

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027
(Filed February 28, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING
REGARDING QWEST COMMUNICATIONS CORPORATION
MOTION TO ADMIT EXHIBITS 142 and 142-C**

By this ruling Exhibits 142 (a public document) and 142-C (filed under seal as "highly confidential") are hereby admitted into the evidentiary record of this proceeding. On August 17, 2005, Qwest Communications Corporation (Qwest) sought admission into the record of documents marked for identification as Exhibit 142 and 142-C.

A ruling on Qwest's motion to admit Exhibit 142 and 142-C into the evidentiary record was deferred pending receipt of a written response from the Joint Applicants. On August 19, 2005, the Joint Applicants filed a response in opposition to Qwest's motion to admit the exhibits. Qwest filed a third-round reply on August 23, 2005, to Applicants' opposition. Qwest filed both a redacted public version and unredacted confidential version of its third-round reply, and moved for leave file under seal its unredacted response which contained

confidential information. SBC Communications Inc. (SBC) supplemented its response through an informal email message sent to the Administrative Law Judge (ALJ) and parties of record on August 24, 2005. Qwest supplemented its reply by email to the service list on August 25, 2005.

Exhibit 142 consists of a cover document entitled “Redacted Supplemental Declaration of Adam L. Sherr Regarding Admission of Data Request Responses,” together with copies of redacted responses of the Joint Applicants to certain designated data requests and attachments thereto. Exhibit 142-C (an unredacted confidential version of Exhibit 142) consists of confidential responses to the Joint Applicants to certain data requests and attachments thereto. With one exception (Exhibit 33 thereto), the documents attached to Exhibits 142/142-C were produced by the SBC in response to Qwest Data Requests 4-26 through 4-35. Qwest sought these responses and documents for the purpose of supporting its claims as to the influence of AT&T Corp. (AT&T) over the development of SBC’s federally-tariffed special access generic term plans. Qwest claims that Exhibits 142/142-C are relevant in the assessment as to whether the merger will cause competitive harm, and to support Qwest’s contention that the merger will enable SBC to raise special access rates to the detriment of competition absent mitigating conditions.

Claims of Lack of Foundation and Untimeliness

Parties’ Positions

Applicants object to admission of Exhibits 142/142-C based, in part, on the claim that the underlying documents were not produced in a timely manner and lack foundation. Qwest propounded the discovery that it seeks to enter into the record through Exhibit 142/142C on the same date that its reply testimony was due. Thus, due to the late receipt of the discovery responses, Qwest did not

include the responses in testimony of its own witness, nor did it cross examine Applicant witnesses concerning the discovery responses in Exhibits 142/142-C. Applicants thus argue that the documents in Exhibits 142/142C are out of context and deny Applicants the opportunity to provide clarifying context through redirect testimony.

Qwest responds that any lack of timeliness is due to SBC's delay in producing the responsive documents. Qwest accuses SBC of delay in producing the documents in an attempt to get its witnesses on and off the stand before Qwest could review the documents for use in its cross-examination. SBC counterclaims that Qwest bears responsibility for delay in that Qwest started its discovery late in the proceeding and waited until August 18th to review responsive documents that SBC had produced on August 5th.

Discussion

While each side blames the other for the delay in waiting until the end of hearings to produce the documents in Exhibits 142/142-C, the end result is that the delay prevented Qwest from being able to include the documents either in its testimony or for use in cross examination. Even if some responsibility for delay may be attributable to Qwest's actions, SBC also appears to have contributed to the delay, as recounted by Qwest. Qwest should not be deprived of the opportunity to submit Exhibits 142/142-C merely because delays at least partly attributable to SBC precluded Qwest from timely incorporating these documents into its own witness' testimony and/or in cross examining SBC witnesses. Also, the relevance of these documents in examining the question of the effects of AT&T on mitigating SBC's control over special access pricing tips the scales in favor of receiving these documents into evidence.

The authentication of the documents is not in question. SBC has acknowledged the authenticity of the documents.¹ SBC objects to admission, however, because it has not been allowed to produce redirect testimony concerning the significance of the documents. By the same token, however, Qwest has not produced any testimony concerning the significance of the documents. Both Qwest and Applicants will have the opportunity to present arguments in opening and reply briefs concerning the significance of documents in Exhibits 142/142-C and resulting inferences that may be drawn. Accordingly, SBC's objections regarding lack of timeliness and foundation do not warrant exclusion of Exhibits 142/142-C from the record.

Claims of Nondisclosure Agreement Violation

Parties' Positions

Another reason cited for opposition to Qwest's motion is SBC's claims that Qwest violated its nondisclosure agreement (NDA) with SBC. Based on such claims of violation, SBC requests that the motion to admit Exhibits 142/142-C be denied, and that Qwest be sanctioned, requiring that: (1) Qwest return immediately all confidential documents and data request responses that were produced to Qwest by either of the Joint Applicants in this proceeding; and (2) Qwest be forbidden from using these same materials in briefing in this proceeding.

¹ See Reporter's Transcript at 2300-01.

SBC claims that Qwest is attempting to use the same documents produced in the California proceeding to support its efforts in the state of Ohio and “to advance other business interests” in violation of the NDA between Qwest and SBC. SBC points to an August 15, 2005 pleading filed by Qwest in the Ohio merger docket requesting leave to serve discovery (similar to DRs 4-26 through 4-35). SBC claims that by citing, in its motion in the Ohio proceeding, to the existence of confidential documents produced in California under the NDA, Qwest violated the NDA provision that confidential information produced in this proceeding “shall be used exclusively for purposes of participating in [the California] proceeding.” SBC argues that the NDA prohibits Qwest, not only from sharing the substance of confidential information with others, but also from using the knowledge of the existence of information obtained confidentially here for any purpose other than this proceeding.

SBC also notes that two of the four attorneys on the Ohio pleading are signatories to the California NDA, and claims that they are in direct violation thereof. SBC also claims there is a “distinct possibility” that the other two attorneys shown on the Ohio pleading have reviewed these highly confidential materials even though never being authorized by SBC to do so.

Qwest denies Applicants’ allegations that it has violated the NDA, and argues that SBC’s accusations are, themselves, sanctionable. Qwest denies that it disclosed in Ohio the contents of the documents produced in California, and maintains that it merely identified that similar requests had been propounded and that documents (identified in a footnote by Bates number) had been provided in response. Qwest argues that there is nothing confidential in its mere disclosure that it served similar requests in California or that Applicants responded with documents of a certain Bates-number range. Qwest argues that

recitation of information in the public domain cannot be a violation of the NDA. Qwest argues that the purpose of an NDA is to protect trade secret information, not to “embargo” the mere existence of information from other venues where the information may be probative.

Discussion

Applicants have not presented a convincing case that Qwest revealed or used confidential information in the Ohio proceeding in violation of the NDA. The Declarations submitted by Qwest provide assurance that there was no unauthorized disclosure of the substance of California confidential information by Qwest counsel. SBC has not demonstrated that the mere fact of the production of proprietary information is, itself, proprietary information that is entitled to protection against disclosure under the NDA.

Applicants attached a copy of the Qwest Discovery Motion in the Ohio proceeding as “Exhibit 2” of its Opposition. Contrary to Applicants’ claims, however, an examination of the “Exhibit 2” does not provide any evidence that the contents of confidential responses from California were used or revealed by Qwest in formulating its arguments in its Discovery Motion in the Ohio proceeding. Qwest merely indicates in its Ohio motion that it served similar requests in California, and was seeking permission to ask SBC for the same information in the Ohio proceeding that SBC had produced in California. Nothing in the pleading, however, suggests that preparation of the motion required knowledge of the actual confidential contents of the information produced in California.

Likewise, an examination of the Ohio Order does not indicate that any actual contents of the confidential information from the documents produced in the California proceeding were used or revealed by Qwest in its pleadings on the

Ohio Discovery Motion. The Ohio Order merely recites Qwest's statement that Joint Applicants had already responded to the same discovery requests in California. Qwest's mere recitation that Applicants' data response containing confidential information had been produced in California is not, in itself, a confidential fact. Qwest's "use" in its discovery motion in the Ohio proceeding of the fact that responsive documents had been produced by SBC in California does not violate the NDA prohibition against the use or disclosure of confidential information.

Moreover, in the Ohio Order, the "Attorney Examiner" directed that "to the extent that Qwest has already received responses to the same discovery requests in the state of California, the responses can be relied upon for the drafting of surrebuttal testimony in [the Ohio] proceeding." The Ohio "Attorney Examiner" directed Qwest and the Joint Applicants "to enter into the appropriate confidentiality agreement(s) to effectuate this ruling." Thus, even to the extent that the Ohio jurisdiction authorized the use of such responsive data, the Ohio order limited access to the information only pursuant to a duly executed confidentiality agreement between SBC and Qwest to protect the confidentiality of any trade secret information. Thus, any confidential data would not be accessible until parties had executed an appropriate confidentiality agreement, as directed by the Ohio "Attorney Examiner."

To the extent that SBC continues to oppose the use of documents in the Ohio proceeding as directed by the Ohio "Attorney Examiner," SBC's recourse would appear to be more appropriately a matter for the Ohio jurisdiction. In any event, SBC has not shown that Qwest has acted in violation of its NDA relating to this proceeding, or that its proposed sanctions should be imposed on Qwest.

IT IS RULED that that Exhibits 142 (a public document) and 142-C (filed under seal as “highly confidential”) are hereby admitted into the evidentiary record. Qwest’s motion to file under seal its confidential unredacted response, filed concurrently with its August 24, 2005, motion is also hereby granted.

Dated August 29, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Qwest Motion to Admit Exhibits 142 and 142-C on all parties of record in this proceeding or their attorneys of record.

Dated August 29, 2005, at San Francisco, California.

/s/ JANET V. ALVIAR

Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.