

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NORTHWEST PAYPHONE ASSOCIATION, A	)	
WASHINGTON NON-PROFIT CORPORATION,	)	
DIGITAL ACCESS COMMUNICATIONS CORP.,	)	
NCS TELEWORK COMMUNICATIONS CO.,	)	
PAYTEL NORTHWEST, INC., AND PUBLIC	)	
COMMUNICATIONS OF AMERICA,	)	
Complainants,	)	DOCKET NO. UT-920174
	)	
v.	)	
	)	
U S WEST COMMUNICATIONS, INC.,	)	FIFTH SUPPLEMENTAL ORDER
	)	DENYING RECONSIDERATION,
Respondent.	)	CLARIFICATION, REHEARING,
.....	)	AND REOPENING

**SUMMARY**

**PROCEEDINGS:** On March 17, 1995, the Commission issued the Fourth Supplemental Order, a final order in the above captioned and docketed matter.<sup>1</sup> On March 27, 1995, U S WEST Communications, Inc. (U S WEST or company), filed a petition for reconsideration, clarification, rehearing or reopening of the Commission's final order. On April 7, 1995, U S WEST filed an emergency motion for stay of the Fourth Supplemental Order.

The Commission received the answer of the complainants, Northwest Payphone Association, et al. (complainants or NWPA), to U S WEST's motion for stay on April 11, 1995; U S WEST replied to complainants' answer on April 18, 1995. On April 28, 1995, complainants and Commission Staff answered U S WEST's petition for reconsideration; the company replied to complainants and Commission Staff on May 5, 1995.

**COMMISSION:** The Commission rejects the motion of U S WEST for an emergency stay of the Fourth Supplemental Order, and denies the company's petition for reconsideration. The company must file tariffs consistent with the Commission's Fourth Supplemental Order within 20 days of the effective date of this Order.

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<sup>1</sup> ORDER GRANTING COMPLAINT IN PART, DOCKET NO. UT-920174, MARCH 17, 1995

**MEMORANDUM**

**I. Emergency Motion for Stay**

U S WEST's emergency motion for stay of final order in this matter was filed on April 7, 1995, 21 days after issuance of the Fourth Supplemental Order against which the motion is directed. RCW 34.05.467 provides for the filing of a stay of the effectiveness of a final order "within ten days of its service unless otherwise provided by statute or stated in the final order." The company contends it misread the Commission's final order to require filing of tariffs within 60 days of the order instead of the 20 days stated therein.

The deadline for filing a motion for stay of a final order is set in conjunction with RCW 34.05.470 governing petitions for reconsideration, which likewise must be filed within ten days of service of a final order. This section explicitly states that "no petition for reconsideration may stay the effectiveness of an order." It is therefore contemplated by the Administrative Procedure Act that any party seeking reconsideration of a final order must affirmatively move for a stay of that order's effectiveness within the same time limit provided for filing for reconsideration.

The Commission's final order does not make any other provision for seeking a stay of its effectiveness, and U S WEST has cited to no other statutory basis for its motion. The Commission therefore rejects the company's motion for stay of the Fourth Supplemental Order as untimely filed.

**II. Issues in Petition for Reconsideration, etc.**

U S WEST urges three primary arguments in its petition for reconsideration: First, while claiming to accept the fundamental proposition that a properly constructed imputation test must be applied when setting the price floor for essential monopoly services utilized by its competitors, the company faults the Commission's imputation test for public payphone services for failing to include other relevant costs and revenues. The company asks the Commission to reconsider the elements of the imputation test and to re-open this proceeding to establish that current rates pass the proper imputation test.

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Next, the company asserts that before the Commission can address the substantive issues posited by the complaint, it must resolve the threshold jurisdictional issues whether public payphone service is regulated and public payphone providers are telecommunications companies. Finally, the company argues the Commission cannot in the context of a complaint proceeding order a reduction in challenged rates without inquiring whether the new rates will produce "fair, just, reasonable, remunerative and sufficient rates and revenues for the Company." [Emphasis in petition.]

The complainants answer that the Commission should deny U S WEST's petition because the company's positions already have been argued and rejected, or could have been raised previously and the company failed to do so. NWPA maintains that U S WEST has presented no justification for re-opening the record to update costs. Neither has the company demonstrated that its purported new evidence was essential to the Commission's decision nor that it was unavailable during the hearings in this matter.

NWPA argues the Commission twice has resolved the issue of jurisdiction over their complaint irrespective of complainants' classification. Finally, the complainants repudiate the company's contention the Commission could not order rate reductions without considering the impact upon the company's revenue requirement.

### III. Imputation Test

#### A. U S WEST Petition

The company recognizes that an imputation test is appropriate to establish a price floor for its public payphone service and accepts the cost inputs identified in the Commission's final order, but disagrees with the conclusion that the retail rate for a local payphone call is below the appropriate price floor. The company argues this conclusion is reached because the Commission erred when it rejected the use of toll and operator services and other revenues in the imputation test it approved.

In support of its position, the company urges that "competitive fairness" requires recognition in imputation tests of the same revenues (as determined by the marketplace) to which all competitors have access and the same cost drivers to which all competitors are subject. U S WEST also challenges the exclusion of revenue derived from the placement of telephone directories alongside payphones as appropriate to the imputation test, noting "the same analysis is applicable" to this revenue.

The company claims that it now can prove to the Commission that its public payphone service passes the Commission's imputation test. It conducted a new imputation analysis using the Commission ordered methodology, and this time it used "current costs" and added the "revenues" described above, with the result that its current rates pass imputation testing and do not require rebalancing.

As a result of its recalculation, U S WEST asks the Commission to reconsider the methodology established in the Fourth Supplemental Order to permit inclusion of toll and operator services and directory placement revenues and be updated to use current costs. The company also requests that this proceeding be re-opened to take into evidence its calculations<sup>2</sup>, which it argues will "demonstrate that cost-revenue relationships are satisfied and no changes in current rates are indicated, absent any determination of current revenue requirement."

U S WEST also urges reconsideration to provide "an opportunity to clarify precisely how 'public policy' payphones are to be accommodated in a proper imputation test." The company claims the Commission order is "unclear whether revenues and expenses associated with such phones are to be excluded or included in a proper imputation test." It is the company's position that imputation is not appropriate for those payphones it would remove from service if it were unregulated.

B. NWPA Answer

The complainants argue the petition for reconsideration should be denied because U S WEST has not demonstrated it is entitled to relief based upon the criteria for reconsideration established by Commission rule and precedent. Specifically, NWPA maintains the petition re-argues issues/positions previously argued at hearing and rejected in the Commission's final order and raises "new" arguments which were clearly available to the company at hearing but are now raised for the first time upon reconsideration.

It is the contention of NWPA that the Commission considered the testimony of U S WEST with regard to appropriate revenues and expenses to be included in an imputation methodology and explicitly rejected the company's position. Likewise,

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<sup>2</sup> U S WEST filed with its petition for reconsideration Confidential Exhibit A which identifies only the price floor figure for a public payphone local call using imputation analyses now advocated by the company.

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complainants argue U S WEST had the opportunity to update to "current costs" during the hearing process and failed to do so, thereby waiving any right to raise this information upon review. More importantly, they argue the company has failed to make the requisite demonstration that this new data was "unavailable and not reasonably discoverable by U S WEST at the time of the original hearings or some other good and sufficient cause," and that it was essential to the decision reached by the Commission.

Finally, the complainants answer that the Commission's exclusion from the imputation test of "public policy" payphones is amply supported by the record. They argue the company's position on such phones has no basis in any Commission decision, their number was grossly overstated, and complainants demonstrated that even accepting U S WEST's "public policy" payphone test, a price squeeze exists.

C. U S WEST Reply

In its reply, U S WEST reiterates competitive fairness requires that no competitor, including it, be disadvantaged by a Commission policy regarding price floor. In formulating such important economic policy as imputation price floors for all of its services, the company calls for all members of the Commission to be engaged in the decision.

U S WEST quotes complainants' witnesses as establishing the proposition that operator service revenues are part of payphone operations and commissions are paid on that revenue, and therefore must be included in the imputation test. The company reports that it now voluntarily pays such commissions, which it contends is "new information that the Commission must consider in setting imputation tests" which was not part of the record when closed. Since U S WEST now pays commissions, operator revenues are urged as a necessary part of any imputation test, and they argue for recognition of operator services revenue in the imputation analysis and clarification of the appropriate removal of public policy payphones from the cost-price equation.

D. Commission Discussion and Decision

The Commission will not disturb its decision on the appropriate imputation test for the local public payphone market. As we stated in the Fourth Supplemental Order, "[the analysis we approve] is a very narrow and conservative imputation test."

The Commission discussed at length its rationale for limiting the imputation test to an analysis that compares "the revenue derived from a local call with the tariffed rate for 'bottleneck' network services, plus the additional incremental costs of providing local payphone service." [Emphasis added.]

While the parties proposed other costs and revenues under various imputation scenarios, the Commission noted that no party "included both revenues and costs for these services in their imputation analysis."

The Commission limited the imputation test to local payphone revenues in order to determine whether the relationship between the public access line rate and the \$0.25 per local call created a price squeeze. We prescribed explicitly the cost and revenue components both to be included and excluded from the imputation test consistent with our responsibility to make this focused determination. We continue to believe the imputation test we adopted is appropriate for the local public payphone services market and the issues posited by this complaint. The Commission therefore will not grant reconsideration to accept other imputation analyses containing different and additional costs and revenues.

#### IV. Commission Jurisdiction

##### A. U S WEST Petition

The company again raises the issue of the Commission's jurisdiction to hear this complaint. U S WEST asserts the Commission must state as a matter of law whether a non-local exchange company, non-alternate operator services company offering public payphone service is providing telecommunications service, must register as a telecommunications company with the Commission, and whether such providers must file tariffs or price lists for payphone services. Further, if the Commission's position is that these payphone service providers are not telecommunications companies, the company urges the Commission must state if and why U S WEST is.

##### B. NWPA Answer

The complainants answer that the Commission has twice considered and rejected U S WEST's arguments on lack of jurisdiction. They assert the arguments presented by the company do not constitute a proper basis for reconsideration.

NWPA argues the registration statute's purpose is to facilitate Commission regulation in the public interest, not to shield U S WEST from claims of anti-competitive behavior. To prohibit the Commission from hearing a complaint by an unregistered telecommunications company, which NWPA maintains is not supported by Washington law, would prevent the Commission from protecting the public interest.

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NWPA challenges U S WEST's assertion the Commission must decide whether complainants are telecommunications companies, and if so, whether they are exempt from regulation. They argue the complaint did not seek classification, U S WEST did not counterclaim seeking classification nor did it petition for declaratory order whether complainants are entitled to service from U S WEST pursuant to WAC 480-120-061(9), Refusal of service, nor did U S WEST's amended answer to the amended complaint address classification, registration, or jurisdiction.

C. U S WEST Reply

U S WEST reasserts its argument that NWPA failed to establish its complaint falls within the strictly limited jurisdiction of the Commission. Nor does the Commission have any authority to right alleged competitive inequities except between regulated companies. The company posits that because the Fourth Supplemental Order does not adequately examine the pivotal issue of Commission jurisdiction over this complaint, the Order must be reconsidered.

D. Commission Discussion and Decision

The Commission finds nothing in the petition of U S WEST to support reconsideration of our jurisdiction to hear this complaint. The parties presented written pleadings and oral argument to the Commission on the issue of jurisdiction at the outset of this proceeding. We reviewed carefully complainants' proffered bases for the complaint, and U S WEST's arguments opposing our exercise of jurisdiction at that time, and determined there was adequate statutory authority in the Commission to exert jurisdiction.

Again, in the Fourth Supplemental Order, we restated our assertion of jurisdiction generally under RCW 80.04.110 and RCW 80.36.135. Our Order also recited our broad authority to protect against discrimination pursuant to RCW 80.36.080, .140, .170, .180, and .186. U S WEST's petition has provided no acceptable basis for reconsidering our exercise of jurisdiction over this complaint and we decline to do so.

V. Rate Reductions

A. U S WEST Petition

U S WEST argues the Commission cannot order it to lower its current rates for public access line (PAL) and answer supervision-line side services (AS-LS) without an investigation into the effect of such action on the company's opportunity to

earn a fair rate of return. Here, there is no evidence in this record on the company's level of earnings either before or after the ordered rate reductions. Therefore, the Commission cannot lawfully order U S WEST to unilaterally reduce rates because the Commission cannot make the requisite findings that such rates will be fair, just, reasonable, and sufficient.

B. NWPA Answer

NWPA answers contending U S WEST had ample notice that rate adjustments were under consideration in this complaint proceeding. U S WEST elected not to present any evidence regarding potential rate of return effects, did not address the issue on brief, and has not alleged it was unable to address the issue at hearing or on brief. Therefore, NWPA urges the prerequisites for reconsideration have not been met.

The statutory grant in the Commission of primary jurisdiction to determine whether rates are preferential or discriminatory pursuant to RCW 80.36.170, .180, .186 would be meaningless if the Commission were powerless to order changes in rates it finds preferential, disadvantageous, anticompetitive, or discriminatory. NWPA argues the power to enforce these statutory provisions is the Commission's authority to adjust rates to correct these abuses.

NWPA argues it proved the existence of a price squeeze. To remedy this price squeeze, the Commission ordered rate reductions for two "bottleneck" monopoly services to eliminate the price squeeze rather than increase the local coin rate. U S WEST's PAL and AS-LS rates remain above its long-run incremental cost of providing the service.

It is NWPA's position that U S WEST could have raised insufficiency of rates as an affirmative defense. If it had, U S WEST would have borne the burden of producing evidence on the sufficiency of rates which resulted from correcting the price squeeze. NWPA notes U S WEST had ample notice of rate adjustments sought by complainants, and was in sole possession of the facts necessary to make a demonstration of the sufficiency of the proposed rates.

C. Commission Staff Answer

Commission Staff asserts authority in the Commission to order rate reductions in the instant complaint proceeding. The jurisdictional requirements are met as complainants are customers of U S WEST; the Commission has broad regulatory authority to prescribe rates charged customers. Commission Staff cites State

ex rel. Goss v. Metaline Falls Light & Water Co.<sup>3</sup> where the Washington Supreme Court interpreted RCW 80.04.110, the complaint statute, ruling that complaints alleging discrimination may be brought by any person.

Staff argues the distinction between a rate or revenue requirements case and a proceeding in which the issue is discrimination. Staff cites to a decision of the Federal Power Commission, In Re Northern Natural Gas Company<sup>4</sup>, in support of this distinction:

The matter before us involves that which is frequently termed a "discrimination case" as distinguished from that which is usually called a "rate case." As so designated, the latter type of case generally involves a determination as to the reasonableness of rates in the sense of whether they are excessive and unjust. Here we are not concerned with reasonableness in this sense, but rather as to whether rates--otherwise presumed to be reasonable--are unduly discriminatory or preferential. [Emphasis supplied in Staff Answer.]

Staff argues the record in the instant proceeding supports both jurisdiction and the finding of a price squeeze, and therefore the Commission does have authority in the context of this complaint filing to order U S WEST to lower its PAL and AS-LS rates. The Commission is not obligated to determine whether or not a utility is earning an overall fair rate of return on each rate it charges. Staff urges U S WEST is free to file a rate case at any time it believes its revenue requirement to be inadequate.

Commission Staff reinforces NWPA's contentions that a party cannot assert new defense theories on appeal. US WEST's rebuttal case and closing brief are devoid of argument on the Commission's lack of authority to order rate reductions outside a general rate case -- it is now not an appropriate basis for reconsideration. Petitions for reconsideration and re-hearing must present "additional, newly discovered evidence not discoverable through the exercise of due diligence prior to close of the record." Likewise, the U S WEST petition does not meet the standards for re-opening under WAC 480-09-820.

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<sup>3</sup> 80 Wash. 652 (1914)

<sup>4</sup> 9 PUR 3d 8 (1955)

Finally, Commission Staff notes U S WEST appears regularly before the Commission seeking rate adjustments. The Commission reviews the individual rates at issue to determine whether the proposed rate is compensatory. Staff asserts that not every rate adjustment case is a revenue requirements case. Staff argues if that were so, every complaint case involving rates would necessarily become a rate case.

D. U S WEST Reply

U S WEST argues that complaints directed against the existing level of a regulated company's rates, whether brought by the Commission or a third party pursuant to RCW 80.04.110, place no burden on the respondent company to justify those rates. In the instant case, complainants' direct case presented no evidence that any proposed rate adjustment would result in "sufficient" rates to the company.

Citing POWER v. Washington Utilities and Transportation Commission,<sup>5</sup> U S WEST maintains the Commission is obligated to allow U S WEST rates "sufficient to create an opportunity to earn a fair rate of return on its property dedicated to the public use." The Commission cannot order U S WEST to reduce rates in any proceeding by any amount, especially in a third party complaint proceeding, with no evidence that the existing rates are producing excess revenue to the company.

E. Commission Discussion and Decision

The Commission is not persuaded by U S WEST's characterization of our inability to lower rates for a service upon successful prosecution of a complaint proceeding against those rates. Commission Staff and NWPA have drawn a clear and convincing legal distinction between the traditional rate case where revenue requirement is a central issue and a complaint case alleging undue discrimination with regard to individual rates.

The Fourth Supplemental Order discusses the limited rate adjustments for PAL and AS-LS services in response to the price squeeze demonstrated by the complainants. As noted by NWPA, the rates ordered by the Commission remain above U S WEST's long-run incremental cost of providing the services. This result is consistent with Staff's assertion that the Commission's responsibility is to review every rate to ensure that it is compensatory. The Commission will not reconsider its decision to order rates to be lowered for PAL and AS-LS services.

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<sup>5</sup> 104 Wn.2d 798 (1985)

Having reviewed above in detail the parties pleadings on the petition for reconsideration, and having stated findings and conclusions, the Commission now makes and enters the following Order.

**ORDER**

THE COMMISSION ORDERS:

- 1. The U S WEST Communications, Inc., Emergency Motion for Stay of Final Order is rejected as untimely filed;
- 2. The U S WEST Communications, Inc., Petition for Reconsideration, Clarification, Rehearing or Reopening is denied;
- 3. U S WEST Communications, Inc., is ordered to file tariffs as fully described in the Fourth Supplemental Order in this matter within 20 days of the effective date of this Order; and,
- 4. The Commission retains jurisdiction to effectuate the terms of this and other Orders in this matter.

DATED at Olympia, Washington, and effective this 29th day of June 1995.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*Sharon L. Nelson*

SHARON L. NELSON, Chairman

*Richard Hemstad*

RICHARD HEMSTAD, Commissioner