporate terms and conditions for access to sub-loops. The letter of transmittal for that amendment was included as Attachment E to Qwest's Motion, and the proposed amendment itself is now included with this reply as Reply Attachment C. It was AT&T's dissatisfaction with that negotiation process that resulted in the filing of this complaint. Thus, it is somewhat humorous that AT&T now accuses Qwest of "stealthfully" changing terminology by discussing the sub-loop (Response at p. 5). Clearly AT&T has recognized this as the issue all along.

B. State and Federal Law

The essence of AT&T's response to Qwest's Motion for Summary Determination is that AT&T has a state-law right to obtain direct access to Qwest's building terminals, which AT&T incorrectly claims are NIDs. AT&T is wrong, for a number of reasons. First, Congress clearly required that parties must memorialize their rights and obligations under the Act in an interconnection agreement, and AT&T has based its claim on rights granted under the Act. Second, the FCC has held that access to UNEs is governed only by interconnection agreements reached under the Act. Indeed, in January 2001, the FCC issued an order preempting the Virginia State Corporation Commission's jurisdiction because that Commission had purported to resolve the rights of parties in accordance with state law, not the Act. Finally, AT&T's

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interpretation of the two MCImetro cases that it discusses in its reply is not sound, and does not withstand a close and accurate reading of those Washington orders.

1. The Act Requires Interconnection Agreements for Access to UNEs

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 (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*.

2. The FCC Requires Interconnection Agreements for Access to UNEs

All of the FCC orders to date interpreting the Act contemplate that the parties who assert rights under the Act will do so in accordance with the terms and conditions of an interconnection agreement. As early as 1996, the FCC clearly stated that the obligation to provide network elements *only* arises under an interconnection agreement. In its Reconsideration Order, the FCC specifically discussed access to OSS functions and access to UNEs in general, as follows:

> As with *all other* network elements, the obligation arises *only* if a telecommunications carrier has made a request for access to OSS functions pursuant to section 251(c)(3), and the actual provision of access to OSS functions by an incumbent LEC must be governed by an implementation schedule established through negotiation or arbitration.[14]

Thus, AT&T's claim that Qwest's position is without legal support (Response at p. 6) is incorrect. AT&T's citation to the general provisions in the First Report and Order, which permit

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carriers to continue to pursue existing remedies under other statutes or the antitrust laws, is simply not on point. That reference only supports seeking relief under those laws if the claimed injury is premised on rights afforded by those laws. Here, it is clear that AT&T is seeking to enforce its right to access FCC-mandated UNEs under state law, not an interconnection agreement, and that is impermissible.

As Qwest pointed out in its Motion, the FCC has stated that if the incumbent and CLEC cannot reach an agreement pursuant to voluntary negotiations about the availability of space or the technical feasibility of sub-loop 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*, [which, of course, results in an interconnection agreement] that there is no space available or that it is not technically feasible to unbundle the sub-loop at the requested point (emphasis added).[15] 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.[16] This holding is entirely consistent with the requirements of the Act, and with prior FCC decisions as discussed above.

3. The FCC Has Preempted State Law Consideration of Sections 251 and 252 Issues

In a decision released a week before AT&T filed its Response, the FCC provided additional guidance on the propriety of resolving Sections 251 and 252 issues under state law,

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[14] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Second Order on Reconsideration*, FCC 96-476 (rel. Dec. 13, 1996) ("Reconsideration Order).
[15] UNE Remand Order at ¶223.
[16] Id. at ¶¶ 223, 229.

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rather than under the negotiation and arbitration provisions of the Act.[17] In the WorldCom Order, the FCC held that the Virginia State Corporation Commission could not determine interconnection disputes wholly under state law, and that its failure and refusal to conduct an arbitration pursuant to the Act, upon the request of WorldCom, subjected the Virginia Commission to preemption under Section252(e)(5). Clearly, the Commission in this case should be cognizant of this decision in making a determination about whether to consider AT&T's "state law" claims in a complaint proceeding, especially when the rights that AT&T seeks to assert are clearly rights under the Act and the FCC's UNE Remand order, as discussed above. For ease of reference, that FCC order is attached hereto as Reply Attachment D.

4. AT&T Misreads Applicable Washington Precedent

AT&T discusses two Commission decisions that it claims supports its right to the relief it requests in this case. AT&T misreads those decisions. AT&T also fails to either distinguish or discuss the applicability of other Commission decisions that Qwest cited in its Motion, such as the Ninth Supplemental Order in the original interconnection dockets, UT-941464, et al. There, the Commission clearly stated that while general terms and conditions might ultimately be tariffed, the details of the arrangements between carriers would be contained in contracts or agreements with one another for interconnection and the purchase of UNEs. This holding is consistent with the FCC requirements discussed in sections A.1. and 2., above.

The Commission adhered to this holding in the MCImetro decision in Docket No. UT-971158, granting Qwest's Motion for Summary Determination in that case. In its Response, AT&T claims that the Commission only decided contractual issues, because MCImetro did not

[17] *In the Matter of Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No 00-218, *Memorandum Opinion and Order*, FCC 01-20 (rel. Jan. 19, 2001) ("WorldCom Order").

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raise the issue of whether U S WEST had an independent obligation to provide testing (Response at p. 7). Thus, AT&T concludes that the Commission found that the issue of MCImetro's independent entitlement to testing was not ripe for decision.

Qwest does not agree with AT&T's interpretation of that decision. The MCImetro complaint was based on alleged obligations under the Act, state law, and the parties' interconnection agreement. The conclusion that AT&T cites, holding that MCImetro's claim was not ripe, was only with regard to MCImetro's claim concerning combinations of UNEs, a separate issue which was raised in addition to the testing issues. Indeed, ATT's characterization of the Commission's holding on that issue, that the parties should negotiate and arbitrate the issue, is the same holding that should pertain in this case.

AT&T also misinterprets the other MCImetro case, Docket No. UT-971063. Although AT&T claims that the Commission's February 10, 1999 final order in that case supports AT&T's position in this complaint, the MCImetro decision is distinguishable from this case. In that order, the Commission required U S WEST to route MCImetro's traffic through the access tandem under certain limited circumstances involving congestion or a lack of facilities. The order did not give MICmetro a right to unilaterally demand particular routing, nor did it decide the method of accomplishing that routing. Essentially, the Commission clarified MCImetro's right to have traffic routed through the access tandem – a parallel holding in this case would simply affirm AT&T's right to access Qwest's building cable. However, in this case, Qwest and AT&T do not have a dispute over AT&T's right to access to building cable – Qwest has acknowledged that right all along.

The MCImetro order also did not determine the terms and conditions that would govern the access tandem arrangement between the parties. Notably, after that order was entered, MCImetro and U S WEST continued to have disputes over the terms and conditions necessary to

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implement that portion of the order. The parties very nearly needed additional proceedings before the Commission to resolve those issues. However, on December 13, 1999, the parties jointly requested approval of an amendment to their interconnection agreement, which resolved the disputes between the parties.[18] This resolution reinforces Qwest's position in this case that particular terms and conditions should be contained in interconnection agreements, which must be negotiated or arbitrated, not established through the complaint process.

III. CONCLUSION

As set forth in Qwest's Motion for Summary Determination, the allegations raised in the complaint fail to state a claim upon which relief can be granted. 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 obligated only to negotiate that issue under the Act, and was under no obligation to provide access absent approved or agreed terms and conditions. The Commission should dismiss the complaint, and direct AT&T to pursue negotiations with Qwest under the Act.

Respectfully submitted this 20th day of February, 2001.

Qwest Corporation

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Lisa A. Anderl, WSBA No. 13236

[18] See, Twelfth Supplemental Order in Docket No. UT-971063, February 24, 2000.

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