

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re the Complaint of)	DOCKET NO. UT-991292
)	
AT&T COMMUNICATIONS OF THE ,)	FIFTH SUPPLEMENTAL ORDER
NORTHWEST, INC.,)	
)	
Complainant)	
)	
)	
U S WEST COMMUNICATIONS, INC.)	
)	ORDER REAFFIRMING AND
Respondent)	CLARIFYING FOURTH
)	SUPPLEMENTAL ORDER;
Regarding the Provision of Access)	EXTENDING HEARING
Services)	SCHEDULE
.....)	

Background

This Docket involves a private complaint by a competitive local exchange company, AT&T, against an incumbent local exchange company, U S WEST Communications, Inc., USWC. The parties received the Commission's authorization to conduct the limited discovery available under Commission rule 480-09-480, and propounded to each other the discovery requests allowed by rule. The Commission did not grant AT&T's motion for expedited treatment, but established a reasonable schedule based upon the nature of the complaint's allegations of a specific number of identifiable violations and certain representations about the parties' expected ability to provide answers to discovery in a timely manner.

On October 15, 1999, AT&T filed a motion to compel responses to AT&T's data requests, stating generally that USWC had failed to provide answers to AT&T's discovery requests in a timely manner and that it was refusing to respond to some inquiries. The Commission scheduled the dispute for conference hearing on October 25, 1999 before Administrative Law Judge C. Robert Wallis. With the consent of the respondent and the presiding officer, AT&T detailed its motion and asked the Commission to compel responses to 61 of AT&T's 90 data requests. On November 12, 1999, based on the written motion, the record of that conference, and copies of the data requests and responses provided by USWC, the Commission entered its Fourth Supplemental Order in this Docket granting, in part, the motion to compel.

In the Order, the Commission noted that USWC had provided many data responses despite objection and noted that responses appeared to be untimely under the expectations of the case, but specifically declined to find fault. The Commission rejected some of USWC's objections to the data requests and ordered the company to respond, but accepted other objections, finding that some of AT&T's requests were not proper. The Commission granted data requests that it believed related to the specific allegations of the complaint and observed that some other data requests related not specifically to those requests but to a broader area that could be relevant to the complaint. The order found that those inquiries were addressed not to the individual incidents complained of, but to corporate policy.

The Commission determined that the latter inquiry was not beyond the bounds of the complaint, which does allege discrimination, but that it was beyond the focus on specific incidents. The Commission granted several of the requests for this sort of information, with specified limits, but conditioned USWC's obligation to respond to these inquiries upon AT&T's election to forego the hearing date previously set and to continue the start of the hearing.

The Fourth Supplemental Order (Fourth Order) also addressed specific subjects of the motion to compel, created a "superprotective" provision for some confidential documents, and established a date for supplemental rebuttal testimony based upon the schedule established for the production of information.

AT&T "Response" to the Commission's Fourth Supplemental Order¹

Reconsideration of the choice between delay and discovery. AT&T asks the Commission to reconsider its decision to put AT&T to an election as to schedule if it wishes to pursue certain discovery matters. AT&T contends that the problem results exclusively from USWC's violation of the case schedule and states that the offered election puts it in the impossible and improper position of choosing between information it is entitled to and the speedy decision that its customers are entitled to. It says it is willing to work evenings and weekends, and it contends that no one else is affected.

AT&T is simply incorrect in its perspectives on several accounts. First, AT&T does not accurately represent the state of the discovery record when it states that the cause of delay rests exclusively with USWC. While the Commission expressed concern about USWC's responses and their timing, it specifically refused on the

¹We find no provision in Chapter 480-09 WAC for parties' "responses" to Commission orders. Reconsideration will lie only upon a final commission order. The Commission has received petitions for clarification of interim orders and addressed matters raised therein to prevent manifest injustice and to clarify the course of the proceeding.

available record to find fault with USWC. Moreover, the Commission affirmed USWC's objections to many of the data requests, ruling that they were improperly broad as to subject or as to scope. AT&T did not present a detailed motion to compel, which increased the complexity of the matter submitted to the Commission and increased the time required for its resolution. Responsibility for delay is certainly be divided equally among the parties and does not rest solely on USWC.

Second, the Washington State Administrative Procedure Act grants exceptionally broad discretion to agencies to allow or to restrict discovery. The Commission promulgated WAC 480-09-480 within that discretion; the rule makes discovery a privilege limited to "data requests" for the disclosure of facts and allows the Commission broad discretion to manage the process. The Commission in its discretion stated a willingness to allow access to the information upon AT&T's election of a reasonable schedule. AT&T never contended that it would be prejudiced by denial of access to the information and while moving to compel reiterated its desire to maintain schedule irrespective of the result of its motion to compel. Hearings in other states on comparable complaints are on similar reasonable schedules, most set for times later than the Washington schedule, or may not yet have not been scheduled.

The Commission is eminently conscious of potential barriers to competition that are exacerbated by delay, and it established in this docket a schedule for the proceeding that minimized delay, consistent with the needs of the Commission, the needs of the parties, and the needs of fairness and due process given the subject and scope of the complaint. The Commission in its discretion determined that the established hearing schedule is inconsistent with the specified data requests and offered AT&T the opportunity to choose its priority. The evaluation, the limitations on discovery, and the opportunity granted to AT&T are all within the Commission's discretion.

AT&T is also incorrect in its assertion that the grant of its data requests on the existing schedule would impose burdens only on it and would affect no other party. Producing the requested data will affect USWC. The Commission Staff, Public Counsel, and intervenors as well as AT&T may have the obligation to review the data provided. If AT&T chooses to present additional evidence based on the information, as it anticipates in its request as to rebuttal timing, additional time will be required for the respondent, the Commission Staff, and other parties to review the evidence and prepare for the hearing. The Commission insists that the schedule allow sufficient time to conduct a fair hearing. To deprive parties of sufficient time could adversely affect AT&T's customers far more severely than the additional time that the Commission contemplated.

AT&T asks that the response time established in the Fourth Order be maintained, despite the delay caused by hearing this request for review. That is

unreasonable. It would require a response by USWC three business days after this order.

AT&T has declined to make an election under the terms of the order, so the Commission will order the data to be produced but will delay the hearing schedule. We have reserved three days in early January and we adopt the following schedule:

Deadline for AT&T rebuttal on previously data	December 1, 1999
Deadline for USWC data responses provided for in this Order:	December 3, 1999
Deadline for AT&T evidence based only on responses to additional data requests	December 13, 1999
Prehearing conference, approximately	December 17, 1999
Hearing begins	January 3, 1999

We are setting this schedule with the presumption that it will afford both the Commission Staff and the respondent sufficient time to prepare for the hearing. The prehearing conference will provide an opportunity to do a reality check on that presumption and will assist all parties in preparing for the hearing.

We cannot leave this subject without restating the concerns voiced in Footnote 1 of the Fourth Order, that discovery has gone beyond the scope contemplated at the time the Commission adopted WAC 480-09-480. The Commission must remain conscious of the realities of the parties' need for information and the realities of the regulatory role the Commission is being asked to fill as we enter the new Millennium. The Commission will monitor the use of data requests in the matters before it and will consider whether a policy or interpretive statement or a rulemaking may be appropriate to supplement or to reflect the results of a case-by-case approach.

Due date for rebuttal testimony. AT&T contends that it would be harmed by the inability to present rebuttal testimony in one package rather than, on the current schedule, presenting its rebuttal testimony on December 1 and its supplementary "further rebuttal" testimony three business days later on December 6.

AT&T cites no reason, beyond the mere assertion, that it will be prejudiced by presenting its evidence in two parts. We see none, in the abstract. If the

supplemental filing is a true supplement, limited in scope and limited in volume to a fraction of the original case, we expect no problems. If it constitutes a new case, we expect that required process may require an extension of the hearing schedule.

Data Requests 14 and 15. AT&T asks clarification of the Fourth Order's ruling on DR 14 and 15, which we denied on the basis of USWC's representation that it no longer uses certain terms to describe central offices. AT&T contends that a civil complaint against USWC on behalf of customers, filed in Larimer County, Colorado, alleges that USWC did use the terms, perhaps during the time relevant to this proceeding. AT&T asks the Commission to compel the Company respond to the requests.

USWC should be, and is, directed to respond to the data requests if it did use the relevant terms during the restricted time frame for which discovery is allowed in the Fourth Order.

Superprotective treatment. The discovery order directed special treatment of particularly confidential materials. USWC offered to make some documents available to counsel on a "view only" basis in USWC (Seattle) or USWI (Denver) offices. The order found that to be unnecessarily restrictive. In the absence of the parties' agreement, the Commission required that the information be provided to and held by AT&T's counsel but that it not be disclosed to AT&T employees. AT&T asks clarification that the order does not mean what it says and that any AT&T employee who has filed a confidentiality agreement may see it. AT&T alleges that this provision will bar witnesses from seeing the information.

The Commission in some prior decisions has recognized a danger in sharing information with competitors' operating personnel. The Commission has a continuing interest in facilitating the free exchange of information to its staff and among parties to litigation. That may be hampered if information is freely available to competitors' operating personnel. AT&T's request is not consistent with the order's direction or the need to protect certain competitive information. Other means are available to AT&T to deal with the information. In the context of this proceeding, where the parties did not make contrary agreements, the Commission is comfortable that the proposal meets the interests of both of the parties -- AT&T will have access to sensitive information that is better than the mere right to examine it in USWC offices, and USWC will have some more meaningful assurances that the information it designates as confidential will not unfairly or inappropriately reach operating personnel. AT&T is free to work out broader access with USWC. USWC may waive the protections of the order and if it chooses to do so may allow access by any person who has filed a confidentiality agreement.

Conclusion. The Commission denies AT&T's petition for reconsideration. The provision is within the Commission's discretion in case management. The Commission will grant the requested discovery, but will extend the time for the hearing.

The Commission denies AT&T's request to extend the original rebuttal filing date, grants its request for clarification of the order as to DR 14 and 15, and grants in part AT&T's request for clarification of additional protective provisions for material designated as especially confidential, to authorize the parties to agree on other provisions and to specifically authorize USWC to waive restricted access as to any person.

It is so ordered.

DATED at Olympia, Washington and effective this 19th day of November, 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner