

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<p>IN RE:</p> <p>AT&amp;T COMMUNICATIONS OF THE MIDWEST, INC., AND TCG IOWA, INC.,</p> <p style="text-align:center">Complainants,</p> <p style="text-align:center">v.</p> <p>QWEST CORPORATION,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-51</p>
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**ORDER DENYING PETITION FOR REHEARING**

(Issued January 12, 2007)

**INTRODUCTION**

On December 4, 2006, the Utilities Board (Board) issued its "Order Granting Motion to Dismiss" in this docket. On December 21, 2006, AT&T Communications of the Midwest, Inc., and TCG Iowa, Inc. (AT&T), filed a petition for rehearing of that order. On January 8, 2007, Qwest Corporation (Qwest) filed its answer or objection to AT&T's petition for rehearing. Pursuant to Iowa Code § 476.12, the Board must either grant or deny the petition by January 19, 2007, or it will be deemed denied.

AT&T asserts three reasons why the Board should grant rehearing and reverse its decision to dismiss AT&T's complaint: First, res judicata does not apply where the Board lacks jurisdiction to award the relief AT&T seeks, according to

AT&T. Second, AT&T says the scope of the 2002 investigation was too narrow for AT&T to have raised its claims at that time. Third, AT&T says that one of the Qwest agreements at issue was not, and could not have been, known to AT&T at the time of the Board's 2002 investigation.

On January 8, 2007, Qwest filed its "Opposition to AT&T's Petition for Rehearing." As a general response, Qwest asserts that rehearing should not be granted because AT&T does not disagree with the result of the Board's order (dismissal of the case); "AT&T only asks the Board to grant rehearing so it can dismiss the case once again on other grounds." (Opposition at p. 1.) Qwest argues that AT&T's request is burdensome and granting it would be a waste of resources. Qwest also offers responses to each of AT&T's three reasons for granting rehearing.

The Board will address each of the three issues separately.

**ISSUE 1: DOES THE BOARD HAVE AUTHORITY TO AWARD AT&T THE RELIEF IT SEEKS?**

AT&T states that res judicata does not apply in a later proceeding if the body that issued the first decision did not have the power to grant the type of relief requested in the second proceeding, citing the Restatement (Second) of Judgments, § 26(1)(c). AT&T then asserts that it is seeking money damages from Qwest, "but the Board had no power to award damages in its 2002 investigation (and has no such power today)." (Petition for Rehearing at p. 3.) Accordingly, AT&T concludes, the 2002 investigation can have no res judicata effect on AT&T's current case.

Qwest responds that AT&T has not offered any new arguments on this point. Qwest declines to repeat the res judicata analysis it offered in its motion to dismiss, but instead incorporates those arguments into its Opposition by reference.

The Board will not grant rehearing and reverse its decision to dismiss this case on this basis. The question AT&T has raised regarding the precise extent of the Board's jurisdiction in this matter is complex and the parties have not briefed it thoroughly, but the ultimate outcome (dismissal) is the same either way.

AT&T is now of the opinion that the Board cannot grant the relief it has requested, that is, money damages. (Petition for Rehearing at p. 2, n. 1.) That proposition, however, is not so well-established as AT&T appears to believe. What AT&T is seeking is a particular category of money damages, a refund for services rendered to AT&T by Qwest pursuant to the interconnection agreement between them. AT&T's position is that the interconnection agreement gave AT&T the right to lower rates than those AT&T paid, based upon the unfiled agreements between Qwest and the other competitive local exchange carriers (CLECs). In other words, AT&T is seeking refunds of alleged overcharges under its interconnection agreement with Qwest.

Prior to 1981, it was clear that the Board could not order refunds or reparations for wrong amounts charged. Oliver v. Iowa Power & Light Co., 183 N.W.2d 687 (Iowa 1971). The Board (actually, its predecessor agency, the Iowa

State Commerce Commission) could order prospective relief only; a party seeking retroactive relief had to go to court. (Id.)

However, in 1981 the Legislature amended the relevant statutes, see 1981 Iowa Acts ch. 156, § 5, and in 1988 the Iowa Supreme Court considered those changes and determined that the agency now has the authority "to order the refund of overcharges and illegally collected revenue." Mid-Iowa Community Action, Inc., v. Iowa State Commerce Comm'n, 421 N.W.2d 899, 901 (Iowa 1988). So, as a matter of state law, the Board currently has the authority to order refunds of utility overcharges and the Board had that authority in 2002.

What is not so clear is whether that state law authority applies to a claim such as AT&T's, which has state law elements but is ultimately based on federal law (Qwest's obligation to file interconnection agreements with the Board pursuant to 47 U.S.C. § 252(e)). The parties have not briefed that particular issue and the Board need not decide it here, because the final result of this docket is the same either way: this complaint must be dismissed. Either the Board had the authority to order refunds of overcharges in a case based on federal law in 2002 and res judicata therefore applies, requiring dismissal, or the Board did not have that authority in 2002 or at present and the case must be dismissed for lack of jurisdiction to grant the requested relief. Either way, the final result is dismissal, so it is unnecessary for the Board to decide the question of whether its state law authority to order refunds of overcharges applies to claims ultimately based on federal law. In this respect, the Board agrees

with Qwest and the cases cited by Qwest that it would be a waste of resources to litigate and decide an issue that will not affect the final outcome.

The Board will not grant hearing to further consider this unnecessary issue.

**ISSUE 2: WAS THE SCOPE OF THE 2002 INVESTIGATION TOO NARROW FOR AT&T TO HAVE BROUGHT ITS CURRENT CLAIMS?**

AT&T's second argument in favor of rehearing is that it did not have a full and fair opportunity to litigate its claims in the 2002 docket. AT&T argues that the Board's "order initiating the 2002 investigation limited the scope of that investigation to deciding what types of agreements between Qwest and other carriers must be filed with the Board," and that AT&T therefore could not pursue its claims for damages in that docket. (Petition for Rehearing at p. 5.) AT&T admits that the Board's subsequent order (finding that Qwest had failed to file agreements that it was required to file) gave the parties the opportunity to "request a hearing to further explore the facts,"<sup>1</sup> but AT&T says it read that language as being limited to further exploration of the Board's tentative conclusions and not as an opportunity "to seek a hearing on facts related to other types of claims for carrier-specific damages." (*Id.* at page 6.)

AT&T argues that it should not be penalized now for taking the Board's order at face value, abiding by the limited scope established by the Board, and "not

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<sup>1</sup> "Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing," 2002 Iowa PUC LEXIS 220 at \*27 (Ordering Clause 1), issued May 29, 2002. It is worth noting that in its petition for rehearing, AT&T never refers to this order by title, which clearly states that the Board is "granting [the] opportunity to request [a] hearing."

seeking to radically change the scope of the case by injecting brand-new disputes having nothing to do with the Board's conclusions." (Id. at p. 7.)

Qwest responds that "AT&T had the opportunity to advocate any remedy it wished in 2002, [but] AT&T took no action at that time, leaving any claims or remedies available to it on the table." (Opposition at p. 7, footnote omitted.) In support of this statement, Qwest offers the AT&T letter that initiated the Board's 2002 docket (attached as Exhibit 1 to the Opposition). In that letter, AT&T asserts that Qwest may have entered into a series of amendments to its interconnection agreements with various CLECs to provide preferential treatment to those CLECs. AT&T also asserts that "Qwest is under a legal obligation to submit agreements of this nature to the state commission for approval, to make all such agreements public, and to provide the same services to other CLECs on a non-discriminatory basis." (Id.) Qwest argues that this shows that AT&T was aware of, or should have been aware of, its rights in February of 2002, and the fact that AT&T did not seek a remedy at that time does not change that fact.

The Board will not grant rehearing on the basis of AT&T's belief that the scope of the 2002 proceeding was too narrow to allow it to present its claims. AT&T offers no new arguments in support of its position, but merely takes issue with the Board's interpretation of the language it quoted from the orders issued in 2002. The bottom line is that the Board's "Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing" clearly stated in

Ordering Clause No. 1 that "[i]f any party disagrees with the Board's tentative conclusions, that party can request a hearing to further explore the facts, but any such request for hearing must identify a disputed issue of material adjudicative fact and explain how that issue will best be resolved by hearing." Contrary to AT&T's apparent belief, that invitation was extended to "any" party, which included AT&T.

The Board will not grant rehearing to further consider this issue.

**ISSUE 3: DOES THE ALLEGED EXISTENCE OF AN UNKNOWN AGREEMENT IN 2002 MEAN THAT RES JUDICATA DOES NOT APPLY?**

AT&T's third argument in support of its petition for rehearing is that at least one of the Qwest interconnection agreements that should have been filed with the Board was not known to AT&T until after the 2002 investigation was concluded. Specifically, AT&T says its claim relies, in part, on an oral agreement between Qwest and a CLEC. The existence of that oral agreement was not established until September 20, 2002, when an administrative law judge in a proceeding before the Minnesota Public Utilities Commission found the agreement to exist, according to AT&T. AT&T says that it could not have brought claims based on that oral agreement in the Board's 2002 proceedings, "assuming such agreement applied or had a counterpart in Iowa... ." (Petition for Rehearing at p. 8.) Thus, res judicata cannot apply with respect to claims based on this oral agreement, according to AT&T.

Qwest responds that AT&T had knowledge of the alleged oral agreement at least as far back as June 12, 2002, when counsel for AT&T was served with the public versions of various affidavits filed in the proceedings then taking place before the Minnesota Public Utilities Commission. According to Qwest, those affidavits were the key evidence of the alleged oral agreement, so AT&T was aware of the agreements at least by that date, if not before.

The Board will not grant rehearing on the basis of this issue. Assuming the alleged oral agreement applied in Iowa and therefore could form a part of the basis of AT&T's complaint (an assumption that is neither proven nor disproven by this record), the record also shows that AT&T knew, or should have known, of the existence of the alleged oral agreement at or about the relevant time frame. For example, in support of its argument, AT&T attached as an exhibit to its petition a copy of the rebuttal testimony that Qwest filed in the Minnesota proceedings on August 1, 2002, in which a Qwest witness disputes the existence of an oral agreement with the CLEC. It is clear that the Qwest witness is responding to the prefiled testimony of another witness, Mr. W. Clay Deanhardt. The AT&T exhibit does not reveal when Mr. Deanhardt's direct testimony was filed, or even the identify of the party on whose behalf he filed it, but it was clearly filed some time prior to August 1, 2002. Thus, AT&T's own exhibit establishes that evidence had been introduced in the Minnesota proceedings tending to show the existence of the Minnesota oral agreement at some time prior to August 1, 2002. Clearly, if other parties knew of the existence of the

Minnesota oral agreement prior to August 1, 2002, then AT&T could have known of it, as well (assuming AT&T did not).

That much can be seen from AT&T's own exhibit to its petition for rehearing. Qwest's response provides additional information in this respect, information which is not critical to the Board's finding on this issue, but which provides some additional detail. As shown in Qwest's opposition, the affidavit of Mr. W. Clay Deanhardt was filed in the Minnesota proceedings on June 12, 2002 (see Exhibit 2 attached to the Opposition) and that is the affidavit that the Qwest witness was responding to. Thus, AT&T's own exhibit establishes that AT&T had notice of the alleged oral agreement prior to August 1, 2002, and Qwest's exhibit indicates that AT&T had that same notice no later than June 12, 2002. In either event, it is clear that AT&T had knowledge of the alleged oral agreement at a time when it could have been raised in the Board's 2002 docket.

The Board rejects AT&T's third argument in support of rehearing.

### **CONCLUSION**

The Board will deny AT&T's petition for rehearing. The Board's "Order Granting Motion to Dismiss" issued in this docket on December 4, 2006, will not be the subject of rehearing or further consideration.

**ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

The "Complainants' Petition for Rehearing" filed in this docket on  
December 21, 2006, is denied.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper \_\_\_\_\_  
Executive Secretary

Dated at Des Moines, Iowa, this 12<sup>th</sup> day of January, 2007.