

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Application of

U S WEST, INC., and QWEST
COMMUNICATIONS
INTERNATIONAL INC.

For an Order Disclaiming Jurisdiction
or, in the Alternative, Approving the U
S WEST, INC.-QWEST
COMMUNICATIONS
INTERNATIONAL INC. Merger

NO. UT-991358

PUBLIC COUNSEL MOTION TO
COMPEL; MOTION FOR
CONTINUANCE

MOTION TO COMPEL

A. Motion to Compel

Pursuant to WAC 480-09-480(7), Public Counsel files this motion to compel responses by U S West, Inc., U S West Communications, Inc. (USWC), Qwest, Inc., and Qwest Communications International, Inc., to Data Requests (DRs) propounded by Public Counsel in this proceeding. For ease of reference, a table listing the Data Requests which are the subject of this motion is attached hereto as Appendix A. In addition, those responses involving objections or other substantive disputes are attached. To avoid burdening the record, those Data Requests which have simply not been answered are not attached. The substance of each DR with a late response is summarized in the table. Public Counsel will provide complete copies upon request by the bench or USWC.

B. Informal Conference with Opposing Counsel to Resolve Disputes

Public Counsel has made a good faith effort to resolve these matters informally by conferring with counsel for USWC, Ms. Anderl.

Late Responses. With regard to the late requests, Ms. Anderl contacted me on October 22. She stated that responses to our DR sets 1 (DRs 1-22) and 2 (DRs 23-39) were substantially

answered, that set 3 (DRs 40-68) would be answered on Monday, October 25, and Set 4 (DRs 69-82) on Tuesday, October 26. A significant number of the responses due were not received. I subsequently left a voice mail message listing the DRs not answered. I received a responsive voice mail from Ms. Anderl on or about Friday, October 29 indicating she was checking the status of responses. Ms. Anderl and I spoke by telephone on November 2 regarding discovery issues, including missing responses. In general, USWC's response has been to acknowledge that answers are late, and to indicate that the matter will be checked into. With regard to some DRs, Ms. Anderl has advised that the response is in the hands of Qwest.

Public Counsel DRs 1-3 (regarding "synergies"). On October 28, 1999, Public Counsel consultant Mike Brosch left a voice mail for Ms. Anderl asking to confirm that materials he had received in the USW/Qwest merger case in Iowa, where he is also a consultant for the Iowa Office of Consumer Advocate, were the same "synergy studies" requested in Public Counsel DR 1. I spoke further with Ms. Anderl about this, including by phone on November 2, 1999, and was advised that USWC objects to Mr. Brosch having these studies in his possession, although they were produced to his client, the Iowa OCA, in discovery.

Objections re "unduly burdensome" requests. I conferred with Ms. Anderl regarding these requests (see Appendix A) on Friday, November 5, 1999. Copies of the DRs are attached hereto. She indicated a willingness to try to find a possible resolution of the "burdensomeness" objections but we were not able to finally resolve the problem. I advised Ms. Anderl that I would file the motion but would agree to continue discussions.

C. Argument

1. Late Requests.

The Prehearing Conference Order in this docket requires that responses to Data Requests be provided in seven business days. Prehearing Conference Order, p. 3. USWC and Qwest have

not met that timeline for the DRs listed in Appendix A. Many of the responses are now overdue under the standard ten business day timeline of WAC 480-09-480(6)(v). While Ms. Anderl did attempt to provide general oral notice of late response on October 22, subsequent contacts have provided no clear idea of when responses will be provided.¹ In many cases Ms. Anderl has not provided any specific reason why the answers have not been provided in a timely fashion other than the volume of discovery in USWC states. While Public Counsel understands the burden being experienced by the merging companies as they deal with multiple state proceedings, USWC and Qwest should have been aware of and prepared for the requirements of the formal proceedings required for merger approval. As a practical matter, is impossible for Public Counsel to adequately evaluate the merger, or to prepare its testimony or its case without the information sought.

2. Synergies Studies – Public Counsel DRs 1-3

Public Counsel DRs 1-3 (attached) seek information about the operating savings predicted by the merging companies of approximately \$4.3 to \$4.5 billion, and the net revenue synergies of approximately \$11 billion. USWC’s response in this proceeding was to assert that the information is “highly confidential” and would only be made available for viewing and would not be produced. Public Counsel understands that responsive information on this issue has been produced in Iowa to the Office of Consumer Advocate without similar restrictions, pursuant to a confidentiality agreement. The information (synergy studies) was provided by the OCA to Michael Brosch, who is consulting with both Public Counsel and with the Iowa OCA. Public Counsel has attempted to determine, in the interests of efficiency, whether the Iowa synergy

¹ WAC 480-09-480(6)(v) requires that parties who cannot meet the discovery timeline in the rules must explain in writing why the information cannot be supplied and must provide a schedule for producing the data. While counsel in Commission proceedings have not always insisted on written notice, the rule language does indicate that the deadlines are to be observed and that parties are entitled to know when and if answers will be provided.

material was the same material which USWC intends to provide for “viewing only” in response to Public Counsel DRs 1-3. To date, USWC has not confirmed that this is the same material, and instead has insisted that Mr. Brosch is not entitled to have the studies in his possession.²

Whether or not Mr. Brosch is entitled to see the studies in the Iowa proceeding, it is troubling that USWC has seen fit to provide the documents to consumer counsel in Iowa, but in Washington not only declines to do so, but asserts a higher level of protection beyond that provided by the protective order. At the prehearing conference, the presiding officer specifically encouraged the parties to try to avoid the unnecessary imposition of higher levels of protection. Tr. 56. Moreover, the parties were instructed that a need for a higher level of protection should be brought to the ALJ’s attention so that it could be dealt with. Id. Instead, USWC has unilaterally imposed a higher level of protection on these documents without benefit of a Commission order, without any justification other than its own assertion of special sensitivity, and where similar information was apparently produced to the consumer counsel in a parallel proceeding in another state. USWC should be compelled to produce the synergy studies and other materials responsive to Public Counsel DRs 1-3 to Public Counsel and its consultant in this proceeding.

3. Objections regarding Burden.

In response to Public Counsel DRs 23, 26, 28, 31, 33, 34, USWC has made essentially the same answer – an objection that producing the information for a five year period is overly burdensome, coupled with production of the requested information for a one or two year period (generally 1998 and/or 1999).³ These DRs relate to service quality, identified by the

² The parties have filed motions on the issue before the Iowa Utilities Board. The Iowa OCA strenuously objects to USWC’s position, noting that its consultants are the equivalent of employees under Iowa statute and that USWC has in the past routinely permitted the OCA consultants to review confidential documents provided to the OCA. Copies of the motions are available.

³ For Public Counsel DR 26, only the data for 1997 is required.

Commission as an important issue in this proceeding. In order to assess USWC's present performance and to evaluate the effectiveness of service quality requirements and remedies currently in place, it is important to look at information going back to 1995, when service quality issues were addressed extensively in the 1995 rate case order. The data over this time period allows an evaluation of the incremental changes in service quality resulting from various remedial measures, starting with a benchmark of 1995. With regard to the burden of producing this data, the responses for the years already produced are not voluminous, which indicates that the data for the additional years should also be manageable. The most voluminous response is to Public Counsel DR 23, which fills approximately one large bucket file. This is well within the scale of discovery in any significant utility case. USWC has also not provided the information in the spreadsheet form requested. Public Counsel requests USWC be required to produce material for all the years requested.⁴

MOTION FOR CONTINUANCE

As the motion to compel shows, Public Counsel has not yet received a significant portion of the information it legitimately requires in order to evaluate the merger and prepare its testimony, currently due on November 22. As a practical matter, by the time these motions are resolved and discovery is forthcoming it will be difficult if not impossible to integrate the information into the testimony. For that reason, Public Counsel respectfully requests that an extension of time of approximately two weeks be granted for the filing of its testimony. Public Counsel would not oppose an appropriate extension for USWC's response. With regard to the hearing date, Public Counsel does not request an extension at this time, but notes that the issue

⁴ As noted above, Public Counsel will pursue discussions with USWC counsel in an effort to resolve this item.

may arise in order to allow for completion of discovery, testimony, and preparation.

DATED this _____ day of November, 1999.

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