BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,	)	DOCKET NO. UT-003120
Complainant,	)	SECOND SUPPLEMENTAL ORDER GRANTING MOTION TO AMEND ANSWER, DENYING EMERGENCY RELIEF AND DENYING MOTION FOR SUMMARY DETERMINATION
v.	)	
QWEST CORPORATION,	)	
Respondent.	)	
. . . . .	)	

SYNOPSIS

1 This is a dispute between AT&T and Qwest that relates to an interconnection agreement under which they operate. The Commission directs Qwest to promptly provide access to AT&T, and orders the parties to continue the bona fide request (BFR) process to negotiate the compensation due Qwest for that access, and report back to the Commission within 30 days.

MEMORANDUM

2 **Parties:** Steven H. Weigler, attorney, Denver, Colorado, represents AT&T Communications of the Pacific Northwest, Inc. Lisa Anderl, attorney, Seattle, Washington, represents Qwest Corporation.

3 **Procedural History:** On November 6, 2000, AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed with the Commission a complaint against Qwest Corporation. The complaint alleges that Qwest denied AT&T access to inside wiring in multiple dwelling units (MDUs). Specifically, AT&T alleges that Qwest denied AT&T access to various "Option 3"[1] MDUs. Qwest answered the complaint, denied its allegations, and argued that the complaint must be dismissed because the actions about which AT&T complains are governed not by state law, but rather by the Section 252 of the Telecommunications Act of 1996.

[1] In an "Option 3" building, the building owner has opted to have Qwest's regulated facilities terminate within the building at each customer unit. In an "Option 1" building, the building owner has opted to have Qwest's regulated facilities terminate at the point of entry into the property or the building. Facilities that are "inside wire" in an "Option 1" building remain a part of Qwest's loop plant in an "Option 3" building. *See* Qwest Tariff WN U-40, Sec. 2.8.1.B.5.

4 The Commission convened a prehearing conference on December 20, 2000. Among other things, the Commission established a procedural schedule, invoked the discovery rule (WAC 480-09-480), and entered a Protective Order (First Supplemental Order, January 2, 2001). Evidentiary hearing proceedings were scheduled for June 25-28, 2001.

5 On December 20, 2000, Qwest filed a Motion to Amend Answer to Include a Cross-Complaint for Emergency Relief. On January 11, 2001, Qwest filed a Motion for Summary Determination.

DISCUSSION AND DECISION

6 This Order addresses the two procedural motions filed by Qwest; it does not address the substance of the Complaint.

A. Qwest's Motion To Amend Answer to Include a Cross Complaint for Emergency Relief

7 Qwest seeks to amend its answer to include a request for emergency relief pursuant to RCW 34.05.479 and WAC 480-09-510, set forth in Attachment A, which authorize the Commission to use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare. Qwest alleges that AT&T's actions in gaining access to MDUs without agreement by Qwest have jeopardized the integrity of Qwest's network, have jeopardized service to all customers within the MDU, and have placed customers out of service. Qwest attaches the Declaration of Jeffrey T. Wilson in support of its motion. The declaration cites three instances where AT&T's unauthorized access to Qwest terminals was believed to be the direct cause of at least three customers being placed out of service. Qwest requests the Commission to Order AT&T to cease and desist its activities at once, unless and until the parties are able to agree on a reasonable protocol for interim access while the complaint is being resolved.

8 **AT&T's Response.** AT&T responds that Qwest's cross-complaint fails to meet the requirements for obtaining emergency relief. AT&T asks the Commission to deny the request for emergency relief and permanently enjoin Qwest from padlocking NID/MPOE[2] terminals until AT&T's complaint can be heard by this Commission in its entirety. AT&T argues in the alternative, that if the Commission believes that initiating an emergency adjudicative proceeding is warranted, the proceeding should include contemplation of emergency relief to AT&T on its Complaint. Thus, the

[2] NID is the Network Interface Device which includes all features, functions and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring. *UNE Remand Order*, ¶233. MPOE terminal is the Minimum Point of Entry terminal.

Commission should hear this matter, in its entirety, in an extremely expedited manner.

9 AT&T maintains that the Commission should afford little weight to Qwest's employee declaration. AT&T argues that the declaration only contains the employee's suspicions that AT&T is responsible for certain service outages. Qwest offers no direct evidence that AT&T actually caused those outages by its actions.

10 Following AT&T's response, the parties filed a series of unsolicited pleadings. Qwest moved for leave to file a reply to AT&T's response, AT&T filed an answer to Qwest's motion for leave to file a reply, Qwest responded to AT&T's answer, and AT&T responded to Qwest's response to AT&T's answer.

Commission Discussion and Decision

11 The Commission grants Qwest's motion to amend its answer to include a cross-complaint for emergency relief. The Commission denies, however, the request for emergency relief. RCW 34.05.479 authorizes the Commission to use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare. The facts alleged in the pleading fail to show the existence of an immediate danger to the public health, safety, or welfare requiring immediate agency action. We conclude that there is not an "emergency" within the meaning of RCW 34.05.479. Our decision to deny the request for emergency relief is based on Qwest's motion and AT&T's response. The remainder of the pleadings filed by the parties were not requested by the Commission, fail to address the merits of the motion, and are not germane to our decision.

B. Qwest's Motion for Summary Determination

12 **Standard of Review.** WAC 480-09-426(2), set forth in Attachment A, 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 may look to, but is not bound by, the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior courts. CR 56 is the summary judgment rule.

13 CR 56(b) provides that a party against whom a claim is asserted may move with or without supporting affidavits for summary judgment in its favor as to all or any part of a claim. 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). The decision-maker 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.

14 **Qwest's Position.** Qwest contends that 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. Qwest contends 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. Qwest argues that the interconnection agreements currently in effect between Qwest and AT&T and Qwest and TCG do not contain terms and conditions governing access to the building cable in MDUs as described in AT&T's complaint. No sub-loop elements are identified as separately available in the Agreements, nor are there prices set for the sub-loop elements. Both Agreements provide for use of a bona fide request (BFR) process to request unbundling of sub-loop elements. AT&T did not use the BFR process.

15 Qwest does not dispute AT&T's right to access the sub-loop. Rather, Qwest disputes AT&T's claim that it can unilaterally dictate the terms and conditions for that access. Qwest maintains that AT&T's right of access to the sub-loop at the building terminal is based solely on the FCC's *UNE Remand Order*.[3] In that order 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 wire or fiber within the cable without removing a splice case to reach the wire or fiber within." *UNE Remand Order* at ¶206. The FCC 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 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*. Also in that order the FCC established a "rebuttable presumption that the sub-loop can be unbundled at any accessible terminal in the outside loop plant. *Id*. at ¶223. Thus, 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, that there is no space available or that it is not technically feasible to unbundle the sub-loop at the requested point. *Id*.

16 Qwest argues 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

[3] *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 (November 1999) (*UNE Remand Order*).

arbitrating an agreement under the Act. Qwest contends that this Commission considered a similar complaint, 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. *MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc*., Docket No. UT-971158, (Order Granting Motion for Summary Determination, February 19, 1998).

17 **AT&T's Response.** AT&T opposes the motion for summary determination. AT&T argues that pursuant to the *UNE Remand Order*, AT&T has a clear right of access to the various MPOE Terminals/NIDs at MDUs in order to connect its network to internal customer premises wiring. AT&T maintains that there is a clear mandate from the FCC to allow AT&T access to the MPOE/NID, without distinction as to who owns the internal customer premises wiring. The NID section of the *UNE Remand Order* 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 through the incumbent LEC's network interface device, or any other technically feasible point, to access the inside wire subloop network element."[4] AT&T argues that the NID section of the UNE Remand Order does not reference the need to pursue negotiation or arbitration under Section 252 of the Act, because a CLEC should not have to negotiate a right it is clearly afforded under law.

18 AT&T next argues that 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 Act. AT&T cites the FCC's statement that "nothing in sections 251 and 252 or the implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes or the common law."[5] AT&T further argues that the Washington Commission has held that a CLEC has the right to pursue state remedies when there is a perceived violation of rights afforded to it under the Act, regardless of whether there is an interconnection agreement in place on the specific subject.[6] AT&T distinguishes *MCIMetro Access Transmission Services, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971158 cited by Qwest, by noting that the dispute there was based on an alleged *contractual* obligation to perform testing based on a superceding agreement negotiated by the parties after the dispute at issue arose.

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[4] *UNE Remand Order* at ¶237.

[5] *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 (August 1996) ¶129.

[6] *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*, UT-971063 (Feb. 10, 1999) at ¶117-123.

19 Finally, AT&T argues that Qwest has flagrantly violated Washington statutes by attempting to negotiate commercially coercive, anti-competitive terms that are inconsistent with relevant law. AT&T contends that Qwest has violated 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 80. 36.070 (relating to damage to property).

20 **Qwest's Reply.** Qwest argues that a careful reading of all of the relevant FCC decisions clearly demonstrates 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. Qwest references the paragraphs in the *UNE Remand Order* devoted to sub-loop (¶¶ 202-229) and NID (¶¶ 230-240) and asserts that the NID is really the point where the loop plant ends, and is connected to another element. Qwest argues that the building terminals in this case are not NIDs, because they are a point wholly within Qwest's loop plant – the loop extends on either side of the building terminal in Option 3 buildings, because Qwest owns the facilities on either side of the building terminal. The NID in those buildings, the place where regulated facilities end and customer-owned facilities begin, is located in each individual apartment unit.

21 Qwest also references the FCC's *Access to Wiring Order*[7] as support for its position that AT&T seeks access to the sub-loop. Qwest argues that several passages in that order also make it clear that where the ILEC's network extends into the building, the issue of access to that building cable is indeed the same as access to a sub-loop element.

22 In response to AT&T's position that it has a right to relief wholly under state law, Qwest argues that AT&T has misinterpreted Commission precedent, and has overlooked important provisions of federal law governing this issue. Qwest reiterates that the Act and FCC orders 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. In further support of its position, Qwest references a

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[7] *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 (Oct. 25, 2000). (*Access to Wiring Order*), ¶¶ 44 and 48.

January 2001 FCC 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.[8]

Commission Discussion and Decision

23 Based on the pleadings before us, the issue to be resolved is what process the parties must follow to address their underlying dispute. AT&T's right to unbundled access to the sub-loop is undisputed. Rather, it is the terms and conditions of the access that need to be resolved. Qwest argues that the interconnection agreements currently in effect between the parties do not contain terms and conditions governing access to the building cable in MDUs as described in AT&T's complaint. Therefore, Qwest asserts, AT&T must use the mandated process of negotiating and then arbitrating an agreement under the Act.

24 AT&T argues that it has a clear right of access to the building cable in MDUs. Therefore, AT&T asserts, it should not have to negotiate a right it is clearly afforded under law. AT&T maintains that a complaint under state law is the appropriate process because Qwest has violated Washington statutes by attempting to negotiate commercially coercive, anti-competitive terms.

25 We note that the Act and prior Commission orders contemplate that interconnection and unbundled access will be accomplished through agreements, not piecemeal litigation. However, we are unable to agree with Qwest, that AT&T has no recourse outside of a Section 252 proceeding. Viewing the facts in the light most favorable to AT&T, Qwest could have failed to negotiate in good faith, and that conduct could be a violation of state law.

26 Here the parties have a third option, contained in their existing interconnection agreements. Both agreements include provisions that allow AT&T to negotiate for elements not expressly included in the agreement through a BFR process. *AT&T Agreement*, para.48, p. 55; *TCG Agreement*, p. 32. Based on the pleadings before us, it is unclear whether the parties were negotiating under the BFR process. It is clear that AT&T requested access to portions of Qwest's network necessary to serve individual customers, though AT&T may have phrased the request incorrectly because of the changing FCC rules and interpretations of those rules. It is also clear that Qwest responded to AT&T's request with three proposals for access that would be technically feasible.

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[8] *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 (January 19, 2001). Qwest's Reply Attachment D.

27 AT&T has a right to this access, and it requested access. Qwest's response may not be that of a party negotiating in good faith. The appropriate next step is for Qwest to promptly provide access to AT&T in any technically feasible manner requested by AT&T. The *UNE Remand Order* established a rebuttable presumption that the subloop can be unbundled at any accessible terminal in the outside loop plant. We note the long period of time AT&T has awaited access and conclude that prompt access is consistent with the public interest. The parties should continue the BFR process to negotiate the business arrangements by which Qwest will be compensated for that access.

28 Accordingly, we deny Qwest's motion for summary determination. We direct Qwest to promptly provide access to AT&T in any technically feasible manner requested by AT&T, and order the parties to continue the BFR process to negotiate the compensation due Qwest for that access, and report back to the Commission within thirty days of receipt of this Order.

FINDINGS OF FACT

29 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by reference.

30 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate telecommunications companies offering service to the public for compensation.

31 (2) Qwest Corporation (Qwest) and AT&T Communications of the Pacific Northwest, Inc. (AT&T) are engaged in providing telecommunications services for hire to the public in the state of Washington.

32 (3) The facts of record do not demonstrate the existence of an immediate danger to the public health, safety, or welfare requiring immediate agency action.

33 (4) AT&T is entitled to access to the portion of Qwest's network that is properly identified as the sub-loop, and Qwest is entitled to compensation for that access.

34 (5) The interconnection agreements currently in effect between Qwest and AT&T and TCG do not contain terms and conditions governing access to the sub-loop as described in AT&T's complaint.

35 (6) The interconnection agreements currently in effect between Qwest and AT&T provide for use of a bona fide request (BFR) process to request unbundling of sub-loop elements.

36 (7) Under the facts presented, it is unclear whether the parties followed the BFR process.

37 (8) The pleadings show AT&T did request access and the parties were negotiating the request. The pleadings also show that Qwest offered AT&T three proposals for access that would be technically feasible.

CONCLUSIONS OF LAW

38 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

39 (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties and subject matter of this proceeding. *RCW 80.04, RCW 80.36.*

40 (2) Qwest's motion to amend its answer to include a cross-complaint should be granted.

41 (3) Under the evidence presented in this proceeding, there is not an immediate danger to the public health, safety, or welfare requiring immediate agency action. *RCW 34.05.479*

42 (4) Qwest's cross-complaint for emergency relief should be denied.

43 (5) Qwest's motion for summary determination should be denied.

44 (6) Qwest should be ordered to promptly provide access to AT&T in any technically feasible manner requested by AT&T, and the parties should be ordered to continue the BFR process to negotiate arrangements by which Qwest will be compensated for that access, and report back to the Commission within 30 days of receipt of this Order.

ORDER

THE COMMISSION ORDERS:

45 (1) Qwest's motion to amend answer to include a cross-complaint is granted.

46 (2) Qwest's cross-complaint for emergency relief under RCW 34.05.479 is denied.

47 (3) Qwest's motion for summary determination is denied.

48 (4) Qwest is ordered to promptly provide access to AT&T in any technically feasible manner requested by AT&T, and the parties are ordered to complete the BFR process to negotiate the business arrangements by which Qwest will be compensated for that access, and report back to the Commission within thirty days of receipt of this Order.

DATED at Olympia, Washington, and effective this ____ day of April, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

NOTICE OT PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-09-760.

Attachment A – Applicable Statute and Rules

RCW 34.05.479 Emergency adjudicative proceedings. (1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

(8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease

and desist order. The agency may proceed, alternatively, under that independent authority.

WAC 480-09-510 Emergency adjudicative proceedings. (1) The commission may use emergency adjudicative proceedings pursuant to RCW 34.05.479 to suspend or cancel authority, to require that a dangerous condition be terminated or corrected, or to require immediate action in any situation involving an immediate danger to the public health, safety, or welfare requiring immediate action by the commission. Such situations include, but are not limited to:

(a) Failure to possess insurance;

(b) Inadequate service by a gas, water, or electric company when the inadequacy involves an immediate danger to the public health, safety, or welfare; and

(c) Violations of law, rule, or order related to public safety, when the violation involves an immediate danger to the public health, safety, or welfare.

(2) The commission shall hear the matter and enter an order. If a majority of the commissioners is not available, a commissioner shall hear the matter. If no commissioner is available, a commission administrative law judge shall hear the matter.

(3) The commission's decision shall be based upon the written submissions of the parties and upon oral comments by the parties if the presiding officer has allowed oral comments. The order must include a brief statement of findings of fact, conclusions of law, and justification for the determination of an immediate danger to the public health, safety, or welfare. The order is effective when entered. The commission must serve the order pursuant to WAC 480-09-120.

WAC 480-09-426 Motion for summary disposition.

(2) Motion for summary determination. 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 this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court.