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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))

INTRODUCTION

U S WEST Communications, Inc., (U S WEST) hereby moves to dismiss the Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Inc. pursuant to Washington Administrative Code (“WAC”) 480-09-426 for the following reasons: (1) AT&T failed to state a claim upon which relief can be granted; (2) the Washington Utilities and Transportation Commission (“Commission”) lacks jurisdiction to consider any complaint or claims related to interstate services; (3) the Commission, in its Prehearing Conference Order dated September 3, 1999, stated: “The bench asked parties to focus their presentations in this proceeding on information that is relevant to prove the existence of violations within this state.”; and (4) to the extent that AT&T’s complaint purports to be brought on behalf of its end-user customers instead of AT&T directly, AT&T lacks standing to bring the complaint.

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In considering this motion, it is critical that the Commission recognize that AT&T's complaint is based exclusively on services ordered by AT&T out of U S WEST's federal and state tariffs. The complaint does not allege any violations of the U S WEST/AT&T interconnection agreement approved by the Commission.

In its complaint AT&T very generally refers to "access services". See e.g., Introduction and Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 34, 39, and 46. Moreover, paragraph 39 of the complaint refers to 70 current held orders for access services in Washington. AT&T does not, however, differentiate access services it has ordered from U S WEST pursuant to the Washington intrastate tariffs that the Commission has jurisdiction over versus the access services AT&T has ordered from U S WEST pursuant to U S WEST's interstate FCC tariff. In the limited time it has had to respond to AT&T's unanticipated complaint, U S WEST has determined that the vast majority of the access services referred to in AT&T's complaint are interstate services that are ordered out of U S WEST's FCC tariff. As the accompanying declaration of Elizabeth Quintana explains, U S WEST has determined that as of the date of U S WEST's answer, AT&T has 2 held orders for Washington for intrastate services. One order is for a jointly provided private line, which requires that U S WEST and an independent telephone company both provision facilities. US WEST's part of that order is ready and is thus held for

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2 independent company reasons. The other order had been held for
3 facilities and funding reasons, but it has been given a job
4 assignment and should be provisioned by the end of the month. All
5 remaining held orders for access services are for interstate
6 services ordered out of an FCC tariff.

7 The fact that the majority of AT&T's access services are
8 ordered out of federal tariff is critical to this proceeding and
9 to U S WEST's ability to effectively prepare a response and
10 defense to the AT&T complaint. The Federal Communications
11 Commission, and not the individual state commissions, has the
12 exclusive authority to regulate interstate telecommunications.
13 *See North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th
14 Cir.), *cert. denied*, 434 U.S. 874 (1977) (if states were allowed
15 to regulate interstate services the FCC "would necessarily be
16 prevented from discharging its statutory *duty* . . . to regulate
17 interstate communication.") (emphasis added); *see also*
18 *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir.
19 1998) (recognizing FCC "*responsibility* to regulate interstate
20 telecommunications") (emphasis added); and 47 U.S.C. § 261(c)
21 (state commission authority to impose additional requirements
22 limited to "intrastate services"). Indeed, under federal law the
23 respective rights of carriers and customers with respect to
interstate common carrier communications services are governed by
tariffs filed with the Federal Communications Commission. Section
203(c) of the Federal Communications Act makes it unlawful for a

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2 carrier to "extend to any person any privileges or facilities in
3 such communication, or employ or enforce any classification,
4 regulations, or practices affecting such charges, except as
5 specified in such a [tariff]." An effective tariff approved by
6 the FCC is the "law" between the carrier and its customers. In
7 AT&T v. Central Office Telephone, Inc., 118 S. Ct. 1956, decided
8 June 15, 1998, an AT&T reseller customer had sued AT&T for AT&T's
9 alleged failure to perform certain business commitments to the
10 customer which were not part of AT&T's federal tariff for the
11 service. These commitments included delivery of various services,
12 special provisioning and billing options in addition to those set
13 forth in AT&T interstate tariff. In an extremely broad decision,
14 the United States Supreme Court found in AT&T's favor and held
15 that the filed rate doctrine dictates that all terms and
16 conditions of a federally tariffed service, specifically including
17 special provisioning, must be governed entirely by the terms of
18 the tariff. The United States Supreme Court explained:

17 [E]ven provisioning and billing are, in the relevant
18 sense, "covered" by the tariff. For example, whereas
19 respondent asks to enforce a guarantee that orders would
20 be provisioned within 30 to 90 days, the tariff leaves
21 it up to petitioner to "establish and confirm" a due
22 date for provisioning, requires that petitioner merely
23 make "every reasonable effort" to meet that due date,
and if it fails gives the customer [*21] no recourse
except to "cancel the order without penalty or payment
of nonrecurring charges." § 2.5.10(B). Faster,
guaranteed provisioning of orders for the same rate is
certainly a privilege within the meaning of § 203(c) and
the **filed-rate doctrine**...(refusing to enforce promise for
faster, guaranteed service not included in the tariff)...

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2 The Ninth Circuit distinguished respondent's claims from
3 those in our filed-rate cases involving special services
4 in one other respect: according to respondent, the
5 "special services" that it sought were provided by
6 petitioner, without charge, to other customers, 108 F.3d
7 at 989, n. 9. Even if that were so, the claim for these
8 services would still be pre-empted under the **filed-rate**
9 **doctrine**. To the extent respondent is asserting
10 discriminatory treatment, its remedy is to bring suit
11 under §202 of the Communications Act. To the extent
12 petitioner is claiming that its own claims for special
13 services are not really special because other companies
14 get the same preferences, "that would only tend to show
15 that the practice was unlawful [with regard to] the
16 others as well." *United States v. Wabash R. Co.*, 321
17 U.S. 403, 413, 88 L. Ed. 827, 64 S. Ct. 752 (1944).
18 Because respondent asks for privileges not included in
19 the tariff, its state-law claims are barred in either
20 case.

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22 The United States Supreme Court decision in AT&T v. Central
23 Office Telephone, Inc. could not be more on point: to the extent
AT&T is ordering access services out of U S WEST's interstate FCC
tariff, AT&T is limited to the relief afforded it in U S WEST's
interstate FCC tariff. AT&T cannot come to this Commission and
seek additional or different state relief. Instead AT&T must
pursue its relief associated with interstate access services with
the FCC pursuant to the Federal Telecommunications Act.

As plead, AT&T's complaint fails to distinguish access
services ordered pursuant to U S WEST's interstate FCC tariff and
U S WEST's intrastate tariff. Without specific pleadings
identifying AT&T's service issues under U S WEST's intrastate
tariff, the Commission will not
be able to comply with the "filed rate doctrine" explicitly upheld

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for AT&T by the United States Supreme Court. Accordingly,
U S WEST requests that the Commission order AT&T to file a revised
complaint identifying and deleting any claims associated with
access service ordered out of U S WEST's interstate FCC tariff.
AT&T's substitute complaint should be limited to services ordered
out of U S WEST's Washington intrastate tariffs approved by the
Commission.

DATED this 16th day of September, 1999.

U S WEST Communications, Inc.

Lisa A. Anderl, WSBA No. 13236