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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re:)	DOCKET NO. UT-980948
)	
U S WEST's Petition for a Declaratory Order)	U S WEST'S ANSWER TO PUBLIC
Ending Imputation of Revenues Derived from)	COUNSEL'S MOTION FOR SUMMARY
Transferred Yellow Pages Publishing Business)	JUDGMENT
)	
)	
_____)	

U S WEST Communications, Inc. (U S WEST), hereby files its answer to Public Counsel's Motion for Summary Judgment. That motion was filed jointly by Public Counsel and intervenors TRACER and AARP on June 30, 1999. Those parties are referred to herein as "Public Counsel" unless otherwise indicated. This answer is filed pursuant to the Commission's Notice of June 18, 1999 permitting answers to be filed on the same schedule as the opening brief.

INTRODUCTION

Public Counsel requests summary determination on two separate bases. First, Public Counsel argues that U S WEST has failed to either allege or establish that its petition is based on unforeseen "future changed conditions", a condition that Public Counsel contends is required

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under the terms of the settlement and orders in Docket No. U-89-3524 AT (the Merger Case).
Accordingly, Public Counsel contends that U S WEST’s petition must be denied.

As a second basis for relief, Public Counsel argues that U S WEST should be equitably estopped from asserting that imputation of yellow pages revenues constitutes “installment” payments for the value of the directory publishing business.

Public Counsel’s motion is not well taken and should be denied. First, U S WEST does not believe that “unforeseen future changed conditions” are a necessary prerequisite to the petition in this case. However, even if they were, the evidence in this case establishes that conditions since 1989 have changed in ways that could not have been foreseen. Second, U S WEST is not equitably estopped from asserting its position in this case, as none of the elements necessary for equitable estoppel is present in this case.

ARGUMENT

U S WEST did not agree that the sole basis upon which it may request relief from imputation is a showing of unforeseen “future changed conditions.”

Public Counsel’s primary argument in Section 1 of its motion is that the Third Supplemental Order in the Merger Case (Exhibit C to Motion for Summary Judgment) requires U S WEST to establish future changed conditions in order to seek an end to imputation. This is simply incorrect.

Public Counsel quotes at length from U S WEST’s petition for clarification (Exhibit B to Motion for Summary Judgment) of the Second Supplemental Order in that case (Exhibit A to Motion for Summary Judgment). In that petition, U S WEST explained the need to be able to petition the Commission for a change to imputation at some point in the future. U S WEST explained that future changed conditions, that no party could predict with certainty in 1990, might

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warrant such a petition. U S WEST also explained that the 1990 Commission could not legally bind future Commissions.

However, while the Commission in the Third Supplemental Order (Exhibit C to Motion for Summary Judgment) agreed that U S WEST should not be subject to imputation indefinitely, the Commission did *not* impose a requirement that U S WEST show unforeseen changed conditions as a prerequisite to a petition to end imputation. The order simply states that directory advertising revenues will be imputed until December 31, 1994 and that imputation will continue thereafter “unless and until altered by subsequent order of the Commission.” Third Supplemental Order at p. 2. Thus, Public Counsel is incorrect that the Commission imposed a requirement of a showing of “future changed conditions” before U S WEST would be permitted to petition for an end to imputation.

It is apparent that unforeseen future changed conditions do exist, and did exist at the time U S WEST filed its petition in this case.

U S WEST disagrees that it is required to show unforeseen future changed conditions from the time of the Merger Case, but indeed such conditions do exist and did as of July 10, 1998 when U S WEST filed its petition.

The changed conditions that existed as of the date U S WEST filed its petition include, but are not limited to, the passage of the 1996 Telecommunications Act, including § 253, and the issuance on December 24, 1997, of the Supreme Court’s decision on this and other issues in U S WEST’s general rate case. Public Counsel asserts at page 6 of its motion that U S WEST is barred from asserting each of the claims in its petition, including its claim under § 253 of the Telecommunications Act of 1996 under the doctrine of equitable estoppel. However, what Public

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Counsel fails to explain or even address is whether the passage of the Telecommunications Act constitutes an unforeseen changed condition. U S WEST believes that it does, and challenges any party to this case to truthfully assert that such a change as was accomplished by the Telecommunications Act of 1996 was foreseen or foreseeable in 1990 at the time of the merger.

Additionally, it is clear that the Supreme Court decision in December of 1997 changed U S WEST's view, and perhaps other parties' view of the law. The Supreme Court determined that the Commission had authority to impute directory revenues to remedy the 1984 transfer of the regulatory asset by U S WEST to an affiliate for inadequate compensation. It is because of this holding that U S WEST filed this petition. This case is clearly based on the Supreme Court's decision that when adequate compensation could be shown, U S WEST could petition for an end to imputation. After the Supreme Court decision, U S WEST determined that it should file this petition to request such relief from the Commission. U S WEST believes that the Supreme Court decision alone is an unforeseen future changed condition upon which it premised the petition in this docket, if such unforeseen future changed conditions were indeed a prerequisite to the filing of the petition in this case.

3. The doctrine of equitable estoppel does not apply to U S WEST's claim that imputation is compensation for the value of the business.

In this section of its motion, Public Counsel claims that U S WEST is equitably estopped to claim that annual imputations of revenue were actually installment payments for the directory publishing business. Public Counsel states that U S WEST's current position is inconsistent with the position that U S WEST took in the Merger Case, and that U S WEST is therefore barred from asserting its claim in this case.

Public Counsel is wrong that the doctrine of equitable estoppel applies to U S WEST. The

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three essential elements necessary for the doctrine to apply are all missing in this case. However, what is very clear from the record in this case is that the doctrine of equitable estoppel does bar Public Counsel from asserting that imputation is *not* compensation for the value of the yellow pages business. That argument is set forth in U S WEST’s brief on estoppel issues, filed contemporaneously with this answer.

Public Counsel correctly states that the equitable estoppel doctrine is comprised of three elements:

- (1) a party’s admission, statement or act inconsistent with its later claim;
- (2) action by another party in reliance on the first party’s act, statement or admission;
- and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement of admission.

Kramarevcky v. Dep’t of Social and Health Services, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

Here, in fact none of the three elements is present. U S WEST’s statements or acts in the Merger Case are not inconsistent with its petition in this docket. Public Counsel and the other parties who filed the motion for summary judgment cannot show that they acted in reliance on U S WEST’s statements or actions in the Merger Case, and those same parties cannot show any injury as a result of any reliance.

First, even if it were correct that U S WEST’s commitment in the Merger Case petition for clarification was that it would seek relief from imputation only upon a showing of changed conditions, U S WEST has shown that there are such unforeseen changed conditions, and has appropriately requested an order from the Commission ending imputation.¹ As noted above, it is

¹ Public Counsel refers to the “settlement of a major merger case,” as if the Commission “settled” with U S WEST. What actually occurred was that U S WEST petitioned for clarification and the Commission issued a Third Supplemental Order that was different from the Second Supplemental Order.

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not correct that U S WEST's commitment was to seek an end to imputation only based on changed circumstances.

What is simply incomprehensible in Public Counsel's motion is the claim, unsupported by affidavit or any other proof, that Public Counsel and TRACER acted in reliance on U S WEST's "commitment" by refraining from challenging the merger. (Motion for Summary Judgment, page

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5, lines 22-25). This allegation, without any proof whatsoever, should be summarily dismissed by the Commission. Additionally, U S WEST has uncontroverted proof in this docket that Public Counsel and TRACER did not and could not have relied on U S WEST's "commitment" in deciding not to litigate the merger. In the Merger Case, Public Counsel affirmatively stated that the only concerns that it had with regard to the merger were that ratepayers should be protected from additional costs resulting from the merger, from service degradation, and diversion of investment to other states (Second Supplemental Order, pp. 5-6). None of these has anything to do with directory imputation. It is the worst type of revisionist history for Public Counsel to now claim that it did not challenge the merger based on U S WEST's petition for clarification, when the Second Supplemental Order recounts Public Counsel's position as being neither in favor of nor opposed to the merger, without any mention of directory imputation. Public Counsel's claim of reliance in this docket is entirely unsupported by any affidavit or other evidence from any officer in the Public Counsel office who was present at the time the merger took place. Finally, Public Counsel's claim that it acted in reliance on U S WEST's merger agreement cannot be true because neither Public Counsel nor TRACER was a party to the settlement agreement and they are therefore not parties who could claim any reliance or rights under it. See Motion for Summary Judgment, Attachment A, Appendix A.

TRACER is similarly but even less fortunately situated than Public Counsel with regard to its reliance claim. TRACER's claim of reliance in this motion is also unsupported by affidavit or other proof. U S WEST asked the only witness sponsored by TRACER in this docket, Michael Brosch, if he could respond to questions concerning TRACER's reliance on U S WEST's representations in the Merger Case and TRACER's attorney objected to those questions, which

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objection was sustained. (Tr. 674-6). Further, TRACER’s claim of reliance is shown to be patently false because TRACER withdrew from the merger docket five months prior to the petition for clarification on the settlement agreement. Attached to this answer is an affidavit of Douglas N. Owens which attaches to it the memorandum of understanding between U S WEST and TRACER concerning TRACER’s issues in the docket and the parties’ agreement as to those issues that was Exhibit 11 in the merger docket. Based on the inclusion in the record of that memorandum of understanding which is specifically cited at p. 2 of the Second Supplemental Order, TRACER *withdrew* as an intervenor to the case, five months prior to U S WEST’s Petition for Clarification and the Third Supplemental Order on that petition. That memorandum of understanding was a contract. It is incomprehensible that any of the parties to this motion could claim detrimental reliance based on the uncontroverted facts set forth above. See RPC 3.3(a)(1).

Of course the parties cannot claim any injury if they did not in fact rely on any representations, which is clearly the case here. However, U S WEST disputes that Public Counsel or TRACER will suffer any harm if U S WEST is permitted to take the position it does in this case. In fact, U S WEST is taking a position that is entirely consistent with the position Public Counsel took in its representations to the Supreme Court in the 1995 rate case appeal, when Public Counsel represented to the Court as follows:

If U S WEST believes that the imputation has been sufficient, it should petition the WUTC to perform a valuation of the asset that was transferred (the publishing right) and the value that has been received from imputation to determine whether imputation should continue.

Ex. 103, Public Counsel/AARP Response Brief, pp. 34-35. Public Counsel cannot claim harm when all U S WEST has done is file a petition consistent with Public Counsel’s earlier recommendation. TRACER cannot claim harm because it cannot prove that imputation affects any

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rates that its members pay. Further, the “loss in value” that TRACER claims as harm is not a loss because fair compensation has been paid. Finally, as noted above, TRACER waived its rights to challenge the merger based on an agreement with U S WEST that had nothing to do with imputation.

4. Waiver

U S WEST has not waived its right to challenge imputation on any grounds other than unforeseen “future changed conditions.” As noted above, U S WEST believes it has established there were changed conditions in 1998 when it filed its petition which could not have been foreseen in 1990. Thus, even under Public Counsel’s theory of the case, U S WEST has established that it has a right to file the petition in this case.

However, Public Counsel advances the interesting argument that U S WEST somehow waived any rights to argue for an imputation based on clearly unforeseeable circumstances because U S WEST accepted benefits of the merger order. Of course, Public Counsel fails to address the fact that nowhere in the Commission’s Third Supplemental Order does the Commission require that U S WEST be limited to file an appeal only upon a showing of future changed conditions. Thus, U S WEST, even in accepting the “benefits of the merger order,” cannot be deemed to have accepted some sort of a condition implicit or inherent in that order that was not stated explicitly. The condition in the first case cited by Public Counsel, Potter v. Potter, 46 Wn.2d 526, 527, 282 P.2d 1052 (1955) was an explicit award of all property in a divorce to the respondent subject to a lien payable to appellant at \$50 per month. The court held that acceptance of monthly payments waived the appeal of the property award. That is not the case here._

In Henry v. Russell, 19 Wn. App. 409, 415, 576 P.2d 908, rev. den. 90 Wn.2d 1018 (Wn.

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App. Div. II 1978), another divorce case cited by Public Counsel, a custodial parent who intentionally omitted the issue of support from the non-custodial parent at the time of the initial decree in hopes of improving his strategic position by piecemealing the litigation was held to have waived his right. That does not apply here, either.

5. Collateral attack

Finally, Public Counsel contends that U S WEST’s petition should be dismissed as an improper collateral attack on the Commission’s Third Supplemental Order in the Merger Case. Public Counsel spends barely two paragraphs on this argument and it is devoid of any merit whatsoever. U S WEST agrees that a collateral attack is an attempt to avoid the effect of a judgment or order in an action other than that in which the order was rendered. However, U S WEST strenuously disagrees that the collateral attack rule applies in this case to defeat U S WEST’s petition. As has been discussed in numerous instances above, U S WEST has established that the petition was brought under changed conditions which no party could have predicted in 1990. Even that aside, U S WEST is clearly not seeking to avoid the impact or effect of the Third Supplemental Order in the Merger Case, because that order only requires that imputation continue until subsequent order of the Commission. What U S WEST is asking for here is that “subsequent order” and there is nothing improper about that request.

AARP was not a party to the merger docket and is not entitled to relief on any of the theories in the motion.

CONCLUSION

There is nothing in the Commission’s orders or the settlement agreement in the Merger Case which bars U S WEST’s petition in this proceeding. The doctrine of equitable estoppel, and

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the doctrine precluding a collateral attack on an order, are clearly inapplicable to U S WEST's

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position in this case. Nor has U S WEST waived any right to challenge imputation under the circumstances set forth herein. Public Counsel's motion for summary judgment must be denied.

DATED this 20th day of September, 1999.

U S WEST Communications, Inc.

By: _____
Lisa A. Anderl, WSBA No. 13236