

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
MOTION TO COMPEL AND FOR DEPOSITION BY QWEST
COMMUNICATIONS CORPORATION**

This ruling addresses unresolved issues in the Motion to Compel filed by Qwest Communications Corporation (Qwest) on July 22, 2005, relating to Qwest's second and fourth sets of data requests. Applicants filed a response in opposition on July 26, 2005. Qwest filed a third-round reply on July 28, 2005. Parties also presented oral arguments concerning the motion at the Prehearing Conference (PHC) held on July 29, 2005. This ruling also addresses the related motion of Qwest, filed on July 26, 2005, for a determination that deposition of Joint Applicants' witnesses falls within permissible discovery limits. Joint Applicants filed a response in opposition to the July 26th motion on August 3, 2005.

The second and fourth sets of data requests, as identified in Qwest's motion, relate to the provision of special access and Voice over Internet Protocol (VOIP)/stand-alone Digital Subscriber Line (DSL) services. As argued by Qwest, discovery concerning SBC's provision of these services bears upon the question of whether the proposed merger will adversely affect competition for telecommunications services in California.

Applicants asserted various objections to the data requests, including lack of relevance, burdensomeness, and commercial sensitivity of the materials sought. At the PHC, the ALJ concluded that the data requests were relevant discovery, and that previously adopted safeguards adequately addressed Applicants' objections on the basis of commercial sensitivity of the requested data. The ALJ agreed with Applicants' objections, however, to the extent the data requests called for production of documents that are not readily available or maintained in the normal course of business.

The ALJ has previously ruled that SBC is not required to provide information in response to data requests that it does not maintain in the normal course of business. *See* Administrative Law Judge's Ruling Regarding ORA's Second Motion to Compel, entered June 8, 2005, at 5-6 (citing Civ. Proc. Code §§ 2030(f)(2), 2031(A)(1)). SBC objected to the data requests to the extent that they request information that SBC does not maintain in the normal course of its business.

As affirmed by ruling at the PHC, consistent with this limitation on the company's obligations, SBC shall not be required to produce any further responsive materials in reference to those data requests which would require additional sorting, tabulating, and categorization that would be beyond what is produced in the normal course of business. (TR. 68:8-15).

At the July 29th PHC, however, the ALJ noted that parties had failed to meet and confer in an attempt to resolve their disputes over the fourth set of data requests. Accordingly, the ALJ directed the parties to meet and confer to resolve, or at least narrow, their differences concerning the fourth set of data requests at issue in Qwest's motion to compel. SBC and Qwest each separately reported to the ALJ by email on August 2, 2005 regarding the results of that meet and confer session.

In reporting on the meet-and-confer session as ordered by the ALJ, Qwest states that SBC has yet to produce responsive data (with one exception) or documents responsive to the Special Access DRs, and has gotten no further than identifying the 12 records custodians it believes would have responsive documents. SBC agreed to update Qwest as to the status of its search on August 3rd.

This ruling resolves the remaining disputes between the parties relating to the fourth set of data requests that were not resolved through the meet-and-confer session.

Data Requests 4-26 through 4-35 (Subsections (a) through (c))

The fourth set of data requests (DRs 4-26 through 4-35) ask an identical series of questions as to ten different SBC special access plans. Subsections (a) through (c) ask for dates the plans were first made available by tariff and each modification of the plan since it was first offered. In addition to the other information already produced regarding special access services, SBC provided Qwest with access to its tariffs, which describe the terms and conditions under which SBC provides special access services to customers. SBC argues that the details sought by Qwest—such as “all documents . . . that relate in any way” to SBC's tariffs—are irrelevant to any analysis of the merger's effect on competition.

SBC informed Qwest that its tariff plans are available on SBC's website. Qwest agreed to look at that website to determine if that is sufficient, but asked SBC to investigate whether it has this historical information readily available. Qwest suggested that a tariff manager employed by SBC may track and maintain the information requested in subsections (a) through (c).

SBC indicates that its historical tariff plans are also publicly available and can be accessed via the Public Access section of the FCC Wireline Competition Bureau's Electronic Tariff Filing System (ETFS). At this website, customized searches can be performed for SBC's tariffs back to January 1, 1997. Qwest agreed to review this website and inform SBC whether additional information is required. SBC believes that this information answers sub-parts (a)-(c) of DRs 4-26 through 4-35.

Based upon the inquiry conducted thus far, SBC believes that changes to its tariff plans are reflected in the tariffs themselves and may be reflected in the transmittal letters that accompanied the tariffs when filed. The tariffs are publicly available. SBC claims that to retrieve, review and provide hard copies of these tariffs would impose a substantial burden. Based on its preliminary assessments, SBC believes these materials are very voluminous, and that it would take at least a week to retrieve, review and produce these documents.

Discussion

It is concluded that SBC has provided a sufficient response to data requests 4-26 through 4-35, subsections a-c, through the providing access to pertinent links on its own website, as well as that of the FCC. Since Qwest can access these websites independently, SBC shall not be compelled to retrieve, review and provide hard copies of the requested tariffs for Qwest. With the

provision of the website information, Applicants' response to subsections a-c shall be deemed complete.

Data Requests 4-26 through 4-35 (Subsections (d)-(e))

Sub-parts (d)-(e) of data requests 4-26 through 4-35 asked SBC to produce "all correspondence, memoranda, proposals, bids, or other written documents" between SBC and any carrier regarding any current or past plan's rates, terms or conditions that pre-date the plan's adoption; all internal SBC documentation that pre-date the plans adoption regarding any current or any past plan's rates, terms or conditions; and an explanation of why SBC decided to offer any current or past plan's rates, terms or conditions

SBC asked Qwest whether it could narrow the scope of sub-parts (d)-(e) and clarify what specific types of documents it seeks. Qwest claims it can not limit that request any further for sub-parts d(1)-(3) or e(1)-(3) and still receive meaningful data. The request for documents already includes the following limitations: (a) it must be a document transmitted between SBC and another carrier (or vice versa); (b) it must predate the particular plan being referred to in the DR; and (c) it must relate to the subject plan or have a bearing on the rates, terms and conditions of the plan.

Qwest, however, limited its requests for subsections (d)(4) & (5) and (e)(4) & (5), similar to the limitation agreed to by SBC regarding Qwest's planning documents, by agreeing to accept (for each plan) the "speaking documents" that reflect SBC's analysis in recommending and approving a particular plan. For example, if there is an email or memorandum from a product manager (or other employee) to the ultimate decision maker laying out the terms of term plan the employee is recommending, analyzing alternative terms and explaining why particular terms should be included and excluded, Qwest would accept that

document and responsive documents from the decision maker reflecting how and why the recommended term plan was approved or modified. Qwest would then not need to review "all documents" relating to the same subject.

Subsection (d) and (e) also ask for documents and information reflecting SBC's decision-making process in ultimately establishing the terms of the plan. Qwest argues that documents responsive to subsections (d) and (e) are critical to establishing the role other carriers have played in influencing the terms ultimately set out in SBC's generic term plans.

SBC has identified 12 individuals who it believes may have been involved in the formulation of the plans identified by Qwest. Because only one of these persons is still in the same position within the company, SBC claims it will be difficult and burdensome to locate potentially responsive documents. Because SBC has been unable to identify or locate any summary documents relating to the decision making process, and given the breadth of Qwest's requests, SBC seeks permission to respond to this request by consulting the 12 individuals identified to determine whether any readily available, responsive documents exist. SBC will attempt to complete this investigation, review and produce responsive documents by close of business on Friday, August 5. SBC argues that this further investigation should fully satisfy Qwest's Fourth Set of Data Requests.

Discussion

The approach proposed by SBC for completing its response to Qwest's fourth set of data requests is hereby accepted. SBC shall respond to this request by consulting the 12 individuals identified to determine whether any readily available, responsive documents exist. Qwest advised SBC on July 31st of the SBC department which Qwest believed likely possesses responsive documents.

Qwest likewise identified two individuals Qwest believed would be helpful in responding to the Special Access DRs. SBC shall also consult with the two individuals that Qwest has identified.

The ALJ also ordered SBC to produce the Bates numbers of the SBC planning documents (including special access planning documents) to be found in SBC's no copies room. SBC provided Qwest with bates numbers late during the week of July 29th. Qwest reports that its local counsel is in the process of reviewing the specified documents. Qwest expresses concerns about the scope of what was produced and reserves the right to raise the issue with the ALJ.

SBC shall complete this investigation, review and deliver responsive documents to Qwest by the close of business on Friday, August 5, in accordance with the process it has proposed. With the delivery of responsive documents in accordance with these directives, Applicants' response with respect to Qwest's fourth set of data requests shall be deemed to be completed.

Qwest's Motion for a Deposition

By its July 26, 2005 motion, Qwest seeks a determination of whether a proposed deposition would be a permissible follow-up to Qwest's outstanding data requests relating to special access issues. Qwest indicates that it intends to utilize the deposition as an alternative mechanism to attempt to obtain the same information sought in the third and fourth sets of data requests that it has failed to obtain through written discovery. Qwest seeks to depose a self-designated corporate representative of Joint Applicants with responsibility for a variety of activities related to the purchase and sale of special access services. Qwest argues that given the pace of the schedule in this proceeding with evidentiary hearings starting on August 8th, there is not enough time remaining to continue to pursue written interrogatories. Qwest argues that even with a favorable

ruling on its pending motion to compel, it will be impossible, without the deposition, to obtain the responsive information prior to the start of hearings. Qwest thus argues that, given the proximity of the hearings, it is critical that Qwest (in addition to receiving full responses to the Special Access DRs) be given the opportunity to conduct the deposition that is the subject of its July 26, 2005 motion for determination.

Applicants oppose Qwest's motion for a deposition. SBC argues that it has already provided extensive information on special access services and is producing more based on meet-and-confer discussions with Qwest. AT&T timely responded to Qwest's data requests indicating that AT&T had not identified information sought by Qwest at that time. Since responding to Qwest on July 15, 2005, AT&T has identified certain responsive materials and produced them on August 2, 2005. Applicants argue that Qwest fails to show why additional information is needed, or why Qwest did not seek the information within the schedule set by the ALJ. The ALJ's June 22 ruling provides that discovery served after June 24 must "relat[e] to Applicants' Rebuttal Testimony" and that "[d]iscovery relating to the Applicants' Rebuttal Testimony shall be served by July 15."¹

Yet, Qwest sought the depositions of Applicants' witnesses for the first time on July 21, nearly a week after the discovery cut off. Since Qwest seeks discovery after the deadline set by the ALJ, Applicants argue that no further discovery should be permitted.

¹ See Administrative Law Judge's Ruling Denying Motion to Extend the Schedule and Granting in Part, Discovery Limits, entered June 22, 2005, at 6-7.

Qwest subsequently proposed to take depositions after the evidentiary hearings are completed. Takemoto Decl. Ex. C. Applicants oppose this alternative, arguing that such depositions would be unprecedented. As noted in an email dated August 3, 2005, by Level 3 Communications, LLC, (Level 3) such a procedure also would permit Qwest to have a portion of the hearing after the actual hearing had concluded. Takemoto Decl. Ex. D. Level 3 argues that such an approach would be unfair to parties who are concerned about issues which might be raised in the deposition, including the possibility that the Joint Applicants could use the deposition to buttress perceived shortcomings in their presentation at the hearing itself through the use of fresh witnesses who had not served written testimony. If the deposition were taken before the hearing, however, then at the time the transcript or portions thereof are offered into the record, parties could object and to use the written transcript in cross-examination, if necessary.

SBC's counsel stated in his response to Qwest's deposition notice (which was made on behalf of AT&T as well) that the notice was untimely and there is no basis for allowing the depositions.²

Discussion

Qwest's motion has not justified its request for a deposition. Such a request would be in violation of the adopted schedule, as noted above. On that basis, the request is denied. It would unduly jeopardize the integrity of the schedule to authorize Qwest to conduct a new deposition at this late date.

² See Declaration of Joseph F. Wiedman in Support of Qwest's Motion for Determination that Deposition of Joint Applicant's Witness Falls Within Permissible Discovery Limits, Ex. A.

Although Qwest may not be entirely satisfied with the extent of discovery responses it has received (or will yet receive) relating to its data requests, Qwest has not made a convincing showing that a deposition should also be compelled at this late date. Likewise, in view of the due process concerns raised by Level 3, it would not be appropriate to schedule the deposition to occur after the close of evidentiary hearings.

Qwest's Production of Documents

In addition to discussing the Special Access DRs, Qwest and SBC also discussed Qwest's production of its planning documents. As ordered, Qwest made available to SBC planning documents (327 pages) on a no copies basis at 4:00 p.m. on July 29. SBC has reviewed those documents. Qwest expected to produce additional documents on August 3rd (as ordered), but also advised SBC that it was still awaiting documents from one Executive Vice President, whose documents will not be available for review by Qwest counsel until Wednesday, August 3rd. As a result, and depending on the volume, Qwest reports that it may not be able to produce those documents in its no copies room until Thursday. Qwest anticipates that any documents this Executive Vice President has will be duplicative of documents already produced because Qwest has already polled each VP reporting to said Executive Vice President, and Qwest has produced documents from those VPs.

Qwest claims that it has been diligent in pursuing responsive planning documents, to abide by the spirit and letter of the ALJ's rulings. Qwest believes that it has already produced documents reflecting Qwest's strategic, business and marketing plans. Qwest asks the ALJ to provide Qwest an extra day to provide any additional documents obtained from the Executive Vice President. Qwest agrees to do everything it can to have the documents in San Francisco on

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August 3, but does not believe SBC will be harmed if documents are produced on Thursday, rather than Wednesday.

IT IS RULED that

1. The motion of Qwest to compel production of responses to its second and fourth sets of data requests is granted, in part, and denied, in part, as discussed above.

2. Applicants shall not be compelled to produce further data in response to the second or fourth sets of data requests beyond those items specifically outlined in the discussion above, and subject to confirmation that they, in fact, have provided Bates number identification for the pertinent documents provided.

3. The motion of Qwest seeking a deposition is hereby denied on the basis that it is untimely.

4. Qwest shall complete its production of its planning documents, as outlined above, by close of business on Thursday August 4, 2005.

Dated August 4, 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 Motion to Compel and for Deposition by Qwest Communications Corporation on all parties of record in this proceeding or their attorneys of record.

Dated August 4, 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.