

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

In Re Petition of)
U S WEST Communications, Inc.) **Docket No. UT-980948**
For a Declaratory Order Ending Imputation)
Of Revenue Derived from Transferred)
Directory Publishing Business)

REJOINDER TESTIMONY OF

MAX JOHNSON

on behalf of

U S WEST COMMUNICATIONS, INC.

July 16, 1999

1

2 **Q. PLEASE STATE YOUR NAME AND ADDRESS.**

3 A. My name is Max Johnson. My business address is 1705 4th Ave. South, Seattle,
4 Washington 98134. My residence address is 9107 NE 42nd St., Bellevue,
5 Washington.

6

7 **Q. ARE YOU THE SAME MAX JOHNSON WHO PREFILED REBUTTAL**
8 **TESTIMONY IN THIS PROCEEDING?**

9 A. Yes.

10

11 **Q. WHAT IS THE PURPOSE OF YOUR REJOINDER TESTIMONY?**

12 A. I respond to statements in the rebuttal testimony of Commission Staff witness Lee
13 Selwyn and Public Counsel witness Michael Brosch that relate to matters of
14 which I have personal knowledge.

15

16 **Q. HAVE YOU REVIEWED THE TESTIMONY OF DR. SELWYN AND MR.**
17 **BROSCH?**

18 A. Yes.

19

20 **Q. AT PP. 2-3 OF HIS SURREBUTTAL, DR. SELWYN STATES THAT**
21 **U S WEST DIRECT OBTAINED ACCESS TO WHAT HE CALLED THE**
22 **THREE MOST CRUCIAL ELEMENTS OF THE DIRECTORY BUSINESS**

1 **THROUGH THE PUBLISHING AGREEMENT. HE STATES THAT**
2 **BECAUSE PNB RETAINED OWNERSHIP OF THESE ELEMENTS, PNB**
3 **COULD HAVE SUCCESSFULLY REENTERED THE MARKET AFTER**
4 **THE EXPIRATION OF THE FIRST PUBLISHING AGREEMENT. THE**
5 **THREE ELEMENTS ARE: (1) EXCLUSIVE PUBLISHING RIGHTS; (2)**
6 **THE RIGHT TO USE THE TELCO NAME AND TRADEMARKS; AND**
7 **(3) ACCESS TO PNB'S SUBSCRIBER LISTINGS. AS THE PERSON**
8 **WHO OPERATED THAT BUSINESS AT THAT TIME, DO YOU AGREE**
9 **THAT THESE WERE THE MOST CRUCIAL ELEMENTS?**

10 A. No. Item one was important, for a limited time. Item two was not important and
11 item three was necessary for the publishing of the white pages but was available to
12 all competing publishers. The "exclusive right" meant that PNB would not
13 compete in its own name in the directory advertising business during the term of
14 the Agreement. While this was important in the first year or so, by the end of the
15 Publishing Agreement U S WEST Direct had established its own identity as the
16 directory publisher and the noncompetition agreement was of little importance.

17
18 U S WEST Direct used the PNB name on its directories, always with the
19 U S WEST Direct name, until the contract that required PNB's name to be on the
20 directory expired, and then U S WEST Direct took the PNB name off the
21 directories. U S WEST Direct did not advertise the PNB name or promote its

1 association with PNB through paid advertising. The U S WEST Communications
2 name was never on the U S WEST Direct directories. The PNB name for a
3 limited period may have been useful to help end users avoid confusion until they
4 became used to the U S WEST Direct covers and its own trademark and logos.
5 The advertisers did not need the PNB name to avoid confusion because
6 U S WEST Direct through sales contacts explained that U S WEST Direct was the
7 successor to the previous operator of the directory business.

8
9 With regard to the third point, U S WEST Direct obtained access to subscriber
10 listings through the initial Publishing Agreement, but the same listings were
11 available to any other publisher at prices that were far below what U S WEST
12 Direct paid in publishing fees to PNB. U S WEST Direct used the subscriber
13 listings to produce the white pages directories. These listings had nothing to do
14 with the sale of directory advertising. U S WEST Direct received separately the
15 service order data, showing new connects and moves and changes which was
16 utilized to identify prospective new business advertisers. Any publisher could
17 obtain this information from PNB.

18

19 **Q. IN YOUR OPINION, FROM HAVING PERSONALLY OPERATED THE**
20 **DIRECTORY ADVERTISING BUSINESS, WHAT WERE ACTUALLY**
21 **THE MOST CRUCIAL ELEMENTS TO THE SUCCESS OF THAT**

1 **BUSINESS AND WHICH COMPANY OWNED AND CONTROLLED**
2 **THEM?**

3 A. In my opinion, based on my personal experience in running U S WEST Direct, the
4 most crucial elements to the success of the directory advertising business were
5 effective systems, knowledgeable people, favorable contracts for printing, paper
6 and distribution and ongoing relationships with advertisers. U S WEST Direct
7 owned and controlled all of these items. U S WEST Direct continued to obtain
8 data processing services from PNB during the Publishing Agreement's early years
9 but by the end of the Agreement it had processing capabilities. All of the
10 knowledgeable people in the yellow pages directory operation came over to
11 U S WEST Direct at the time of the reorganization. All of the contracts for
12 printing, paper and distribution were transferred to U S WEST Direct at the time
13 of the reorganization. And with the sales force came the ongoing relationships
14 with advertisers that were clearly owned, controlled and expanded by U S WEST
15 Direct from the first days of its existence.

16
17 **Q. HAD PNB DECIDED TO REENTER THE DIRECTORY BUSINESS AT**
18 **THE END OF THE AGREEMENT AS DR. SELWYN SUGGESTS, WHAT**
19 **WOULD YOUR REACTION HAVE BEEN?**

20 A. U S WEST Direct would not have exited the market because we had the systems,
21 the people, the contracts and the relationships with advertisers in place and

1 U S WEST Direct was the ongoing publisher. PNB would have had to start up by
2 hiring people, creating systems, establishing supply contracts and marketing to
3 advertisers. U S WEST Direct had firmly established its name and identity to
4 advertisers and users throughout the territory through its aggressive advertising
5 program and had established itself as the publisher of the most complete, accurate
6 and effective directories it marketed.

7

8 **Q. AT PP. 6-7 OF HIS SURREBUTTAL, DR. SELWYN STATES THAT**
9 **BECAUSE OF THE THREE ELEMENTS THAT HE DESCRIBES AS**
10 **CRUCIAL, IF PNB HAD REFUSED TO RENEW THE PUBLISHING**
11 **AGREEMENT, U S WEST DIRECT COULD NOT HAVE CONTINUED**
12 **TO PUBLISH YELLOW PAGES DIRECTORIES IN WASHINGTON**
13 **SUCCESSFULLY. AS THE PERSON WHO MANAGED THAT**
14 **BUSINESS AT THE TIME, DO YOU AGREE WITH HIM?**

15 A. No, and I think that history bears out my view, and contradicts his. If PNB had
16 chosen not to renew the publishing agreement, there is absolutely no doubt that
17 U S WEST Direct would have remained a competitor in the marketplace.
18 U S WEST Direct had been created from the ground up as an unregulated,
19 competitive company that served at least fourteen states, and it did not require
20 PNB's permission to conduct directory advertising business in Washington.
21 U S WEST Direct would have purchased move and change orders at

1 nondiscriminatory prices from PNB just as other publishers did. In fact,
2 U S WEST Dex purchases these items on the same terms and conditions as other
3 publishers do from U S WEST Communications, Inc., today. U S WEST Direct
4 never said on its directories or in its marketing that it was the “exclusive” or
5 “official” publisher for PNB. By 1987 the value of the “exclusive right” had
6 disappeared because by then, PNB would have been the start up company in
7 competition with the holder of the first supplier advantage, and I believe that at
8 best entry would have required considerable time and investment and would have
9 been a challenge. By 1987, which was when the Publishing Agreement expired,
10 U S WEST Direct had already established itself as the publisher of the most
11 accurate and complete directories in Washington and it would have continued to
12 prevail in the marketplace based on that perception by the public. As I stated
13 above, as soon as U S WEST Direct legally could do so, it ceased using the PNB
14 name. In addition, the history of independent directory publishers also bears out
15 my view and contradicts Dr. Selwyn’s. Many of these publishers are thriving in
16 the marketplace, and I know that this is true because I have witnessed their
17 substantial growth over the years. While some have fallen by the wayside, there
18 have been other notable successes.

19

20 **Q. AT PP. 7-8 OF HIS SURREBUTTAL, DR. SELWYN TESTIFIES THAT**
21 **THE PNB FIRST SUPPLIER ADVANTAGE WOULD NOT HAVE BEEN**

1 **DISSIPATED AFTER THREE YEARS OF OPERATION BY U S WEST**
2 **DIRECT BECAUSE THE ORGANIZATIONAL SHIFT OF THE**
3 **RESPONSIBILITY FOR THE PUBLISHING ACTIVITY WAS LARGELY**
4 **TRANSPARENT TO ADVERTISERS AND USERS. IS HE CORRECT?**

5 A. I believe not. The basis of his conclusion, i.e. his characterization of the
6 reorganization, is definitely contrary to historical fact. I lived through this
7 historical period, as manager of the directory advertising operation under both
8 PNB and U S WEST Direct. Dr. Selwyn did not. While U S WEST Direct made
9 sure that advertisers knew that the U S WEST Direct operation included the same
10 people who had produced directories under PNB, the ensuing marketing programs
11 and changes in the directories were aimed specifically at building brand loyalty for
12 U S WEST Direct and increased business for our advertisers. All advertising and
13 promotion of the publishing business was in the U S WEST Direct name, not the
14 PNB name. The U S WEST Direct brand familiarity by the end of the Publishing
15 Agreement was superb. The name recognition of U S WEST Direct by the public
16 grew dramatically during the term of the Publishing Agreement. A study was
17 done about the time the Publishing Agreement expired to determine the name
18 recognition of the various U S WEST companies. The name recognition of
19 U S WEST Direct by the public according to this survey was greater than that of
20 any other U S WEST entity. The U S WEST Direct salespeople presented
21 themselves as U S WEST Direct people, not PNB people, the scoping of the

1 directories changed in many areas and the basic marketing style of the operation
2 was fundamentally changed by U S WEST Direct to emphasize relationship
3 selling. All of this cumulative work in developing advertiser brand loyalty to
4 U S WEST Direct would not have disappeared just because PNB chose to
5 compete in its own name. U S WEST Direct would still have had the people who
6 had produced the directories for many years, the ongoing relationships with the
7 advertisers, and a clearly recognized and respected product in all homes and
8 businesses in the advertising markets we serve.

9
10 As I stated above, Dr. Selwyn's testimony that U S WEST Direct's marketing and
11 sales efforts were based on a customer database that was controlled and
12 maintained by PNB is simply not true. Unlike Dr. Selwyn, I was there at the time,
13 managing U S WEST Direct, and I have personal knowledge of these facts.
14 U S WEST Direct in fact did not rely on such a PNB controlled database for its
15 marketing and sales efforts. PNB controlled only the new connect and move and
16 change data. These data were made available to all publishers on a
17 nondiscriminatory basis. U S WEST Direct updated its database with service
18 order information but it relied on its own customer database which included PNB
19 business customers, numerous independent telco business customers and national
20 advertisers who were not even PNB or independent telco customers. If PNB had
21 decided to resume its own yellow page publishing activity after the end of the

1 Publishing Agreement, there is no way it would have obtained access to this
2 U S WEST Direct marketing database. Dr. Selwyn is wrong in concluding that
3 the requirement on U S WEST Direct to return subscriber listing and service order
4 data that PNB supplied to U S WEST Direct during the Agreement means that
5 U S WEST Direct would have had no first supplier advantage. The subscriber
6 listing data were licensed for a single use by U S WEST Direct. In practice,
7 U S WEST Direct used the subscriber listings only to produce each white pages
8 directory once each year, and the listings could easily have been discarded because
9 U S WEST Direct could not legally use them again.

10

11 The service order change information, as I mentioned above, could have been
12 returned but not the information that was developed beyond it which was in the
13 U S WEST Direct advertising order database. PNB would not have had such a
14 database and if it had reentered the directory advertising business it would have
15 competed against a U S WEST Direct that was armed with a formidable
16 marketing database capability, which included information from service orders
17 that PNB was providing all publishers for the same price. By 1987, U S WEST
18 Direct had firmly established solid relationships with key customers and had
19 established its name with both advertisers and end users. U S WEST Direct had
20 ownership of the yellow page listings by heading, advertising data including art
21 work in the ads, and contracts with printers, paper companies and distribution

1 companies. PNB would have had to recreate all of this necessary infrastructure, in
2 competition with U S WEST Direct, had it decided to reenter the market.

3

4 **Q. AT P. 10 OF HIS SURREBUTTAL, DR. SELWYN STATES THAT YOUR**
5 **TESTIMONY IS “NOT CREDIBLE” IN ASSERTING THAT THE USE OF**
6 **THE PNB NAME ON THE DIRECTORY COVERS WAS FOR THE**
7 **BENEFIT OF PNB. AS THE PERSON WHO PARTICIPATED IN**
8 **NEGOTIATING THE AGREEMENT AND WAS RESPONSIBLE FOR**
9 **MANAGING THE DIRECTORY BUSINESS, HOW DO YOU REACT TO**
10 **HIS STATEMENT?**

11 A. Dr. Selwyn has no basis in fact for such a statement. If he does not believe my
12 testimony it is because he doesn't want to, not because it is not true or not correct.
13 The fact is that the contract makes no distinction between directories in which the
14 white and yellow pages are bound together and directories in which the white and
15 yellow pages are separately bound. The contract gave PNB the right to require its
16 name to be placed on all the directories. Management at U S WEST Direct and I
17 personally, interpreted the contract in just this way at the time. Aside from the
18 legal requirement, in the early years the use of both companies' names helped to
19 ease possible end user confusion. As I have previously noted, as soon as this
20 contractual provision expired, the PNB name vanished from all of the directories.
21 During the course of the Agreement, U S WEST Direct progressively diminished

1 the prominence of the PNB name on the covers. The “five years after the 1984
2 directory publishing reorganization” that Dr. Selwyn mentions is the exact term of
3 the Publishing Agreement, as extended by PNB. As far as the language in the
4 agreement that recites “unique value,” suffice it to say that in any negotiated
5 agreement neither party obtains everything it wants, and this is an example from
6 my standpoint of that happening.

7

8 **Q. DID PNB EVER DICTATE WHAT U S WEST DIRECT COULD DO IN**
9 **ESTABLISHING ITS OWN TRADEMARK AND BRAND IDENTITY?**

10 A. No. As I stated in my Rebuttal Testimony, U S WEST Direct took several actions
11 to distinguish its operations from the historic directory publishing operations. The
12 advertising company we hired in 1984 indicated it was imperative that we
13 establish a distinctive and recognizable brand across all markets we served. As I
14 previously stated, one of their recommendations was the new, distinctive directory
15 design cover that emphasized U S WEST Direct’s name. PNB never dictated
16 what U S WEST Direct could do with U S WEST Direct’s own trademarks on the
17 directory covers. PNB only addressed how the PNB name itself must be utilized.

18

19 **Q. AT P. 15 OF HIS SURREBUTTAL, DR. SELWYN DISCUSSES PROF.**
20 **PERLMAN’S TESTIMONY AND NOTES THAT PROF. PERLMAN DOES**
21 **NOT DISPUTE THE IMPORTANCE OF ACCESS TO SUBSCRIBER**

1 **LISTINGS FOR SUCCESSFUL SOLICITATION OF ADVERTISING**
2 **SALES FROM BUSINESS TELEPHONE SERVICES USERS. ARE THE**
3 **TELEPHONE COMPANY’S LISTINGS IMPORTANT FOR THIS**
4 **PURPOSE?**

5 A. No. As I previously stated, the subscriber listings that were received once each
6 year for each exchange were not used for marketing.

7

8 **Q. AT P. 19 OF HIS SURREBUTTAL, DR. SELWYN NOTES ASPECTS OF**
9 **THE DIRECTORIES AS TO WHICH HE MAINTAINS THAT PNB**
10 **RETAINED CONTROL AND HE CONCLUDES THAT THESE MEAN**
11 **THAT NO PERMANENT TRANSFER OCCURRED. WHAT WAS THE**
12 **REASON FOR THESE PROVISIONS?**

13 A. These provisions were included so that PNB could assure itself that its regulatory
14 obligation to provide a white pages alphabetical directory was being met. As I
15 have previously noted, the raw listing data have nothing to do with ad solicitation
16 and could have been returned at termination or not, it would have been a matter of
17 indifference to U S WEST Direct.

18

19 **Q. AT P. 29 OF HIS SURREBUTTAL, DR. SELWYN CLAIMS THAT**
20 **BECAUSE U S WEST DIRECT WAS AFFORDED ONGOING ACCESS**
21 **TO SUBSCRIBER LISTINGS, TRADEMARKS AND TRADENAMES AND**

1 **A DE FACTO EXCLUSIVE RIGHT TO PUBLISH AND A NON**
2 **COMPETE AGREEMENT, SOME PORTION OF THE TOTAL**
3 **PUBLISHING FEES AND POST 1988 IMPUTATION AMOUNTS**
4 **SHOULD BE TREATED AS COMPENSATION FOR THESE BENEFITS.**
5 **IS HE CORRECT?**

6 A. No. Dr. Selwyn has his time periods mixed up. In addition, there are other errors
7 in his analysis. U S WEST Direct paid for listings after 1987 on a per listing
8 basis, the same price that any other publisher paid. There is no reason why some
9 part of imputation or publishing fees in addition to the per listing cash payments,
10 should be deemed compensation for these listings. After 1988, U S WEST did not
11 use any PNB trade name or trademark, and so there was no “ongoing access” to
12 these items after that time. Dr. Selwyn’s own exhibits show this. As I have
13 previously stated, the non compete agreement was worth nothing by 1988 at the
14 latest. There was no “ongoing access” to this item after 1988 at the latest.

15

16 **Q. AT P. 16 OF HIS SURREBUTTAL, MR. BROSCH STATES THAT**
17 **U S WEST DIRECT PAID THE ANNUAL PUBLISHING FEE FOR THE**
18 **TEMPORARY RIGHT TO USE THE TELEPHONE COMPANY’S**
19 **INTANGIBLE ASSETS. IS THIS TRUE?**

20 A. No. The annual publishing fee initially was not separated into elements but it
21 covered a number of services that PNB provided to U S WEST Direct, including

1 the provision of delivery records, coin phone services, the provision of new
2 connect and move and change service orders and listings for use in producing the
3 white pages. The publishing fees included amounts that were over and above the
4 cost of those services to other publishers.

5

6 **Q. MR. BROSCHE TESTIFIES AT P. 25 OF HIS SURREBUTTAL THAT**
7 **THERE IS NO BASIS FOR AN ASSUMPTION IN 1983 THAT**
8 **PUBLISHING FEES WOULD TERMINATE AFTER THREE YEARS OR**
9 **AT ANY SPECIFIC FUTURE DATE. IN 1983 SHOULD U S WEST**
10 **DIRECT HAVE ANTICIPATED INDEFINITE CONTINUATION OF**
11 **PUBLISHING FEES?**

12 A. No. From my standpoint, publishing fees were an overhead item that it was my
13 job to reduce. I did not expect them to continue indefinitely, even though I did
14 not know in 1983 or 1984 exactly when they would end.

15

16 **Q. AT P. 24 OF HIS SURREBUTTAL, MR. BROSCHE DESCRIBES SIX**
17 **ELEMENTS AS KEY DETERMINANTS OF THE VALUE OF THE**
18 **DIRECTORY PUBLISHING BUSINESS OF PNB IN 1984. DOES MR.**
19 **BROSCHE MISCHARACTERIZE ANY OF THESE ELEMENTS?**

20 A. Yes. U S WEST did not have an exclusive right to receive billing and collection
21 services from PNB. U S WEST Direct also did not have an exclusive right to

1 receive business referrals. PNB made business referrals available to any
2 publisher.

3

4 **Q. AT P. 25 OF HIS SURREBUTTAL, MR. BROSCH STATES THAT THE**
5 **MOST REASONABLE ASSUMPTION ON THE ISSUE OF HOW PNB**
6 **EXPECTED TO MEET ITS ONGOING OBLIGATION TO PUBLISH**
7 **WHITE PAGE DIRECTORIES WAS THAT IT WOULD HAVE**
8 **ONGOING AFFILIATE CONTRACTS WITH U S WEST DIRECT**
9 **BEYOND THE THREE YEAR TERM OF THE INITIAL AGREEMENT.**
10 **IS THERE ANY EVIDENCE THAT THIS IS THE MOST REASONABLE**
11 **ASSUMPTION?**

12 A. None that I know of. Mr. Brosch notes in support only a response to a data
13 request that says U S WEST has no basis to believe that U S WEST Direct should
14 have assumed any specific ending point of this obligation. From my standpoint, it
15 was certainly a possibility at the end of the Publishing Agreement that PNB would
16 contract with another publisher or publish its own white pages. The fact that one
17 does not know with certainty of a specific ending date does not logically mean
18 that a perpetual obligation is necessarily the most reasonable assumption.

19

20 **Q. AT P. 27 OF HIS SURREBUTTAL, MR. BROSCH STATES THAT THE**
21 **PUBLIC'S AWARENESS OF THE U S WEST NAME IS PRIMARILY**

1 **GENERATED FROM OPERATING THE DOMINANT LOCAL**
2 **EXCHANGE TELEPHONE BUSINESS AND PROMOTING ITS**
3 **PRODUCTS ACROSS 14 STATES. IS THAT TRUE?**

4 A. I believe it was untrue for the period of time around the end of the Publishing
5 Agreement. Mr. Brosch provides no evidence to support his statement. As I
6 previously stated, U S WEST commissioned a study of name recognition during
7 the period coinciding approximately with the end of the Publishing Agreement.
8 According to this study, the results of which I saw, more people associated the
9 U S WEST name with the directory advertising business than with the provision
10 of local telephone service or any telephone service.

11

12 **Q. AT PP. 28-29 OF HIS SURREBUTTAL, MR. BROSCH SUGGESTS THAT**
13 **THE EXPENSES THAT U S WEST DIRECT INCURRED TO**
14 **REPOSITION ITSELF AND RETAIN AND ATTRACT NEW**
15 **ADVERTISERS HAD NO EFFECT ON REVENUES. IS HE CORRECT?**

16 A. No. Mr. Brosch essentially assumes that the expenses relating to repositioning
17 U S WEST Direct and maintaining and creating new customer relationships were
18 completely ineffective for that purpose. Mr. Brosch has introduced no evidence of
19 this. I believe from my personal experience as manager of this business that these
20 expenses were highly effective in generating additional advertising revenue
21 compared to the hypothetical situation that would exist if U S WEST Direct had

1 not incurred the expenses, and I therefore conclude that Mr. Brosch is incorrect.

2

3 **Q. DOES THIS CONCLUDE YOUR REJOINDER TESTIMONY?**

4 **A.** Yes, it does.

5