

Summary Determination is an appropriate and accepted method the Commission uses to reach decisions.

Overall, AT&T believes that Qwest's attempt to impose an evidentiary hearing into this process will serve only to complicate the issues and distract the Commission from the core issue in this case: that Qwest charges AT&T more for conduit than other carriers providing the same services. As described in further detail below, all of the factual issues Qwest raises either are not genuinely in dispute, are not relevant to the legal issues before the Commission, or are issues of law appropriate for Summary Determination.

Finally, AT&T believes that to the extent the Commission grants Qwest's motion for an evidentiary hearing, it should first decide as a matter of law Qwest's affirmative defense in which it challenges the Commission's jurisdiction over the case, generally. For that reason, AT&T requests that, to the extent the Commission grants Qwest's motion, the Commission order that prior to any hearing sufficient time be allocated to permit briefing and resolution of the issue of Commission's jurisdiction raised by Qwest's Answer.

II. QWEST'S INTERPRETATION OF THE COMMISSION'S HEARING REQUIREMENT IS FLAWED

Qwest's argument that the Commission is not empowered to render a decision on AT&T's Complaint without a formal evidentiary hearing is superficial and unsupported by law. Conspicuously absent from Qwest's Motion is any legal basis for its conclusion that the Summary Determination Motions and Hearings on those Motions will not satisfy the Commission's statutory requirements.

In fact, Washington Administrative Code § 480-07-380(2) specifically provides that the parties may submit Motions for Summary Determination in adjudicatory proceedings. Contrary

to Qwest's assertions,¹ nothing in that section requires the Commission to obtain the parties' consent prior to deciding a case on a dispositive motion, such as a Motion for Summary Determination. Quite the opposite, § 480-07-380(2) states that any case is appropriate for summary determination so long as the moving party is able to show that no *genuine* issue as to any *material* fact exists and that it is entitled to judgment as a matter of law. To the extent that either party is able to meet this standard, there is no reason to conclude that the Commission lacks jurisdiction to render a decision.

Moreover, even if one were to accept Qwest's overly literal interpretation of RCW 80.04.110 and 80.54.030, Qwest overlooks the fact that the Commission is empowered to hold a hearing on the Motion for Summary Determination. There is no reason to believe that a "hearing" on a Motion for Summary Determination would not satisfy these statutory requirements. Indeed, Qwest has cited no law supporting its arbitrary distinction between an evidentiary hearing and a hearing on dispositive motion. As a result, AT&T respectfully requests that the Commission reject Qwest's claim that applicable statutes mandate an evidentiary hearing, and resolve AT&T's Complaint based on a Motion for Summary Determination.

III. NO MATERIAL FACTS ARE IN DISPUTE

At the outset, AT&T believes that Qwest's assertion that there are genuine issues of material fact in dispute is premature. The parties have not met to discuss a statement of stipulated facts, or even to determine which facts are indeed in dispute. More important, however, AT&T believes that any issues on which the parties could possibly disagree will not affect the Commission's ability to render a decision on the question presented by AT&T's

¹ Motion ¶ 9.

Complaint, namely, whether AT&T is and has been entitled to conduit rates equal to those Qwest charges other communications carriers.

Qwest identifies four categories of facts that “are or may be in dispute.”² AT&T addresses each in turn.

First, Qwest alleges that the issue of “whether Qwest’s predecessor had actual knowledge of the true occupant of the conduit” is in dispute.³ This is neither a material fact nor is it genuinely in dispute. Although AT&T believes it is quite clear that Qwest has had knowledge of the true occupant of the conduit, ultimately, this issue is not relevant or material to AT&T’s legal right to the same non-discriminatory conduit rates Qwest charges other carriers.

It is completely irrelevant to the application of RCW §§ 80.54.020-80.54.070 and 80.36.170-80.36.180 or 47 U.S.C. § 224 whether Qwest’s predecessor had actual knowledge of the true occupant of the conduit. Even if, as Qwest asserts, it did not know that AT&T Communications of the Pacific Northwest, Inc. was the entity occupying the conduit, as opposed to American Telephone and Telegraph, it does not change the fact that AT&T Communications of the Pacific Northwest, which is certified by the Commission to provide both local and interexchange service, and its parent AT&T Corp. are legally entitled to be charged only just and reasonable rates on a nondiscriminatory basis. RCW §§ 80.54.020-80.54.070 and 80.36.170-80.36.180; *see also* 47 U.S.C. § 224. At most, the issue suggested in Qwest’s Answer, to which this alleged question relates, is whether AT&T Corp. assigned its rights under the conduit occupancy agreement without Qwest’s approval. Yet, Qwest has not stated any claim of such an “unauthorized” assignment, and even if it had, whether AT&T had breached Article 18 of the

² Qwest Motion ¶ 6.

³ *Id.*

conduit agreement is not legally relevant to whether Qwest has been overcharging AT&T for conduit occupancy for years.⁴

Second, Qwest alleges that the issue of “how the contract rates were arrived at” is in dispute.⁵ Again, this issue is not relevant, and thus not a “material” fact. RCW §§ 80.54.020, 80.54.030, 80.54.040, 80.54.070, 80.36.170 and 80.36.180 entitle AT&T to just, reasonable, and nondiscriminatory conduit rental rates. Qwest has admitted in its Answer that the conduit rental rate it makes available pursuant to its SGAT is a just and reasonable rate under RCW 80.54.040 and federal law. (Complaint ¶ 16 (“The conduit rate produced by the FCC’s formula—and Qwest’s current advertised SGAT rate—is a just and reasonable rate consistent with 47 U.S.C. § 224 and RCW 80.54.040”); Answer ¶ 30 (“Qwest admits the allegations in paragraph 16 of the Complaint”)). It is irrelevant how the contract rates were arrived at in 1988. Since that time, the law has changed, and Qwest is required, by its contract with AT&T and otherwise, to charge AT&T no more than a just and reasonable rate on a nondiscriminatory basis.⁶

The issue of relevancy set aside, there is a dispute over facts. For example, in discovery AT&T requested information about how Qwest calculated the \$1.65 to \$3.78 per foot rates at issue in this proceeding:⁷

Identify and explain the methodology, formulae, cost accounts, data and/or other bases, if any, used by Qwest in calculating or formulating the conduit rental rates assessed under the individual conduit licenses issued pursuant to the “General License Agreement for Conduit Occupancy Between Pacific Northwest Bell Telephone Company and the American Telephone and Telegraph Company for

⁴ Qwest has not and could not allege any damage or injury even if such an “unauthorized” assignment – from the parent to its wholly-owned subsidiary – had occurred. Qwest has been fully, indeed excessively, compensated. There is no charge by Qwest that there has been any damage or injury to the facilities. The issue, like all of the issues raised by Qwest, is a patent “smoke screen” -- a legal and factual irrelevancy meant to hide Qwest’s obvious violation of the law.

⁵ Qwest Motion ¶ 6.

⁶ Under Article 15 of the conduit agreement, subsequent changes in law were to be adhered to by the parties. (Complaint Exhibit 4, Art. 15).

⁷ See Qwest Response to AT&T’s First Set of Data Requests and Request for Production of Documents, Request No. AT&T 01-0111, attached hereto as Exhibit 1.

the State of Washington" dated July 11, 1988 (the "Conduit License Agreement") in Washington.⁸

Qwest responded that it did not have any such calculations:

The annual occupancy fees specified in conduit license numbers 88-10, 88-11, 88-12, 88-13, 89-10, and 90-2 were individually negotiated between the parties. Qwest has no records showing the methodologies, formulae, cost accounts, data and/or other bases for negotiating these rates.⁹

AT&T does not believe that Qwest's response creates a fact in dispute.

Furthermore, when Qwest posed the same question to AT&T during discovery, AT&T responded that it also had no record of any calculations or formulae used to reach these rates.¹⁰

AT&T fails to see how this creates a dispute of fact. Both Qwest and AT&T agree that no records of calculations or formulae exist. AT&T believes that Qwest is attempting to fabricate a controversy where none exists.

Third, Qwest alleges that the issue of "whether AT&T Corp. is authorized to construct facilities in the right of way" is in dispute.¹¹ Again, there is no genuine dispute regarding this fact. AT&T has answered numerous questions regarding Complainants' various authorizations to occupy the public rights-of-way and provide services in Washington, and has either provided copies of the authorizations or has stated that these authorizations are publicly available. Qwest cannot dispute the existence of these public authorizations. To the extent that Qwest challenges AT&T Corp.'s right to occupy public ways, operate or conduct business under its existing authorizations, then that is a question of law appropriate for summary determination and not an evidentiary hearing.¹²

⁸ *Id.*

⁹ *Id.*

¹⁰ See AT&T's Response to Qwest's Third Set of Data Requests, Request No. 29, attached hereto as Exhibit 2.

¹¹ Qwest Motion ¶ 6.

¹² For example, AT&T Corp. provides interstate long distance service pursuant to a tariff filed at the FCC under the name AT&T Communications (which is an unincorporated division of AT&T Corp.). As a telecommunications

Fourth, Qwest alleges that the issue of “the facts concerning how to perform a proper cost and pricing calculation pursuant to the applicable statutory standard” is in dispute.¹³ This is not a material fact in dispute. Again, AT&T is hard-pressed to see the factual dispute over this issue. The issue of what formula, if any, should apply to Qwest’s rates is a question of law. More important, AT&T is not requesting that the Commission develop or otherwise use a formula to calculate Qwest’s rates. As noted above, Qwest has admitted that its SGAT rates are just and reasonable rates under both RCW § 80.54.040 and 47 U.S.C. § 224.¹⁴ Indeed, Qwest has admitted that the SGAT rates were calculated using the FCC’s conduit rate formula.¹⁵ In its Complaint, AT&T also has accepted Qwest’s SGAT rate as a just and reasonable rate for purposes of RCW §§ 80.54.020, 80.54.030, and 80.54.040. In other words, the rates themselves are not in dispute. And thus, AT&T simply seeks non-discriminatory access to such rates, which are the same rates that Qwest charges other carriers pursuant to 80.54.020, 80.54.030, 80.54.070, and 80.36.170-180. AT&T’s entitlement to such treatment is a matter of law based on the application of the undisputed, admitted facts in this case.

In sum, Qwest raises issues that are irrelevant to AT&T’s request for relief, are not genuinely in dispute, and/or are actually questions of law appropriate for summary determination. As such, AT&T requests that the Commission deny Qwest’s request for an evidentiary hearing.

service provider, AT&T Corp. has a federal right to occupy public rights-of-way pursuant to 47 U.S.C. § 224. See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1775 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

¹³ Qwest Motion ¶ 6.

¹⁴ Answer ¶ 30.

¹⁵ Answer ¶ 28.

IV. THE COMMISSION SHOULD RESOLVE THE JURISDICTIONAL ISSUES FIRST

In the event that the Commission grants Qwest's request for an evidentiary hearing, AT&T requests that the Commission first resolve the issue of the Commission's jurisdiction over this matter so that the parties and the Commission do not undertake the cost of such a hearing only to risk the Commission holding it does not have jurisdiction afterward.

Qwest alleges, as an affirmative defense, that the Commission lacks jurisdiction over AT&T's complaint.¹⁶ Although AT&T disagrees with Qwest's position, it is nonetheless concerned about pursuing a lengthy adjudicatory process--especially if the Commission sets this matter for evidentiary hearing--with the basic question of jurisdiction outstanding. AT&T sees no reason to consume the Commission's and the parties' resources with evidentiary and legal issues if the Commission is going to conclude that it lacks jurisdiction over the matter. For that reason, in the event that the Commission grants Qwest's request for an evidentiary hearing, AT&T requests that the Commission set a pleading cycle for briefing of the issue of the Commission's jurisdiction (in the form of a motion for partial summary determination on Qwest's affirmative defense) and permit sufficient time for any evidentiary hearing to take place only after the Commission resolves the jurisdictional question.

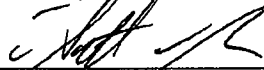
V. CONCLUSION

Because of the disruption to the previous procedural schedule (which called for a submission of facts on Wednesday January 12, 2005) by Qwest's current motion, AT&T does agree that the current procedural schedule should be altered. Otherwise, however, for the reasons set forth above, AT&T respectfully requests that the Commission deny Qwest's Motion

¹⁶ Qwest Answer, ¶ 42.

to Revise the Procedural Schedule and Requesting Prehearing Conference. In the alternative, in the event that the Commission grants Qwest's motion for an evidentiary hearing, AT&T requests that the Commission order the parties to submit briefing on the question of jurisdiction before any further action takes place on this docket.

Respectfully submitted,



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**Attorneys for AT&T Corp. and AT&T
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January 10, 2005

CERTIFICATE OF SERVICE

I, Melissa K. Geraghty, do hereby certify that on this 10th day of January, 2005, a true and correct copy of the foregoing has been sent by United States Mail, First Class, Postage Prepaid and electronic mail, to the following:

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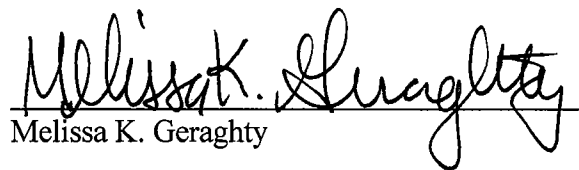

Melissa K. Geraghty

EXHIBIT 1

QWEST CORPORATION

STATE: Washington

DOCKET NO: UT-041394

CASE DESCRIPTION: AT&T CORP., AND AT&T COMMUNICATIONS OF THE PACIFIC
NORTHWEST, INC., v. QWEST CORP.

INTERVENOR: AT&T Communications of the Pacific Northwest, Inc.

REQUEST NO: AT&T 01-0111

REQUEST:

Identify and explain the methodology, formulae, cost accounts, data and/or other bases, if any, used by Qwest in calculating or formulating the conduit rental rates assessed under the individual conduit licenses issued pursuant to the "General License Agreement for Conduit Occupancy Between Pacific Northwest Bell Telephone Company and The American Telephone and Telegraph Company for the State of Washington" dated July 11, 1988 (the "Conduit License Agreement") in Washington.

RESPONSE:

The annual occupancy fees specified in conduit license numbers 88-10, 88-11, 88-12, 88-13, 89-10, and 90-2 were individually negotiated between the parties. Qwest has no records showing the methodologies, formulae, cost accounts, data and/or other bases for negotiating these rates.

Respondent: Roy Rietz

EXHIBIT 2

**Before the
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
Olympia, Washington**

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

Complainants,)

vs.)

QWEST CORPORATION,)

Respondent.)

Docket No. UT-041394)

COMPLAINANTS'
RESPONSE TO QWEST'S
THIRD SET OF DATA
REQUESTS TO AT&T CORP.
AND AT&T
COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC.)

AT&T Corp. and AT&T Communications of the Pacific Northwest, Inc. (hereinafter "Claimants"), through their attorneys and pursuant to WAC 480-07-405, submit this Response to Qwest Corporation's Third Set of Data Requests to AT&T Corp., and AT&T Communications of the Pacific Northwest, Inc. ("Qwest's Third Data Request") in the above-captioned matter.

I. **GENERAL OBJECTIONS**

In addition to the specific objections enumerated below, Claimants expressly incorporate by reference the "General Objections" accompanying their initial Response to Qwest's First Data Request, filed November 2, 2004.

WUTC Docket No. UT-041394
AT&T Response to Qwest's Third Set Of Data Requests
January 5, 2005

Qwest Data Request No. 29: Please provide any information AT&T has concerning how the rates in the conduit licenses at issue in this proceeding were arrived at.

Claimants' Response: Claimants have been unable to locate any information in their records concerning how the rates in the conduit licenses at issue in this proceeding were arrived at, other than the face of the licenses themselves, which suggest that the rates were imposed by Qwest.

Answer prepared on January 4, 2005 by Brian M. Josef, Esq.