BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Inc. Against U S WEST Communications, Inc. Regarding Provisioning of Access Services	No. UT-991292 U S WEST'S MOTION TO DISMISS AT THE CLOSE OF THE COMPLAINANT'S CASE IN CHIEF, AND MEMORANDUM IN SUPPORT THEREOF

I. INTRODUCTION

Hearings were held in this matter on February 1, 2, 3 and 4, 2000 before an Administrative Law Judge and the three Commissioners. At the close of the complainant's evidence, U S WEST moved to dismiss the complaint on the basis that the complainant had not established facts or law establishing that it is entitled to relief. The Commission heard oral argument on the motion, and took the matter under advisement. U S WEST then presented its evidence. At the close of the hearing, a briefing schedule was established. In addition to briefs on the merits, the parties were asked to address the motion to dismiss in a separate memorandum. In accordance with that requirement, U S WEST hereby files its

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

Memorandum in support of its motion to dismiss.

A motion to dismiss at the close of the plaintiff's evidence is authorized in civil practice under CR 41(b)(3), which provides that (in a trial to the court without a jury) the defendant may move to dismiss after the plaintiff's evidence on the basis that upon the facts and the law the plaintiff has shown no right to relief. Such a motion is also authorized by the Commission's procedural rules, WAC 480-09-426. The rule references CR 50, which is the counterpart to CR 41, except that CR 50 applies to jury trials rather than bench trials. A proceeding such as this is more along the lines of a bench trial than a jury trial, so as a technical matter it appears that CR 41 is the more applicable. However, the result would be the same under either rule. This motion should be granted under the standard set forth in prior Commission orders, as well as under the specific requirements set forth by the Commission in this case.

II. ARGUMENT

This is a complaint proceeding under RCW 80.04.110. AT&T, as the complainant, has the burden of proof. The burden of proof in a civil matter such as this means simply that the complaint must introduce sufficient credible evidence to establish its case. The burden of proof means that it is AT&T's obligation to come forward with sufficient evidence establishing all of the facts necessary to show that it is entitled to relief.

In this case, meeting the burden of proof requires two things at an absolute minimum. First, the complainant must establish the factual predicate for a proper jurisdictional finding, and make a showing of significant amounts of intrastate traffic affected by the allegations in the complaint. This requirement was clearly set forth in the

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

Commission's Third Supplemental Order denying U S WEST's motion to dismiss on jurisdictional grounds. There, AT&T had argued that the facilities addressed in the complaint are jurisdictional because they carry intrastate traffic, and that the (intrastate) nature of the traffic would be developed at hearing[1]. The Commission denied U S WEST's motion to dismiss, stating that it would "accept AT&T's representation that it will expand on jurisdictional facts during the hearing." The Commission further stated that "[w]e do expect that the evidence will demonstrate a sufficient volume of intrastate traffic to warrant our proceeding to a decision on the issues presented." Thus, there is a clear evidentiary requirement in this case, resting on AT&T, to show that there are sufficient quantities of intrastate traffic at issue to warrant a decision on the merits.

Second, the complainant must establish facts which show that a state statute, rule, or tariff has been violated. In other words, not only must AT&T show sufficient quantities of intrastate traffic, AT&T must also show that U S WEST's provisioning in connection with that traffic was contrary to the requirements of U S WEST's tariffs or a particular rule or law. AT&T has utterly failed to establish either sufficient levels of intrastate traffic, or violations of law, and this complaint should therefore be dismissed on the basis that upon the facts and the law the complainant has failed to establish that it is entitled to relief.

The Commission has previously ruled on a motion to dismiss brought by the

[1] U S WEST does not agree that AT&T can establish jurisdiction by establishing that the facilities ordered out of the FCC tariff carry intrastate traffic, and does not intend to waive its jurisdictional arguments herein. As set forth in U S WEST's earlier motion to dismiss on jurisdictional grounds, U S WEST believes that the tariff out of which the services are purchased is determinative for all purposes, and that services purchased out of the FCC tariff are subject only to FCC jurisdiction. Indeed, AT&T itself has successfully argued in other venues that services purchased out of the interstate tariff are subject only to FCC jurisdiction, and are interstate services for all purposes. Nevertheless, even assuming the Commission's premise, that AT&T can establish state jurisdiction by showing sufficient volumes of intrastate traffic over the interstate facilities, it is clear that AT&T has failed to make that showing.

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

respondent in a complaint proceeding. The motion was brought under CR 41(b)(3). In an April 2, 1996 order in Docket No. UT-950277, GTE v. Whidbey Telephone Company, 1996 Wash. UTC Lexis 23, the Commission found in favor of the respondent on a motion to dismiss, stating:

> GTE chose to bring a complaint case under RCW 80.04.110. In making this choice, GTE assumed the burdens of the moving party in a complaint proceeding. It was the responsibility of GTE to analyze and determine what it believed to be the elements of a prima facie case. It was the responsibility of GTE to determine what proof would establish each of those elements, and to proffer the requisite evidence in its direct case. . . . We would expect GTE, and any other company filing a complaint against another company in a proceeding before the Commission, to evaluate its responsibilities and have a strategy for fulfilling them before a complaint is ever filed.
>
> The option of bringing a complaint case was available to GTE, and GTE availed itself of that option. The Commission made a forum available to it, and GTE had the responsibility of satisfying the burdens imposed by the option chosen. This matter will be dismissed because GTE did not carry the burden of proof it undertook in choosing to bring the complaint.

The Commission's ruling in this case should be the same as in the GTE/Whidbey case, as AT&T has utterly failed to meet the requirements of making a prima facie showing.

The Commissioners are hearing this case in their quasi-judicial role as presiding officers under chapter 34.05 RCW. As such, AT&T is bound to present sufficient evidence on the record to enable the Commission to find facts based on that evidence, and draw conclusions from those specific facts as to whether state law or tariff violations have been established. This is not a legislative-type hearing where, as suggested by AT&T and Staff, the evidence presented may be considered as illustrative of other events that may have happened in the past or may happen in the future. AT&T chose the complaint as its avenue

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

for requesting relief, and had a burden to establish specific facts in evidence, not illustrative facts from which the Commission is asked to speculate that the situation might in fact be worse.

AT&T has complained about U S WEST's provisioning of AT&T orders. AT&T places the orders with U S WEST, and has direct contact with its end user customers. As such, AT&T is best able to identify intrastate orders and intrastate traffic, if any exists. Thus, information necessary to meet the burden of proof was uniquely available to AT&T. Additionally, AT&T engaged in a relatively massive discovery effort in this case, resulting in the production of boxes of documents, both before and after AT&T's motion to compel additional discovery. Yet, AT&T failed to produce evidence of intrastate traffic sufficient to warrant the Commission proceeding to a decision on the merits, establishing only that 0.6% of the orders were intrastate. Instead of presenting additional evidence of specific customer examples showing mixed inter and intrastate usage on an interstate circuit, AT&T rested on general allegations about how it was possible for some intrastate traffic to be carried over circuits purchased out of the interstate tariff. This is true, but establishing a possibility is not enough. Again, U S WEST is not conceding that such a showing would actually confer jurisdiction on the Commission, but such a showing is what AT&T promised it would do, and what the Commission ordered. The discussion below will show that AT&T has failed to establish that there is anything more than de minimis amounts of intrastate traffic at issue in this complaint.

A. <u>Evidence Presented by AT&T</u>

AT&T's evidence shows that virtually all of the circuits ordered were ordered out

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

of U S WEST's FCC Tariff No. 5. AT&T has not established sufficient facts to show that intrastate traffic was implicated in this case in anything more than a de minimis way. This is in stark contrast to the explicit requirements set forth by the Commission in its substantive and procedural orders entered in this case prior to the hearing. In the first order on prehearing conference, dated September 3, 1999, the parties were asked to focus their presentations in this proceeding on information that is relevant to prove the existence of violations within this state. The Commission went on to clarify that it expected AT&T to show sufficient amounts of intrastate traffic to warrant proceeding to a decision on the merits in this case. In spite of the fact that AT&T had three rounds of testimony in which to introduce evidence of intrastate traffic, U S WEST will show here that AT&T wholly failed to do so.

The evidence presented by AT&T with regard to either intrastate services or intrastate traffic was scant. Indeed, AT&T's witness noted that with regard to services purchased out of the intrastate tariff, "[w]e [AT&T] haven't ordered a significant amount of service under that tariff." (Tr. 272). Below, U S WEST will discuss all of AT&T's evidence, and demonstrate the absence of proof of any significant amounts of intrastate traffic or impacts of this complaint.

Direct Testimony of Charlotte Field – Exhibit # 1: The first exhibit upon which AT&T relies is the direct testimony of Charlotte Field. That testimony does not ever identify any intrastate traffic specifically at issue in this case, or affected by held orders identified in this proceeding. AT&T relied, throughout this proceeding, on the allegation that circuits purchased from the interstate tariff *could* carry intrastate traffic and still

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

properly be purchased from the FCC tariff. This is true, but it is also true that the usage may indeed be 100% interstate. It is also true that AT&T designates its usage on these circuits as 100% interstate when it places its order with U S WEST. (Ex. 20, p. 57, Tr. 698-700). Thus, there is no evidence from which to conclude that it is more likely than not that intrastate traffic *was* carried on any of these circuits, only that it might have been.

When questioned as to where Ms. Field's testimony identified any intrastate traffic, Staff pointed to pages 18-19 of exhibit 1. This testimony discusses only the very general principles of what types of traffic might permissibly be carried over certain types of circuits, but does not connect any intrastate traffic to the evidence in this case. AT&T pointed to pages 5-10 of that same testimony as supportive of the proposition that a significant percentage of the traffic on the interstates circuits could be intrastate. Again, however, this begs the question of whether this was true for these orders in the state of Washington. Ms. Field presented nothing more than a general estimate, based on AT&T's experience nationwide, not in Washington, of how much traffic might be intrastate. The testimony does not tie to any specific order in this case. The testimony also contained the explicit statement that the percentage of intrastate usage varies according to the customer's application. Thus, additional testimony would have been necessary for AT&T to actually show intrastate traffic and meet the requisite standard of proof.

In spite of AT&T's assertions that intrastate traffic may travel over interstate circuits, the more compelling evidence shows that when all the traffic is known to be intrastate, the service is in fact purchased out of the state, not the federal tariff. Ms. Field was asked if a dedicated circuit for intrastate traffic between Tacoma and Seattle could be

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

purchased out of the interstate tariff and she responded "no." (Tr. 255).

Taking another tack, AT&T attempted to suggest that vast amounts of intrastate traffic were potentially at issue by claiming that U S WEST's annual access revenues included $1 billion in intrastate revenues. However, this misses the point, as it does not specifically identify any traffic at issue in this complaint in the state of Washington. In fact, if revenues are to be considered, U S WEST would point to exhibit C-25, which details the switched and dedicated access revenues that U S WEST receives from AT&T in Washington. The switched access revenues are irrelevant for purposes of this proceeding, because AT&T presented no evidence that orders for switched services were held or delayed. AT&T agreed that all of the orders identified in both Ms. Field's and Mr. Wilson's testimony were for dedicated, not switched services. (Tr. 194, 635). Looking only at dedicated access, the revenues from AT&T for intrastate services were small, less than half a million dollars for the entire year. Thus, AT&T's revenue argument does not advance its cause.

70 held orders – Exhibit # 5: The next exhibit upon which AT&T relies is a snapshot of held orders as of August 6, 1999. AT&T's own witness, Ms. Field, established that AT&T believed that each and every one of the 70 held orders initially at issue in complaint, and detailed in that exhibit, were ordered out of the interstate tariff. Each order was for a dedicated rather than a switched service, and, as such, AT&T designates a PIU (percent interstate usage) on the order as 100%. On orders for dedicated services purchased under the interstate tariff, the percent interstate usage is always designated as 100% interstate usage. (Ex. 20, p.57). Ultimately, it was disclosed by U S WEST's own

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

research that one order was placed under the intrastate tariff.

While there was much discussion about how such circuits *could*, in the abstract, still carry interstate traffic, there was not one scintilla of evidence that any of these 70 circuits (other than the one intrastate order) actually carried even one minute of intrastate traffic. This is in spite of the fact that AT&T's witness and counsel were given multiple opportunities to explain where on the record this information had been provided.
U S WEST will discuss in its responsive brief on the merits why no violations of state law or rules have been shown with regard to the intrastate orders themselves. The purpose of this filing is simply to argue that the level of proof required in this complaint with regard to levels of intrastate traffic has not been met. One order out of 70 is 1.4%, which does not appear to meet the requirement that there be a sufficient quantity of intrastate traffic to warrant a decision on the merits of AT&T's complaint.

Exhibits 14 and 15 – Customer Examples: These exhibits to Ms. Field's direct testimony purport to show customers with delayed orders, but again are devoid of any proof that the services were ordered out of the intrastate tariff or that intrastate traffic was affected.

Other Exhibits in Ms. Field's Testimony: Ms. Field presents four illustrative exhibits: 2, 3, 4, and 17. All of these show simplified diagrams of types of network access services, but none shows any actual intrastate traffic affected by the orders or allegations in the complaint.

Direct and Reply Testimonies of Kenneth Wilson – Exhibits C-101 and C-112: AT&T next introduced the testimony of Kenneth Wilson. Mr. Wilson does not discuss any

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

orders specifically. He had no personal knowledge about any of the orders he included in his testimony, relying on AT&T personnel to supply him with data which he subsequently analyzed. (Tr. 597-9) His testimony does not identify any intrastate traffic. Some of the data Mr. Wilson relies upon is not even Washington-specific, much less intrastate. For example, the information presented at pages 8 and 14 of exhibit C-101 is regional data (Tr. 639), with no showing of how the information correlates to Washington, or whether intrastate traffic is impacted.

Mr. Wilson's reply testimony also addresses the "gold, silver, bronze" wire center designations, and contends that "bronze" wire centers received slower provisioning than others. Again, the merits of this argument will be addressed in the brief on the substantive issues. Here, however, it is important to note that Mr. Wilson's analysis not only fails to establish whether AT&T received disparate treatment from U S WEST's retail customers, it fails to establish that any intrastate orders were provisioned in a discriminatory manner. Mr. Wilson's analysis with regard to the provisioning intervals was based on a data set (in exhibit C-118, discussed below) which did not identify or distinguish between inter and intrastate orders, or inter and intrastate traffic.

Data in Exhibit C-118: This document consists of three separate reports containing information about DS1 special access orders that AT&T placed with U S WEST from October 1998 through September 1999. The first report of the three contains the largest data set, including 1075 DS1 orders in Washington. However, Mr. Wilson's analysis but did not distinguish between inter and intrastate orders, and Mr. Wilson could not testify whether any of the 1075 orders had been placed under the intrastate tariff. (Tr.

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

326). In the two smaller data sets which were included in Exhibit C-118, a total of six orders were identified which were placed under the intrastate tariff, three orders on the second data set and three on the third. However, Mr. Wilson did not consider the inter or intrastate designation in his analysis. (Tr. 336, 610).

All of the other exhibits attached to Mr. Wilson's testimony, including all of his graphs and scatter plot charts, are based on either exhibit C-118, which contains no evidence of intrastate traffic beyond the six orders already discussed, or on U S WEST's data request response number 18, which contained region-wide data, and did not identify or establish intrastate traffic.

The six orders placed under the intrastate tariff undeniably affect intrastate traffic, but are only a very small portion of the orders overall. Six out of 1075 is less than one percent of all orders (approximately 0.6%). One of these orders is a duplicate of the intrastate order identified in Ms. Field's testimony, which means that the entirety of AT&T's proof regarding intrastate traffic rests on six out of 1075 orders. Leaving aside whether or not the provisioning of these six orders was in accordance with tariffed requirements[2], it is clear that this exhibit does not establish a sufficient volume of intrastate traffic to warrant proceeding to a decision on the merits of this case.

B. Summary of the Law Under Which AT&T Claims Relief

AT&T claims relief under three counts. U S WEST describes below that the statutes and rules cited are not shown to be violated under the facts established at the

[2] That discussion is really a discussion of the merits of AT&T's claims. While U S WEST is confident that the merits are in its favor, that issue seems to be more appropriately addressed in U S WEST's responsive brief rather than in this motion to dismiss.

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

hearing. Additionally, although AT&T vigorously claimed tariff violations, no such violations were pled in the complaint, and no such violations were established on the record. While U S WEST expects that some of the discussion below will overlap its arguments in is substantive responsive brief to be filed on March 21, 2000, U S WEST believes that it is important to present a summary here, and briefly show why AT&T's evidence does not establish that it is entitled to relief as claimed.

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

1. Failure to Furnish Necessary Facilities

In its first count, AT&T claims that U S WEST's failure to provision necessary access facilities constitutes an unreasonable and unnecessary practice resulting in a failure to equally utilize toll facilities, and failure to secure adequate facilities. AT&T specifically claims that U S WEST has violated RCW 80.36.300(2) (state policy to maintain and advance the efficiency and availability of telecommunications service), RCW 80.36.160 (Commission to prevent arbitrary and unreasonable practices which may result in the failure to utilize the toll facilities of all telecommunications companies equitably and effectively), RCW 80.36.260 (the Commission may order betterments to secure adequate service or facilities for telecommunications communications) and WAC 480-120-500 (general requirements regarding service quality).

AT&T has not established that it is entitled to relief under the cited provisions of the law. In the first instance, AT&T's claim for relief under this count is predicated on a failure to provision. AT&T has not established even one instance of a failure to provision necessary facilities. AT&T did not establish any held or missed orders for switched access. AT&T did not establish any orders for dedicated access that U S WEST failed or refused to provision. The six orders for intrastate service that are shown on exhibit C-118 were filled as of the date of the hearing, and none of the orders shown on either exhibit 5 or exhibit C-118, inter or intrastate, were shown to be orders where U S WEST refused to provision facilities as stated in count one.

As to the specific statutes under which relief is claimed, no violations are shown. U S WEST cannot be in violation of RCW 80.36.300, because that is a general policy

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

statement and imposes no specific duty on any carrier. That notwithstanding, even if U S WEST were somehow obligated under this statute "to maintain and advance the efficiency and availability of telecommunications service," there is no showing that U S WEST's provisioning performance failed to meet this standard, or even what the specific standard is, or what performance would be required under this statute.

RCW 80.36.160 allows the Commission to prevent arbitrary and unreasonable practices which may result in the failure to utilize the toll facilities of all telecommunications companies equitably and effectively. AT&T has not established any practices of U S WEST to be arbitrary or unreasonable, and has not shown any resulting "failure to utilize" the toll facilities of either U S WEST or AT&T equitably or effectively.

AT&T next claims that U S WEST has violated RCW 80.36.260, and that the Commission should order betterments to secure adequate service or facilities for telecommunications communications. Here again, AT&T's claim for relief is predicated on having made a factual showing that U S WEST failed or refused to provision service. Facilities and service were provided in response to each of AT&T's claimed "missed" orders, and AT&T's own witness described that it was not accumulating a backlog of orders, but that orders were in fact filled in approximately the same number as were placed each month. (Tr. 666).

Finally, AT&T claims that U S WEST is in violation of WAC 480-120-500 and that AT&T is entitled to relief under that rule. AT&T is wrong for the simple reason that this rule, by its own terms, does not provide a basis for a claim for relief. Subsections (1) and (2) set forth general service quality standards, which in any event are not shown by

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

AT&T to be violated, and subsection (3) explicitly states that "[t]hese rules are not intended to establish a standard of care owed by a telecommunications company to any customer(s) or subscriber(s)." With that clear language in the rule, it is puzzling at best why AT&T claims relief under those provisions. Nevertheless, AT&T has not pointed to any acts by U S WEST that violate the standard set forth in this or any other service quality rule.

2. Failure to Reasonably Furnish Requested Telecommunications Services

In its second count, AT&T claims that U S WEST's failure to provision necessary access facilities, and its failure to timely provision those facilities that it does provide, constitutes a failure to reasonably furnish telecommunications services. AT&T specifically claims that U S WEST has violated RCW 80.36.090 (upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled to suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded), 80.36.080 (render and perform requested services in a prompt, expeditious and efficient manner), and WAC 480-120-051 (company shall endeavor to provide a specific date upon which service will be provided and if service cannot be supplied as agreed to promptly notify the applicant of the delay and the reason therefor).

AT&T has not established that it is entitled to relief under any of the cited provisions of the law. RCW 80.36.090 requires all companies, upon reasonable notice, to furnish to all persons and corporations who apply for and are reasonably entitled to suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded. As previously noted, there is no evidence that U S WEST failed to

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

furnish service to any person reasonably entitled thereto. All intrastate orders complained of were filled as of the date of the hearing. (Exhibit C-118, second and third data sets). No interstate orders were shown to be unfilled, or shown to have any intrastate traffic on the ordered circuits.

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U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

RCW 80.36.090 is often referred to as the "obligation to serve" statute. It does not, however, impose an unconditional obligation to serve on a carrier.[3] In fact, the Commission has recognized that a carrier may appropriately define its obligation to furnish a particular service through the terms and conditions set forth in its tariffs. Different services, provided pursuant to different tariffs, may be provided under different terms and conditions. Notably, AT&T here has failed to plead or prove tariff violations, or to establish whether or why U S WEST's provisioning in any particular case was unreasonable.

RCW 80.36.080 requires all companies to render and perform service in a prompt, expeditious and efficient manner, in accordance with the "rules and regulations" (tariffs) of the company, and at the rates and charges established by the company. Again, with regard to the fulfillment of orders out of the intrastate tariff, AT&T has not established that any service order was not rendered "promptly" under the circumstances present in each particular case. There is no requirement that U S WEST fill each and every order on AT&T's demanded due date, which is clear from U S WEST's tariffs. AT&T admits that there is no 100% "on time" standard, and that it would allow a 95% standard as reasonable. Thus, AT&T is bound to show that U S WEST acted unreasonably in provisioning the intrastate orders in this case. AT&T has failed to do so.

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[3] In Docket No. UT-961638, U S WEST filed tariff revisions to its basic local services tariff. The Commission noted that those tariff revisions called for the interpretation and application of both RCW 80.36.090 and RCW 80.36.300, as does AT&T's complaint here. The Commission stated in that decision that it was frustrated by U S WEST's decision to address the issue in a contested case proceeding, stating "[w]e reiterate here our strongly held belief that critical public policy issues of this magnitude, breadth, and impact are not appropriate for resolution a the context of a formal adjudication." The same is true here, where AT&T is demanding sweeping policy holdings and general interpretation of these statutes, but is clearly not proving individual violations.

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

WAC 480-120-051 provides that the company shall endeavor to provide a specific date upon which service will be provided, and if service cannot be supplied as agreed to promptly

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

notify the applicant of the delay and the reason therefor. AT&T's exhibits demonstrate that U S WEST did in fact provide AT&T with due dates, and that U S WEST notified AT&T when orders would be delayed, and gave the reason for that delay. Exhibits 5 and C-118 (third report). Even in instances where the "reason" column states that no reason was given, that is not evidence that U S WEST violated the rule. For example, the 16th listed order on the third report of exhibit C-118 (PON PWS01811872) shows that U S WEST did not provide a reason. However, that order was placed with a requested installation interval of only two days. The information shows that U S WEST committed to a due date of 8-5-99 and met that due date, so of course there is no "reason," because the order was not missed or delayed. Further, this information was supplied by an AT&T employee who did not testify at the hearing, and who was not available for cross-examination. The data was sponsored by a witness who had not reviewed most of the underlying data, and whose other data were shown to be inaccurate. Little reliance should be placed on this document in any event.

3. Prejudice and Disadvantage to AT&T

In its third count, AT&T claims that U S WEST's failure to provision necessary access facilities or to timely provision facilities subjects AT&T and its customers to unreasonable and unlawful disadvantage and prejudice in violation of state law. AT&T specifically claims that U S WEST has violated RCW 80.36.170 (undue or unreasonable preference or advantage, or prejudice or disadvantage prohibited), RCW 80.36.186 (unreasonable preference or disadvantage prohibited with regard to access to non-competitive services), and RCW 80.36.300 (state policy not to allow subsidy of

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

competitive ventures with rates for non-competitive services).

AT&T has not established that it is entitled to relief under the cited provisions of the law. AT&T's entire discrimination claim rests on region-wide data (U S WEST's discovery response number 18, admitted as exhibit C-211), which is not state-specific and which does not differentiate between interstate circuits and intrastate circuits. AT&T cannot point to any facts or evidence whatsoever that shows that in Washington, AT&T has been disadvantaged relative to other customers. AT&T's only state specific claim regarding discrimination is really just an allegation that U S WEST provisions more quickly in some wire centers than others. This does not establish discrimination. First, this allegation, even if true, does not show that AT&T received any disparate treatment in any location that might constitute an undue or unreasonable disadvantage compared to the service that other customers received. Further, different provisioning intervals for different geographic locations are not in and of themselves discriminatory. U S WEST's tariff and service interval guide sets up standard intervals of five days in "high density" (urban) areas, eight days in "low density" areas. (Tr. 328). This is not undue or unreasonable discrimination, and AT&T does not claim that it is. Further, AT&T has wholly failed to establish any evidence of a subsidy in connection with intrastate rates. There is no evidence whatsoever about the costs or rates of any intrastate service, or evidence establishing that any non-competitive services subsidize other ventures.

Finally, AT&T asks that the Commission impose penalties on U S WEST pursuant to RCW 80.04.380, asking for penalties for every current held order, every future held order and all orders which are not timely filled. The record is void of any evidence

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040

supporting a penalty assessment. In order to assess penalties, the Commission must first make a finding that U S WEST has violated an order, rule, direction, or requirement of the Commission. AT&T has failed to establish any such violations, and has particularly failed to show that any intrastate services, provisioned under the Washington tariffs, were provisioned in violation of any specific Commission requirements. Indeed, AT&T agreed more than once that there was no specific standard requiring provisioning in any particular timeframe, or requiring U S WEST to fill any certain number or percentage of orders on the customer requested due date. (Tr. 227). AT&T further agreed on the record that a "zero held order" standard should not be imposed, contradicting its claim for relief in the complaint. (Id.)

III. CONCLUSION

AT&T has failed to meet its burden of proof, and has failed to establish that on the facts and the law it is entitled to any relief. As the complainant, and under the Commission's prior orders in this docket, AT&T was bound to present sufficient facts establishing its right to relief, and evidence of sufficient amounts of intrastate traffic to warrant the Commission proceeding to a decision on the merits. AT&T had failed to do so. The complaint should be dismissed with prejudice.

DATED this 29th day of February, 2000.

U S WEST Communications, Inc.

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Lisa A. Anderl, WSBA No. 13236

U S WEST, Inc.
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 343-4000
Facsimile: (206) 343-4040