

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In re Application of)	
)	Docket No. UT-991358
U S WEST, INC. and QWEST)	
COMMUNICATIONS INTERNATIONAL))	RESPONSE OF JOINT
INC.)	APPLICANTS TO MOTION
)	OF NWPA TO COMPEL AND
For an Order Disclaiming Jurisdiction or, in the)	FOR CONTINUANCE
Alternative, Approving the U S WEST, INC.-)	
QWEST COMMUNICATIONS)	
INTERNATIONAL INC. Merger)	

On November 9, 1999, Joint Applicants received a Motion submitted by the Northwest Payphone Association (NWPA) seeking to (1) compel answers to certain outstanding data requests, and (2) extend the due date for filing their direct testimony in accordance with Staff's previously filed motion. In response, Joint Applicants state as follows:

Motion to Extend Due Date

As indicated in the answer of U S WEST and Qwest to the Requests of Staff and Public Counsel for a Continuance in this matter, Joint Applicants are agreeable to allowing additional time in order for parties to prepare their prefiled testimony. However, such additional time is not warranted for NWPA, because, as will be discussed below, none of NWPA's data requests is proper in this case and Joint Applicants' objections to those data requests should be sustained. Thus, no extension of the schedule would be justified for NWPA. Nevertheless, Joint Applicants would not object to NWPA being given the same extension as might be granted to other parties, without affecting the hearing schedule in this

matter.

Motion to Compel

NWPA's Motion to Compel should be denied. NWPA's data requests are an attempt to get a second, third, or even fourth bite at an apple that NWPA had been after for a long time. The issues raised by NWPA are far outside the scope of this docket, have largely already been decided adversely to NWPA by this Commission and the FCC, and should not be permitted as areas of inquiry in this case.

NWPA first tries to lay the groundwork for its motion by describing the broad scope of permissible discovery, and the low threshold for discoverability in a civil proceeding. Even if that standard were directly applicable in a Commission proceeding, which it is not, NWPA's arguments are not well taken. NWPA suggests that its data requests are within the scope of the proceeding because they are related to the public interest, including the application of merger cost savings. They are not. They are merely an attempt to gain lower rates and/or a competitive advantage for the NWPA members by advocating that payphone operations be placed into a separate subsidiary, and that U S WEST be required to lower certain payphone related rates.

NWPA asserts two separate areas which it contends are appropriate for discovery – alleged subsidies, and access rates. Neither is a proper area for discovery. NWPA contends that it is entitled to inquire about whether a subsidy exists to U S WEST's payphone operations. This issue is not properly within the scope of review of the merger, which has been described by the Commission at page 5 of the Third Supplemental Order as follows: “. . . this is not a general rate case. Our concern in this proceeding is whether the transaction itself has any implications for rates, terms, and

conditions of service.”

“Subsidies” Are Not At Issue

The issue of whether U S WEST is currently cross-subsidizing its payphone operations is certainly not stated or implied as one of the issues the Commission will consider. Further, NWPA has had, and has pursued, multiple opportunities to explore the cross-subsidy issue. For example, NWPA successfully pursued a “price-squeeze” claim in Docket No. UT-920174, and unsuccessfully advocated for a reduction in the PAL rate in Docket No. UT-950200. Additionally, although NWPA did not participate in the docket, it is clear that the Commission recently had an opportunity to consider the subsidy issue in Docket No. UT-970658. Expending resources on these issues again is unnecessary and counterproductive.

The Commission May Not Require a Separate Subsidiary for U S WEST’s Payphone Operations

The point of NWPA’s subsidy argument is that NWPA needs to assert some basis for its real request for relief – that the Commission order U S WEST to move its payphone operation to a separate subsidiary. NWPA asserts that it has the right to ask for this, but the NWPA is wrong. This exact relief was requested from the FCC in 1996 and 1997, and the FCC explicitly rejected the requirement of a structural separation, stating “[w]e decline to require the BOCs or other incumbent LECs to provide their payphone CPE through a structurally separated affiliate.”¹ The Washington Commission is pre-empted by FCC action on this issue from requiring a separate subsidiary for payphone operations. The FCC

¹ In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No 96-128, Report and Order rel. September 20, 1996, ¶ 145.

explicitly stated “we preempt states’ ability to impose structural separation requirements on the payphone operations of the BOCs of other LECs.”² Nothing could be more clear. Yet NWPA boldly asserts, at page 4 of its motion, that it is “entitled to argue for a separate payphone subsidiary as a condition of the merger. . .” The Commission should reject this contention, along with any data requests purportedly related to this claim.

U S WEST’s Rate Levels are Not at Issue

NWPA next claims that U S WEST’s rates may be unlawfully high, and that it wishes to pursue discovery to learn which ones might be reduced. However, this is not a complaint proceeding against rates. Nor is it a general rate case, as the Commission has already pointed out. U S WEST’s various rates have been recently approved by or filed with the Commission or the FCC, depending upon the service and the appropriate jurisdiction. Those rates are presumed lawful, and cannot be collaterally attacked in this proceeding.

Joint Applicants note that they have pending before the Commission a request for relief relating to many of the discovery requests propounded in this docket. Specifically, on October 21, Joint Applicants filed an Objection to the Commission's Third Supplemental Order and requested that the scope of review of this proceeding be narrowed. As noted at page 3 of that filing:

The Commission should not permit this proceeding to becoming a venting session for disgruntled customers or competitors. As a regulated utility, U S WEST must comply with state and federal law, Commission regulations, prior Commission orders and its own tariffs. The Joint Applicants must also perform their obligations under

² Id.

agreements they have entered into with customers and competitors. This proceeding is not the appropriate forum for resolving questions concerning whether the Joint Applicants have met such obligations.

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The Commissioners should also not permit this proceeding to become an open door through which competitors of the Joint Applicants' parent corporations are able to gather industrial intelligence for use in their own merger and acquisition strategic planning or for other business purposes.

The NWPA data requests at issue in the Motion to Compel relate to matters which are not within the scope of this proceeding even if the Commission does not narrow the scope of review, and are certainly outside the scope if the Commission does. NWPA's Motion to Compel should be denied.

DATED: November 17, 1999.
Respectfully submitted,

Qwest

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