BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T CORPORATION and AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., Complainants, vs. QWEST CORPORATION, Respondent.	Docket No. UT-041394 SECOND AMENDED ANSWER OF QWEST CORPORATION TO COMPLAINT OF AT&T CORPORATION, AND AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; ADDING CROSS COMPLAINT

I. INTRODUCTION

1 Qwest Corporation ("Qwest"), by and through its attorneys, and pursuant to WAC 480-07-370(1)(c), hereby answers the Complaint of AT&T Corp. ("AT&T Corp"),[1] and AT&T Communications of the Pacific Northwest, Inc., ("AT&T Pacific Northwest") (sometimes collectively referred to herein as the "AT&T Washington Claimants") in the above captioned

[1] The first named complainant is AT&T Corp. However, the general license agreement and the individual license agreements list the AT&T entity as "The American Telephone and Telegraph Company." (See Exhibits 4 and 5 to the Complaint) Qwest understands that "AT&T Corp" is simply a new name for the same entity formerly known as "The American Telephone and Telegraph Company." Thus, for purposes of this Answer, Qwest's response will assume that AT&T Corp is the same entity as the entity that entered the general license agreement and the sublicenses. If these assumptions prove to be untrue and "The American Telephone and Telegraph Company" and "AT&T Corp" are separate entities, Qwest reserves the right to amend its Answer.

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proceeding.

2 This Answer is organized into the following sections:

- A brief section recounting the general factual information and procedural history underlying this matter.
- Qwest's answer to the specific factual allegations of the AT&T Washington Claimants.
- Qwest's affirmative defenses to the claims asserted by the AT&T Washington Claimants.
- Qwest's cross-complaint against the AT&T Washington Claimants
- The relief requested by Qwest.

II. GENERAL BACKGROUND AND PROCEDURAL HISTORY

3 On or about August 4, 2004, the AT&T Washington Claimants filed their Complaint with the Washington Utilities and Transportation Commission ("Commission"). The AT&T Washington Claimants filed this Complaint with the Commission at the same time that two other AT&T competitive local exchange carriers ("CLECs"), AT&T Communications of the Midwest, Inc., and AT&T Mountain States (the "AT&T Midwest/Mountain CLECs"), are engaged in a complaint before the Federal Communications Commission ("FCC") concerning the same or similar issues in nine of the fourteen states in Qwest's territory. *See AT&T Communications of the Midwest, Inc. and AT&T Communications of the Mountain States, Inc. v. Qwest Corporation; Case No EB-03-MD-020.*[2]

4 The background of the federal case sheds light both on the nature of the AT&T Washington Claimants' legal theories in this docket and on their motivation for filing this Complaint. What

[2] The FCC docket involves conduit space provided by Qwest in nine of the fourteen states encompassed in Qwest's service territory. The AT&T Midwest/Mountain CLECs filed their complaint before the FCC because the commissions in those nine states, unlike Washington, have not certified to the FCC that they have assumed jurisdiction over poles, ducts and right-of-way issues under section 224(c)(2) of the Communications Act, as amended, 47 U.S.C. § 224(c)(2). As discussed below, Qwest believes that the Commission has not perfected its certification with respect to Washington.

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is more, the facts underlying the AT&T Midwest/Mountain CLECs' federal complaint are substantially the same as in this docket, although the legal claims differ slightly between the two proceedings.

5 The federal docket involves a series of conduit license agreements that one of Qwest's predecessors in interest, The Mountain States Telephone and Telegraph Company, negotiated with the American Telephone & Telegraph Company during the late 1980s.[3] This docket involves virtually identical agreements that Pacific Northwest Bell Telephone Company,[4] one of Qwest's predecessors, negotiated with the American Telephone and Telegraph Company, now known as AT&T Corp, at about the same time. As described in paragraph 8 of the Complaint, complainants allege that AT&T Corp voluntarily negotiated and entered into an agreement titled "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"). AT&T Corp also voluntarily negotiated and entered into a series of individual conduit license agreements pursuant to this Conduit License Agreement. Since that time, the Conduit License Agreement in Washington and similar facilities agreements in other states have defined the business relationship by which Qwest has provided AT&T Corp with access to its conduits, and have established the rates and terms under which AT&T Corp has secured this access throughout Qwest's service area.

6 Under the conduit license agreements in Washington, Qwest has for many years sent annual invoices to AT&T Corp charging the negotiated rates established in the license agreements, which have been paid by AT&T Corp. It therefore came as a surprise to Qwest when the

[3] Qwest's predecessors, Pacific Northwest Bell Telephone Company and U S WEST Communications, Inc., will generally be referred to in this Answer as Qwest.

[4] In the late 1980s, Pacific Northwest Bell, Northwestern Bell, and Mountain Bell merged to form U S WEST Communications, Inc.

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AT&T Midwest/Mountain CLECs—both of whom are separate entities from AT&T Corp and who are also separate entities from AT&T Pacific Northwest—recently asserted that they are the actual occupants of Qwest's conduits, and that they are the beneficiaries of the agreements. The AT&T Midwest/Mountain CLECs have now made this claim in their federal complaint against Qwest. Tacitly, AT&T Pacific Northwest has made a similar assertion in the Complaint filed with this Commission, although the AT&T Washington Claimants are careful to avoid pointing out which of the two entities it is referring to in many of its allegations in the Complaint.

7 The FCC docket was initiated by the AT&T Midwest/Mountain CLECs after Qwest refused to grant billing discounts to AT&T Corp from the rates established in the license agreements. Specifically, in May and June 2003, the AT&T Midwest/Mountain CLECs approached Qwest about the calculation of its conduit rental rates and the availability of ARMIS data in connection with their internal "audit." Subsequently, they demanded that Qwest "adjust" downward certain invoices it was sending to AT&T Corp to reflect the discrepancy between the invoice rates and the rates established in Qwest's Statements of Generally Available Terms and Conditions ("SGATs"), which Qwest established on a state-by-state basis for use by CLECs. Qwest told the two AT&T Midwest/Mountain CLECs that they were entitled to the SGAT rates in their capacity as CLECs. During these and subsequent discussions, as well as an internal review of records, however, Qwest discovered that the invoices that the AT&T Midwest/Mountain CLECs were referencing were with AT&T Corp, a different corporate entity from the AT&T Midwest/Mountain CLECs, and that the invoices at issue were under Qwest's license agreements with AT&T Corp. It also became clear that, although the SGAT rates were readily available to the AT&T Midwest/Mountain CLECs through the Section 251 interconnection processes that Qwest had established for CLECs with the states, the AT&T Midwest/Mountain CLECs had not previously identified themselves as occupants of Qwest's

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conduits and had not at any time attempted to place an order for access to Qwest-owned conduit pursuant to the terms of their interconnection agreements or pursuant to the terms of Qwest's SGATs.[5] Given the on-going negotiations between Qwest and the AT&T Midwest/Mountain CLECs to amend their interconnection agreements, during which the parties agreed to expressly reference the SGAT rates, it is inexplicable that the AT&T Midwest/Mountain CLECs were unaware of these processes.

8 Based upon these facts, Qwest ultimately declined to grant the AT&T Midwest/Mountain CLEC's demands for "invoice adjustments" for the conduit leased to AT&T Corp in the 1980s under the AT&T Corp negotiated license agreements. Unilaterally, AT&T Corp then began withholding payment from Qwest of all but the SGAT rates, based on the specious claim that Qwest had in fact agreed to change the rates in the license agreements during its informal discussions with the AT&T Midwest/Mountain CLECs. Subsequently and separately, the AT&T Midwest/Mountain CLECs[6] filed their FCC complaint against Qwest in December 2003.

9 The FCC found the AT&T Midwest/Mountain CLECs' federal complaint to be sufficiently confusing that it ordered two rounds of supplemental briefing to clarify both the facts and the legal claims at issue. Since many of the facts and claims in the FCC docket are relevant to this proceeding, Qwest believes it is necessary to describe the way in which the federal docket has evolved.

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[5] Specifically, although the AT&T Midwest/Mountain CLECs are certificated and operate in the nine states at issue in the FCC docket, and although they have interconnection agreements with Qwest in each of these states pursuant to 47 U.S.C. § 251, they have never ordered conduit access from Qwest and have never sought to access the SGAT rates through the processes that were generally available to CLECs, even though the interconnection agreements and processes have been both public and operational for years.

[6] AT&T Pacific Northwest is not a party to the FCC complaint. Similarly, the Washington license agreements were excluded from the FCC complaint. This is apparently because of the belief that both Oregon and Washington have asserted jurisdiction over poles, ducts and right-of-ways pursuant to Section 224 of the Act, and the FCC therefore does not have authority to review Washington and Oregon conduit agreements under Section 224.

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10 The AT&T Midwest/Mountain CLECs' FCC complaint, like the Complaint by AT&T Pacific Northwest here, attempts to intentionally blur the lines between AT&T's corporate entities as if there were no legal or operational distinctions between them. By use of this fiction, the AT&T Midwest/Mountain CLECs attempted to assert that Qwest either knew (or should have known) that Qwest was dealing with these CLECs, even though the conduit license agreements and invoices at issue are all with AT&T Corp, an entity that is not a CLEC. Through the use of this artful and misleading method of pleading, the AT&T Midwest/Mountain CLECs then asserted that Qwest's refusal to "adjust" the invoices that Qwest was sending to AT&T Corp was in fact "discriminatory" against the AT&T Midwest/Mountain CLECs, that Qwest had acted in bad faith in refusing to issue the billing "adjustments" that they demanded on behalf of AT&T Corp., and that Qwest had violated section 224 of the Communications Act of 1934, as amended (the "Act").[7]

11 In their FCC complaint, the AT&T Midwest/Mountain CLECs also claimed -- through a novel theory -- that Qwest's actions were a violation of an alleged free-standing obligation owed by Qwest to lower its conduit charges under section 224 of the Act, despite the fact that the conduit license agreements with AT&T Corp predate the relevant provisions of, and are expressly excluded from section 224.[8] Further, the AT&T Midwest/Mountain CLECs asserted that Qwest's refusal to grant their requested discounts amounted to both discrimination and anti-competitive conduct against them as CLECs under Section 251, and was a violation of Qwest's interconnection agreements with them. On these grounds, the AT&T Midwest/Mountain CLECs requested both forward-looking and retroactive relief, dating back many years.

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7 47 U.S.C. § 224.

8 *See TCG Dallas, Inc., v. Texas Utils. Elec. Co.*, 13 F.C.C.R. 7298, 7301 ¶ 7 (1998)("The 1992 Agreement, and its 1994 Amendment, because they concern a utility and a telecommunications provider, and were in effect prior to February 8, 1996, comprise the type of agreement specifically excluded by Congress in section 224, as amended by the [Telecommunications Act of 1996]").

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12 Qwest has denied each of the allegations in the AT&T Midwest/Mountain CLECs' FCC complaint. As Qwest has shown in the FCC proceeding, the AT&T Midwest/Mountain CLECs have never requested access to conduit under the interconnection agreements, and had never disclosed to Qwest that they were the parties actually using the conduits that were secured through the conduit license agreements between Qwest and AT&T Corp, and their demands that Qwest "adjust" AT&T Corp's invoices were improper. Although not a party to the federal docket, AT&T Pacific Northwest has likewise never requested access to conduit under its interconnection agreements with Qwest and Qwest has no record of AT&T Pacific Northwest ever having disclosed that it was the AT&T entity actually using the conduit secured through the license agreement between Qwest and AT&T Corp. Finally, AT&T Corp is not a CLEC in Washington.

13 The FCC complaint remains pending at this time.

III. ANSWER

14 With respect to the specific allegations in the Complaint, Qwest admits, denies and alleges as follows:

15 As to the allegations in paragraph 1 of the Complaint, Qwest admits that the Commission, in its order of June 5, 1987 in Docket No. U-86-113, granted AT&T Pacific Northwest's request to be classified as competitive telecommunications company. As explained in the order (a copy of which is attached to the Complaint as Exhibit 1), when AT&T Pacific Northwest requested competitive classification, it provided only "interexchange telecommunication service" in Washington. (See Summary of Commission Order, Finding of Fact No. 6, and Conclusion of Law No. 3). Qwest admits that, in its January 24, 1997 order in Docket No. UT-960248, the Commission granted AT&T Pacific Northwest's petition to amend its competitive classification to classify it as a competitive telecommunications company to include, for the

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first time, the provision of local exchange services. (See Exhibit 2 to the Complaint, Finding of Fact No. 2). Qwest denies that AT&T Corp is registered with the Commission to provide services in Washington or that it has been classified as a competitive telecommunications company in Washington. Copies of the Commission orders that are attached to the Complaint as Exhibits 1 and 2 speak for themselves.

16 Qwest admits the allegations contained in paragraph 2 of the Complaint.

17 The allegations of paragraph 3 of the Complaint are generally allegations of law to which no response is required. To the extent the allegations may be construed as factual allegations, Qwest admits that the Commission has certified to the FCC that it regulates the rates, terms and conditions for pole attachments in Washington..[9] Moreover, as discussed elsewhere in this Answer, Qwest and AT&T Corp have a valid and long standing contract under which AT&T Corp has ordered and used Qwest conduit in Washington. Similarly, Qwest and AT&T Pacific Northwest have, since 1997, had interconnection agreements in Washington under which AT&T Pacific Northwest has had the ability to place an order for conduit access in Washington, though it has never actually done so. Thus, this is not an instance where the Commission should step in and order a remedy based upon the parties' failure to agree. Finally, based on RCW 80.04.240, even if the Commission had jurisdiction over this matter, the Commission lacks jurisdiction to grant much of the relief sought in the Complaint.

18 Qwest admits the allegations in paragraph 4 of the Complaint.

19 As to the allegations in paragraph 5 of the Complaint, Qwest affirmatively alleges that the AT&T entity legally authorized to occupy Qwest's conduit in Washington that is at issue in

[9] RCW 80.54.010 grants the Commission certain authority to regulate rates, terms and conditions for pole attachments (which include duct and conduit). However, even though RCW 80.54.060 states that the Commission "shall adopt rules, regulations and procedures relative to the implementation of this chapter," it has not adopted rules. Further, as set forth in paragraph 42 below, Qwest denies that either AT&T Corp. or AT&T Communications of the Pacific Northwest, Inc., is a "licensee" to whom the provisions of RCW 80.54.070 apply.

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this matter is AT&T Corp. However, based upon the fact that AT&T Pacific Northwest is a named party in this matter and based upon the implication in the Complaint that it, instead of AT&T Corp, occupies some Qwest conduit in Washington, Qwest lacks sufficient knowledge and information to admit or deny which of the AT&T entities is the owner of the communication facilities that occupy Qwest's conduit in Washington.

20 As to the allegations in paragraph 6 of the Complaint, Qwest admits that it directly competes with both AT&T Corp and with AT&T Pacific Northwest.

21 As to the allegations in paragraph 7 of the Complaint, Qwest admits that it is obligated to provide access to Qwest-owned conduit in Washington under rates, terms and conditions that are just and reasonable. However, its obligation springs from a different source of authority as to AT&T Corp and AT&T Pacific Northwest. AT&T Corp is entitled to such access pursuant to the terms of the 1988 Conduit License Agreement, and has continually been granted access by Qwest pursuant to orders placed by AT&T Corp for individual licenses (referred to in paragraph 8 of the Complaint) under that Conduit License Agreement. With respect to that Conduit License Agreement, and the individual licenses, Qwest affirmatively alleges that the rates, terms and conditions, all of which were voluntarily negotiated and adhered to by the parties for many years, are just and reasonable. As for AT&T Pacific Northwest, it requested and was granted access pursuant to Section 251 of the Act under the terms of its negotiated and arbitrated interconnection agreement with Qwest. In addition, AT&T Pacific Northwest is also entitled to access pursuant to Qwest's Washington SGAT or by opting into another CLEC's interconnection agreement pursuant to Section 252 of the Act. However, AT&T Pacific Northwest has never placed an actual order with Qwest for access to Qwest-owned conduit in Washington pursuant to its interconnection agreement or by accepting the terms of Qwest's Washington SGAT. It now appears, however, that AT&T Pacific Northwest may be utilizing the communication facilities that occupy Qwest's Washington conduit pursuant to

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authorization provided by Qwest to AT&T Corp under the Conduit License Agreement and individual licenses described above that were negotiated between Qwest and AT&T Corp. To the extent that AT&T Corp has assigned rights to occupy conduit to AT&T Pacific Northwest pursuant to the license agreement, it has done do in direct violation of "Article 18—Assignment of Rights" of the license agreement:

> Licensee shall not assign, transfer, or sublicense this Agreement or any license or any authorization granted under this Agreement and this Agreement shall not inure to the benefit of Licensor's successors or assigns, without the prior written consent Licensor. Licensor may withhold such consent it its sole discretion.

Qwest has no record of such consent ever having been requested by AT&T Corp.

22 As to the allegations in paragraph 8 of the Complaint, Qwest admits that at least one AT&T entity occupies Qwest-owned conduit in Washington pursuant to the terms of the Conduit License Agreement and individual licenses executed thereto between Qwest and AT&T Corp. However, Qwest affirmatively alleges that no AT&T entity has requested occupancy under the terms of Qwest's interconnection agreement with AT&T Pacific Northwest or pursuant to Qwest's Washington SGAT. AT&T Corp is not registered to provide local telecommunications services in Washington. And, although it is registered in Washington and classified as a competitive telecommunications company, AT&T Pacific Northwest has never placed an order for access to Qwest-owned conduit in Washington pursuant to its interconnection agreement or adopted the terms and conditions of Qwest's Washington SGAT. Accordingly, it has no legal right to occupy Qwest-owned conduit in Washington. If AT&T Pacific Northwest orders conduit pursuant to its interconnection agreement, it is entitled to the rates, terms and conditions found in Qwest's SGAT, or in its interconnection agreement with Qwest, only on a prospective basis.

23 Qwest denies the allegations contained in paragraph 9 of the Complaint. As stated above,

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AT&T Pacific Northwest has never placed an order for access to Qwest-owned conduit in Washington pursuant to the terms of its Washington interconnection agreement with Qwest. Moreover, AT&T Corp is not registered to provide local services in Washington and has never entered into an interconnection agreement with Qwest, adopted the SGAT, or opted into another interconnection agreement pursuant to Section 252 of the Act.

24 With regard to paragraph 10 of the Complaint, Qwest denies that it bills AT&T Northwest for use of conduit in Washington. Qwest admits that it currently bills AT&T Corp for the use of 223,031 feet of conduit in Washington. Qwest does not know which AT&T entities actually occupy the conduit.

25 Qwest admits the allegations contained in paragraph 11 of the Complaint.

26 Qwest admits that the language quoted by the AT&T Washington Claimants in paragraph 12 of the Complaint is an accurate quotation of language found in the Washington interconnection agreement between Qwest and AT&T Pacific Northwest that was approved by the Commission in 1997. However, Qwest and AT&T Pacific Northwest have recently negotiated a new provision in their successor agreement. Several terms of the successor agreement were presented to the Commission for arbitration, but the terms and conditions for conduit were not disputed or arbitrated. Notably, the successor agreement provides for negotiated language that expressly adopts the SGAT rates. (See section 10.8.3 of Exhibit 6 to the Complaint) Qwest affirmatively alleges that AT&T Pacific Northwest has failed to exercise its rights with respect to Qwest-owned conduit in Washington pursuant to the terms of the quoted provision of the 1997 interconnection agreement because AT&T Pacific Northwest has never placed an order with Qwest for access to conduit in Washington pursuant to the terms of its interconnection agreement. To the extent the allegations of paragraph 12 suggest that AT&T Corp was a party to the 1997 interconnection agreement, Qwest denies the same.

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27 As to the allegations in paragraph 13 of the Complaint, Qwest admits that its Washington SGAT contains a conduit rental rate and that the SGAT is on file with the Commission. However, as set forth above, Qwest denies that its Washington SGAT has any application to this docket.

28 As to the allegations in paragraph 14 of the Complaint, Qwest admits that its pole attachment fee and its innerduct occupancy fee are both based on the FCC guidelines. These fees are currently filed in Qwest's SGAT. Qwest denies any remaining allegations in paragraph 14.

29 As to the allegations of paragraph 15 of the Complaint, Qwest admits that the language quoted by the AT&T Washington Claimants in the first sentence of paragraph 15 of the Complaint is an accurate quotation of language found in the Washington interconnection agreement between Qwest and AT&T Pacific Northwest that was approved by the Commission in 2004. Qwest admits the allegations of the second sentence of paragraph 15. To the extent the allegations of paragraph 15 suggest that AT&T Corp was a party to the 1997 interconnection agreement, Qwest denies the same.

30 Qwest admits the allegations in paragraph 16 of the Complaint, except that Qwest denies that the SGAT rate is a just and reasonable rate under RCW 80.54.040.

31 As to the allegations in paragraph 17 of the Complaint, Qwest admits that earlier this year it issued invoices to AT&T Corp pursuant to the terms and conditions of the Conduit License Agreement and individual licenses described above, and that the charges negotiated by the parties in the licenses and contained in those invoices ranged from $1.65 to $3.78 per foot, per year.

32 As to the allegations in paragraph 18 of the Complaint, Qwest admits that its SGAT rate for innerduct occupancy is $0.35 per foot, per year. However, AT&T Pacific Northwest has never

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adopted the terms of Qwest's Washington SGAT or ordered access to conduit from Qwest under its interconnection agreement or in accordance with those terms. AT&T Corp is not a CLEC in Washington and is therefore not entitled to the SGAT rate.

33 As to the allegations contained in paragraph 19 of the Complaint, Qwest admits that AT&T Corp has previously requested that Qwest renegotiate the conduit rental rates established by the parties in the Conduit License Agreement and individual licenses negotiated pursuant thereto. Qwest admits that inquiries regarding this issue were raised by an AT&T entity as early as February 2000, but denies that negotiations commenced at that time. However, these agreements predate the 1996 Telecommunications Act and are not subject to section 224 of the Act.[10] Qwest is not legally obligated to renegotiate the terms of those agreements. As for AT&T Pacific Northwest, Qwest has entered interconnection agreements with it that entitle it to Qwest's SGAT rate for access to Qwest-owned conduit in Washington pursuant to its interconnection agreement or Qwest's Washington SGAT, but AT&T Pacific Northwest has never placed an order for access to such conduit pursuant to its interconnection agreement or adopted the terms of Qwest Washington SGAT. Within the past year AT&T Pacific Northwest and Qwest negotiated, and arbitrated, a successor interconnection agreement. In that agreement the parties agreed to language that expressly adopts the SGAT rates for conduit access. Consequently, Qwest denies the allegation in paragraph 19 that suggest that Qwest has refused to agree that AT&T Pacific Northwest could obtain conduit at the SGAT rate.

34 The allegations in paragraph 20 of the Complaint set forth legal argument and conclusions to which no response is required. To the extent any of these allegations may be construed as stating factual allegations, Qwest denies that any of the provisions of Washington law cited by the AT&T Claimants require retroactive refunds of amounts billed and paid under valid and binding contracts between Qwest and AT&T Corp.

[10] *See* 47 U.S.C. § 224(d)(3).

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35 As to the allegations of paragraph 21 of the Complaint, Qwest admits that the rates under the license agreements are higher than the SGAT rates. Qwest denies the remainder of the allegations of paragraph 21.

36 As to the allegations in paragraph 22 of the Complaint, Qwest admits that it competes with each of the AT&T Washington Claimants but denies that it has acted unjustly or unreasonably with respect to either of these two entities. Further, Qwest denies that it forced AT&T Pacific Northwest to pay any rates above the Qwest Washington SGAT rate on file with the Commission. Qwest affirmatively alleges that these SGAT rates for access to Qwest-owned conduit in Washington have always been, and still are, available to AT&T Pacific Northwest, yet AT&T Pacific Northwest has failed to order such access pursuant to its interconnection agreement or by adopting the terms of Qwest's Washington SGAT.

37 The allegations in paragraph 23 of the Complaint set forth legal argument and conclusions to which no response is required. To the extent any of these allegations may be construed as stating factual allegations, Qwest denies the same.

38 The allegations in paragraph 24 of the Complaint set forth legal argument and conclusions to which no response is required. To the extent any of these allegations may be construed as stating factual allegations, Qwest denies the same.

39 The allegations in paragraph 25 of the Complaint set forth legal argument and conclusions to which no response is required. To the extent any of these allegations may be construed as stating factual allegations, Qwest denies the same.

40 The allegations in paragraph 26 of the Complaint set forth legal argument and conclusions to which no response is required. To the extent any of these allegations may be construed as stating factual allegations, Qwest denies the same.

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41 To the extent Qwest has not specifically admitted or denied factual allegations contained in paragraphs 1 through 26 of the Complaint, Qwest hereby denies those allegations.

42 Qwest also specifically denies that RCW 80.54.070 is applicable to this dispute. In its complaint, AT&T cites to that provision once, and to other provisions of that Chapter as well. It is clear that the obligation imposed on Qwest by RCW 80.54.070 applies only to the rates it charges "licensees" as that term is defined in that chapter. Neither AT&T Corp. nor AT&T Communications of the Pacific Northwest, Inc., is a licensee under RCW 80.54.010(2).[11] A licensee is a group or organization that is *not* a utility. AT&T Communications of the Pacific Northwest, Inc., is a telecommunications company as defined in RCW 80.04.010 and is thus a utility as defined in RCW 80.54.010(3). Thus, AT&T Communications of the Pacific Northwest, Inc., can not be a licensee under RCW 80.54.070. It is not clear whether AT&T Corp. is a utility or not, though Qwest believes it is not, and it is further not clear whether AT&T Corp. has any authority to construct attachments along the public rights of way, though Qwest believes and alleges that it does not. Thus, Qwest denies that either entity is a licensee under RCW 80.54.070.

IV. AFFIRMATIVE DEFENSES

A. First Affirmative Defense

43 [Intentionally left blank.]

B. Second Affirmative Defense

44 The Complaint fails to state a claim upon which relief can be granted.

[11] (2) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, other than a utility, which is authorized to construct attachments upon, along, under, or across the public ways.

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C. Third Affirmative Defense

45 The Complaint is barred by the doctrine of laches.

D. Fourth Affirmative Defense

46 The Complaint is barred by the doctrine of retroactive ratemaking.

E. Fifth Affirmative Defense

47 The portion of the Complaint seeking a refund dating back to July 24, 1997 is barred by the application of RCW 80.04.240.

F. Sixth Affirmative Defense

48 Qwest reserves the right to assert any additional affirmative defenses or special defenses that may become known through discovery or further proceedings in this matter or as may be otherwise appropriate.

V. CROSS COMPLAINT

49 In the event that the Commission determines that AT&T is entitled to rates other than those set forth in its contract, Qwest alleges that the current SGAT rates are not fair, just, reasonable or sufficient under RCW 80.54.040. Proper application of the criteria set forth in that statute would produce a conduit rate of approximately $2.00 per foot per year. If the Commission determines that it may revise the parties' existing rates under RCW 80.54.040, the Commission should, after hearing, grant Qwest's cross complaint in this matter and establish a per foot per year rate in accordance with the criteria in the statute, which will be significantly higher than the SGAT rate.

VI. RELIEF REQUESTED

50 Based upon the foregoing answer and defenses, Qwest requests the following relief:

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A. On the basis of the foregoing, an order denying the AT&T Claimants' prayer for relief.

B. An order dismissing the AT&T Claimants' Complaint with prejudice.

C. Such other and further relief as may be within the Commission's jurisdiction and to which the Commission deems appropriate, including the granting of Qwest's cross-complaint.

RESPECTFULLY SUBMITTED this ___ day of January, 2005.

QWEST

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