

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale))))	Docket No. UT-960369
In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for))))	Docket No. UT-960370
U S WEST COMMUNICATIONS, INC.))	
In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for))))	Docket No. UT-960371
GTE NORTHWEST INCORPORATED)	

**JOINT MOTION OF GTE NORTHWEST INCORPORATED
AND U S WEST COMMUNICATIONS TO STRIKE CLEC BRIEFS OR IN
THE ALTERNAIVE RE-OPEN THE RECORD TO ALLOW DISCOVERY
AND A RESPONSE**

GTE Northwest Incorporated (“GTE”) and U S WEST Communications (“U S WEST”), by counsel, hereby submit this motion to strike the post hearing briefs of MCI WorldCom, Inc. and AT&T Communications of the Pacific Northwest (“AT&T”); NEXTLINK Washington, Inc, Electric Lightwave, Inc., Advanced TelCom Group, Inc., GST Telecom Washington, Inc., and New Edge Networks, Inc. (“Joint CLECs”); and Rhythms Links, Inc., and TRACER (collectively

“CLECs”). In the alternative, GTE and U S WEST request the Commission to re-open the record to allow discovery and a response. In support thereof, GTE and U S WEST state as follows:

1. In their respective post hearing briefs filed March 28, 2000, the CLECs advocate a 5-zone proposal which they claim is based on Exhibits 1T and 2 – the wire center costs developed by AT&T witness Douglas Denney. AT&T Post hearing Brief at 5. However, this proposal is not on the record in this proceeding. Specifically, there is nothing in the record to support the zone boundaries used to create the five zones, and the U S WEST costs used in the filing are not the same as those used in hearing Exhibit 2.

2. The Commission issued a post-hearing brief outline for the parties to follow in drafting their briefs, which included a section entitled “Corrections [to Party’s Proposal] Necessary As A Result Of The Hearing”. See Commission Confirmation of Briefing Schedule, dated March 7, 2000. This outline authorized corrections of errors uncovered in a particular proposal during the course of the hearing. For example, it became clear during the hearing that the proposals for GTE advocated in the pre-filed testimony of AT&T, the Joint CLECs, and Staff included wire centers for that were no longer served by the company. Similarly, the Joint CLEC proposal relied on evidence that was not in the record - specifically HAI 5.0a cost estimates. GTE and U S WEST believe that the Commission intended for the parties to correct these errors based on evidence in the record. It did not intend – nor could it – to allow parties to make wholesale changes not on the record that effectively create an entirely new proposal never seen by the parties before.

3. GTE and U S WEST have never had an opportunity to conduct discovery or cross examine the CLECs’ witnesses on this 5-zone proposal. Specifically, GTE and U S WEST have

been denied an opportunity to evaluate and/or rebut the delineation between zones, and the new cost figures presented for U S WEST. Nor have the companies been allowed to evaluate the administrative costs or implementation issues resulting from a five zone proposal that is not distance sensitive. Consequently, GTE and U S WEST would be prejudiced if the Commission considers this new proposal.

4. Just a cursory glance at the CLECs' proposal uncovers several significant issues that GTE and U S WEST would have explored on cross-examination and/or introduced evidence to rebut. For example, the CLECs' proposal develops GTE deaveraged rates based on unreliable cost estimates produced by HM 3.1. GTE's preliminary analysis shows dramatically different deaveraged rates, which the company would have explored through testimony, exhibits or cross-examination of Mr. Denney to even further demonstrate the self-serving nature of the proposal.¹

Similarly, U S WEST would have introduced evidence to impeach and rebut the CLECs' proposal. Specifically, U S WEST would have introduced evidence describing the very high proportion of business lines in zones 1 and 2, illustrating the self-serving nature of the CLECs' proposal. Similarly, the CLEC proposal creates a two-wire center zone for U S WEST that has very little meaning beyond creating a particular rate in that zone.

5. AT&T in particular has completely altered its position from that in the record. In its brief, AT&T claims that the CLECs' proposal selected zones to make each zone "as homogeneous as possible." AT&T/MCI Brief at 5. However, nowhere in the brief or its attachments do they offer any measure of homogeneity. Indeed when GTE cross-examined Mr. Denney on the criteria used to draw the boundaries between zones, he did not mention

¹ See attachment A for the impact of model choice on CLEC proposal.

homogeneity. Instead, his testimony demonstrated that his cut off points were arbitrarily designed to produce a particular rate. *See* GTE Brief at ¶¶ 38, 40. AT&T has failed to explain how it is suddenly so certain as to the appropriate criteria for zone definitions, and GTE and U S WEST were denied an opportunity to explore this sudden epiphany.

Moreover, if presented with this new criteria before the close of the record, U S WEST would have explored the apparently inconsistent manner in which the CLEC proposal assigns wire centers to zones, while at the same time claiming “homogeneity”. For example, under the CLEC proposal, Seattle would have wire centers in zones 1, 2 and 3, and Spokane would have wire centers in zones 2, 3, 4 and 5. U S WEST was denied the opportunity to prove that this cannot constitute homogeneity.

6. Moreover, the CLECs’ proposal is based Confidential Replacement 2C attached to AT&T’s Brief (Exhibit “R2C”). This exhibit was never admitted into the record, and therefore cannot be considered. Again, GTE and U S WEST were denied an opportunity to evaluate the validity of this Exhibit. Specifically, the costs for U S WEST’s wire centers used in the CLECs’ Proposal – as identified in Exhibit R2C -- are different from the costs filed in Exhibit 2. For example, in Exhibit R2C, costs for the Seattle Main Wire Center are \$8.05, as compared to the cost in Exhibit 2 of \$8.12. As a consequence, U S WEST has no way of verifying these calculations.²

² It appears to U S WEST that AT&T used 1995 line counts in its calculations, which are different from the line counts provided by U S WEST in responses to Discovery Requests. AT&T states in its brief that it used the most recent line counts submitted by U S WEST as requested at transcript 2255. However, it appears that AT&T used 1995 line counts from Bench Request 6, despite having been provided updated line counts by U S WEST in response to AT&T’s Data Request No. 4. Additionally, it is not at all clear that Tr. 2255 does anything more
(continued . . .)

7. The back-door introduction of a new proposal and exhibit after the close of the evidentiary record is particularly offensive given AT&T's strenuous objections to updated discovery responses produced by U S WEST during the hearing. AT&T was at least given an opportunity to cross-examine U S WEST's witnesses and comment on the responses to the extent necessary in their briefs. However, the CLECs have denied U S WEST and GTE the same opportunity.

8. Similarly, GTE followed the correct procedure in advocating a compromise proposal that was not contained in the pre-filed testimony and exhibits. GTE announced its compromise proposals in opening statements on the first day of the hearing – thereby putting all parties on notice. GTE further stated its compromise implicitly in its cross-examination of AT&T witness Denney. Moreover, GTE's witnesses Terry R. Dye and David G. Tucek stated the compromise proposal on the record. In this way, all the parties – as well as the Commissioners and their consultant – were put on notice of the compromise, and granted an opportunity to cross-examine GTE's witnesses on the compromise and comment on its merit in post-hearing briefs. This is the approach the CLECs should have taken to develop yet another alternative proposal.

9. Indeed the Commission established a simultaneous briefing schedule with no responsive briefs based on the parties' agreement that responses would not be required since each party would advocate the proposals they presented on the record. Implicit in this agreement was

than require AT&T to respond to a bench request, which AT&T failed to do. Tr. 2255 certainly does not appear to authorize the production of a new exhibit attached to the closing brief.

the concept that each party would not drastically alter course and advocate deaveraging proposals beyond the evidence in the record.

10. The CLECs unilaterally changed the rules of the game without fair warning to their opponents. It is obvious that the CLECs conferred and coordinated their briefs so as to advocate the same brand new proposal. Yet at no time did they contact GTE or U S WEST to give them fair warning of their plans or an opportunity to review their new proposal. Such conspiratorial coordination amounts to a bad faith attempt to sneak a new deaveraging proposal through the back door once the front door was closed. If successful, this attempt would greatly prejudice GTE and U S WEST.

11. The Washington Administrative Rules make clear that the record in a contested case is limited to evidence introduced in that proceeding. In a contested case, the Commission must confine its decisions to the evidence in the proceeding and will not consider references in briefs or other documents to material that is not on the record or otherwise proper to consider. *Rose Monroe v. Puget Sound Power & Light Co.*, Docket No. U-85-70, Order Affirming Proposed Order (WUTC, October 1986). *See also* WAC 480-09-745(4). The CLECs' disregarded this fundamental procedural rule.

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WHEREFORE, for the foregoing reasons, GTE and U S WEST respectfully request that the Commission strike the CLECs' post hearing briefs, or in the alternative, GTE and U S WEST request the Commission to re-open the record to allow discovery and a response.

Respectfully submitted,

/s/ W. Jeffery Edwards (by telephonic authority)

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