

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC.,

Complainant,

v.

US WEST COMMUNICATIONS, INC.,

Respondent.

NO. UT-991292

COMMISSION STAFF'S
RESPONSE TO US WEST'S
FEBRUARY 29, 2000, MOTION
TO DISMISS AT&T'S
COMPLAINT

The Washington Utilities and Transportation Commission Staff (Staff) files this brief in response to US West Communication, Inc.'s (US West) motion to dismiss AT&T Communications of the Pacific Northwest, Inc.'s (AT&T) complaint. For the following reasons, US West's motion should be denied.

I. BACKGROUND

1. On August 18, 2000, AT&T filed a complaint against US West and sought relief regarding the "inconsistent and inadequate quality of access service" provided by US West. Complaint, at 1. US West answered the complaint and alleged that the Commission does not have jurisdiction over any services provided out of US West's interstate tariffs, rather the Federal Communications Commission (FCC) must resolve these issues. Answer, ¶ 2.

2. On September 16, 1999, US West filed a motion to dismiss AT&T's complaint. US West argued that the Commission "lacks jurisdiction to consider any complaint or claims related to interstate services." US West's Mot. to Dismiss, at 1-3.

3. By order dated November 12, 1999, the Commission denied US West's motion to dismiss. The Commission held that:

[T]he FCC has not clearly provided that it preempts state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the "ten percent rule" preempts all state regulatory authority, we decline to so rule.

Third Supp. Order, at 4-5. The Commission further stated that the evidence should demonstrate a sufficient volume of intrastate traffic to warrant a decision on the issues presented. *Id.* at 5.

4. On December 15, 1999, US West filed a petition for declaratory ruling with the FCC. In that petition, US West asked the FCC to preempt the Commission's consideration of the issues in this case. *In the Matter of Petition of US West, Inc. for Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Service* (Dec. 15, 1999). Concurrently, US West filed a motion in this case to hold the schedule in abeyance until the FCC resolves the jurisdictional issues. The Commission denied this motion in part because of the uncertainty on when the FCC might rule on US West's request for preemption. Eighth Supp. Order, at 1. As of the filing of this brief, the FCC has not ruled on US West's petition or established a pleading schedule.

5. At the conclusion of AT&T's direct case, US West again moved to dismiss this complaint. The Commission took that motion under advisement. *Tr.*, at 710.

II. ARGUMENT

A. AT&T Demonstrated Sufficient Volume of Intrastate Traffic to Warrant a Commission Order on AT&T's Complaint

6. In its motion, US West argues that AT&T failed to prove sufficient volume of intrastate traffic. However, US West does not argue what volume of intrastate traffic would be sufficient for the Commission to issue an order.

7. The Commission has jurisdiction over the provision of intrastate telecommunications services. *See generally* RCW 80.01.040, chapter 80.04 RCW, chapter 80.36 RCW, and chapter 480-120 WAC. The public service laws require that a party must prove a minimum number of violations in order to establish the Commission's jurisdiction over the complaint. Therefore, by alleging and proving a single violation regarding a single intrastate facility, AT&T properly invokes the Commission's jurisdiction. In its motion, US West states that AT&T provided evidence of at least six held orders that could be identified as intrastate orders. *See* US West's Mot. to Dismiss, at 9; Ex. C-118 (KLW-6). US West acknowledges that these six orders "undeniably affect" intrastate traffic. US West's Mot. to Dismiss, at 10.

8. AT&T has alleged sufficient facts upon which the Commission can evaluate whether US West has violated state law in its provision of intrastate access services to AT&T. US West's motion to dismiss based on sufficiency of intrastate traffic should be rejected.

B. The Commission May Consider Evidence Regarding Interstate Service

9. Commission Staff agrees with US West that AT&T has the burden of proof in this case. The burden of proof in administrative hearing is preponderance of the evidence. *See Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). In this case,

the preponderance of the evidence standard means that it is more likely than not that US West violated state statutes and rules in providing access service to AT&T. *See Personal Restraint Petition of Gentry*, 137 Wn.2d 379, 409, 972 P.2d 1250 (1999) (citing WPI 21.01).

10. US West provides service in accordance with state laws, regulations, and its tariffs. Under its state switched access tariff, US West is required to:

[E]stablish a service date when the customer has placed an order for service with all the appropriate information to allow processing of the Access order. The date on which the service date is established is considered to be the Application Date (Order Date). The Company will provide a firm order confirmation to the customer and will advise the customer of the Application Date and the associated critical dates.

The time required to provision the service (i.e., the interval between the Application Date and the Service Date) is known as the service interval. Such intervals will be established in accordance with the service date interval guidelines as set forth in the Service Interval Guide mentioned in 5.2.1, following, and, where possible, will reflect the customer's requested service date.

WN U-37, Section 5.1.1. With respect to its federally tariffed switched and special access services, US West has nearly identical requirements:

The Company will establish a Service Date (Due Date) when the customer has placed an order for service that with all the appropriate information to allow for the processing of the Access Order. The date on which the Service date is established is the Application Date (Order Date).

The time required to provision the service (i.e., the interval between the Application Date and the Service Date) is known as Service Date Interval. The Service Date Interval is established in accordance with 5.2.1, following. The Company will provide a firm order confirmation to the customer advising the customer the Application Date and the associated Service Date Intervals for the Access Order. Access Order firm order confirmations, where possible, will reflect the customer's requested service date.

F.C.C. No. 5, Section 5.1.1. US West's intrastate private line service is subject to the following requirement:

The Company assures that all provisioning requests for DDS, DS1 and DS3 Service will be installed on the customer requested service date (due date) providing it is equal to or greater than the standard intervals published in the Service Interval Guide. . . .

WN U-33, Section 3.2.2.L.

11. According to US West's federal and state tariffs, the company provides access services as set forth in its Standard Interval Guide. The Standard Interval Guide is the same for services ordered from the federal or state tariffs. Tr., at 279. Because the service intervals are the same regardless of whether the service is purchased from the federal or state tariff, evidence regarding US West's history of meeting the standard intervals for interstate access service is probative of US West's timeliness in providing intrastate access services. Therefore, the Commission should not reject AT&T's evidence regarding its experiences ordering access services from the federal tariff. *See* US West's Mot. to Dismiss, at 4.

C. Violations of State Law and Rules

12. In its motion, US West summarizes the state statutes and rules that AT&T alleged US West violated in an attempt to show how AT&T failed to establish violations of those statutes. Staff agrees with US West that these arguments overlap with the substantive arguments in this case and Staff will more fully address these issues in response to AT&T's brief on the merits. However, Staff believes it is important to respond to US West's arguments that the cited statutes and rules do not establish claims for relief.

1. Failure to Provide Facilities: Alleged Violations of RCW 80.36.160, 80.36.260, 80.36.300(3), and WAC 480-120-500

13. US West argues that AT&T cannot bring a claim of failure to provide necessary facilities because the six held orders for intrastate private line service were filled as of the date of the hearing and that AT&T did not prove that US West failed to fill the orders identified on Exhibits 5 or C-118. US West's Mot., at 11. US West's premise is wrong. As a general rule, service delayed is service denied. A company's failure to furnish facilities in a timely manner can result in a finding that the company failed to provide such facilities.

- *Failure to provide facilities violates RCW 80.36.160*

14. The Commission is authorized by RCW 80.36.160 to require the construction and maintenance of suitable connections between telephone lines in order to prevent arbitrary and unreasonable practices that result in the failure to use toll facilities equitably and efficiently. If the Commission finds that a company has failed to provide (or timely provide) access services that are necessary to provide toll service, the Commission may conclude that the company has violated RCW 80.36.160.

- *Failure to provide facilities violates RCW 80.36.260*

15. If a company has failed to provide (or timely provide) access facilities, the Commission may order the company to make repairs, improvements, extensions, or additions to its network. RCW 80.36.260. The Commission is authorized to make such findings in this case.

- *Failure to provide facilities is contrary to state policy as stated in RCW 80.36.300*

16. US West argues that RCW 80.36.300(2) is a policy statement that does not impose specific duties on carriers. US West's Mot., at 11. While that statute sets forth policy rather than obligations, it remains an important consideration in this case. In interpreting the obligations imposed on carriers by chapter 80.36 RCW and the rules implementing that chapter, the Commission must be guided by the policy statements set forth in RCW 80.36.300. Therefore, while the Commission might not determine that US West "violated" RCW 80.36.300, the Commission properly may find that US West's has not provided access facilities to AT&T in a manner consistent with state policy, and may order US West to amend its provisioning procedures to comply with state policy.

- *Failure to provide facilities is a violation of WAC 480-120-500*

17. US West argues that WAC 480-120-500 does not provide a basis for a claim for relief. US West's Mot. to Dismiss, at 12. US West is wrong. This rule requires carriers to comply with general service quality standards. The Commission may find violations of this rule. The Commission may enforce this rule in the context of a complaint even though the rule is not intended to establish a standard of care for determining negligence in a tort case.

2. Failure to Reasonably Furnish Requested Telecommunications Services: Violation of RCW 80.36.080, 80.36.090, and WAC 480-120-051

18. US West argues that AT&T failed to prove violations of RCW 80.36.080 and 80.36.090 for failure to provide telecommunications service. US West does not argue that these statutes do not support a cause of action. However, US West does argue that AT&T is required to prove violations of US West's tariffs in order to prove a violation of these statutes. US West's Motion to Dismiss, at 14-15. US West is wrong. The Commission can determine that US West

violated a state statute regardless of how the company has interpreted or applied its tariff. In such situations, the Commission can order that US West clarify its tariffs to ensure that they will be applied consistently with state law.

- *Failure to provide service promptly, expeditiously, or efficiently violates RCW 80.36.080*

19. US West argues that 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.’” US West’s Mot. to Dismiss, at 14. US West misstates the requirements of the statute. Contrary to US West’s argument, the requirements of RCW 80.36.080 are independent of the company’s tariffs. Under this statute, telecommunications companies are required to provide service “in a prompt, expeditious and efficient manner.” AT&T has alleged that US West does not fill orders for access facilities in a timely manner. Clearly, the Commission has the authority to order US West to fill orders in a timely manner pursuant to RCW 80.36.080.¹

- *Failure to provide access facilities may constitute a violation of RCW 80.36.090*

20. In addition to the requirements of RCW 80.36.080, the Commission is authorized to require telecommunications companies to provide “suitable and proper facilities and connections for telephonic communications and furnish telephone service as demanded.” RCW 80.36.090. The Commission has the jurisdiction under RCW 80.36.090 to order that

¹US West does not argue that the Commission does not have the authority to order it to provide services in a timely manner. Rather, US West argues that AT&T has not proved that US West violated RCW 80.36.080, .090, or WAC 480-120-051.

US West provide AT&T with access facilities in order to connect US West's local network.

US West argues that AT&T presented no evidence that US West failed to furnish service and that all intrastate orders were filled as of the date of the hearing. US West's Mot. to Dismiss, at 13.

The fact that US West filled outstanding intrastate orders as of the date of hearing does not divest the Commission of the jurisdiction to address the issue of timeliness. Carriers should not have to file formal complaints against US West in order to obtain requested services.

- *Failure to provide services in a timely manner may violate WAC 480-120-051*

21. AT&T also alleged that US West's failure to provide service violates WAC 480-120-052, which requires telecommunications companies to "endeavor to provide a specific date upon which service will be provided," and if service cannot be provided on that date, the company must "promptly notify the applicant prior to the agreed upon date that there will be a delay. . . and the reason(s) therefor." In evaluating the evidence in this case, the Commission may consider whether US West violated this rule.

3. Prejudice and Disadvantage to AT&T: Violations of RCW 80.36.170 and 80.36.186

22. The Commission has primary jurisdiction under RCW 80.36.170 to determine whether a carrier has subjected any particular person, corporation, or locality to any undue or unreasonable prejudice or disadvantage. The Commission also has primary jurisdiction to determine whether a provider of noncompetitive services has granted itself an undue or unreasonable preference or advantage, and to determine whether a carrier has subjected another

telecommunications company to any undue or unreasonable prejudice or competitive disadvantage regarding access to those services. RCW 80.36.186.

23. US West argues that AT&T's sole discrimination claim is nothing more than an allegation that it provides services more quickly in some wire centers than in others, and that this does not establish discrimination. US West's Mot. to Dismiss, at 16. US West is wrong on both counts.

24. First, in addition to its complaint that US West refuses to construct facilities in certain communities, Complaint, ¶ 87, AT&T also alleged that US West provides access for its retail customers more quickly than it does its wholesale customers. Complaint, ¶ 86. If the Commission were to find that US West has favored its own retail customers, the Commission could determine that US West violated RCW 80.36.170 and .186.

25. Second, US West is prohibited from subjecting a particular locality to undue or unreasonable prejudice or disadvantage "in any respect whatsoever." Therefore, US West's refusal to provide facilities, or unreasonably delay facilities, in certain wire centers may constitute a violation of RCW 80.36.170. While it may not be unreasonable to have different provisioning intervals for different wire centers, it may in fact be a violation of RCW 80.36.170 to prioritize wire centers such that some localities do not receive the same services as others.

26. US West states that the only evidence AT&T presented regarding its discrimination claim is region-wide evidence, but stops short of arguing that the Commission cannot consider region-wide evidence in making a determination. US West's Mot. to Dismiss, at 16. Evidence of US West's region-wide approach to providing access facilities to AT&T is

probative as to whether US West discriminates against AT&T in Washington. Rather than dismiss AT&T's discrimination allegations, the Commission could order prospective relief to ensure that US West does not conduct its wholesale activities in a manner that violates RCW 80.36.170 and .186.

III. CONCLUSION

27. AT&T has alleged that US West violated numerous state statutes relating to Z US West's provision of access service in the state of Washington. In presenting evidence in support of its case, AT&T proved that some of the circuits at issue were purchased from the intrastate tariff. Therefore, AT&T presented evidence over which the Commission has jurisdiction. The Commission should reject US West's argument that it does not have jurisdiction over this complaint.

28. AT&T presented evidence of how US West provides access facilities under its interstate tariff, which is probative of how US West provides access facilities under its intrastate tariff because the facilities are the same and the tariffs contain the same or very similar requirements. The Commission should reject US West's arguments that the all of the evidence presented must go to intrastate services or intrastate traffic in order to prove that US West does not provide access to AT&T in a prompt, expeditious, or efficient manner.

29. AT&T alleged that US West violated state laws and regulations by failing to provide, or timely provide, access facilities. The state statutes cited by AT&T provide a basis for

AT&T's complaint. The Commission should reject US West's arguments that AT&T has failed to state a claim upon which relief can be granted.

Dated: March 24, 2000.

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