

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-950200
	)	
Complainant,	)	
	)	ELEVENTH SUPPLEMENTAL
	)	ORDER
v.	)	
	)	
U S WEST COMMUNICATIONS, INC.,	)	ORDER GRANTING AND DENYING
	)	MOTIONS OF USWC AND
Respondent.	)	COMMISSION STAFF
	)	
.....	)	

This proceeding involves a filing by U S WEST Communications, Inc. (USWC), to increase its rates and charges for providing telephone service within the state of Washington. In response to the Commission's deadline for filing dispositive motions, Commission Staff and USWC both filed motions on October 2, 1995, as follows: Commission Staff, to exclude certain depreciation changes from consideration; USWC, to a) exclude "Yellow Pages" revenues from consideration; b) to exclude certain issues raised by the Northwest Payphone Association (NWPPA); c) to compel AT&T to answer data requests; and d) to strike testimony of Diane Toomey. Argument was heard at a prehearing conference held on Tuesday, October 17, before Administrative Law Judges C. Robert Wallis and Terrence Stapleton.

**I. COMMISSION STAFF MOTION FOR PARTIAL DISMISSAL**

The Commission Staff moved for partial dismissal to exclude portions of USWC's case that address depreciation issues recently decided by the Commission in Docket No. UT-940641. Staff contends that the final Commission order entered recently in that matter<sup>1</sup> resolved depreciation issues including use of equal life group methodology (ELG) and shorter depreciation lives. Staff contends these issues are raised in this proceeding in the testimony of USWC's witness William R. Easton. Staff urges that the matter has been resolved and need not be re-litigated.

USWC responds that depreciation issues are intertwined with other issues in this general rate case; that treating the issue is required to avoid illegal single-issue ratemaking; that doing so is more efficient than the alternatives; and that it is within the Commission's statutory authority.

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<sup>1</sup>USWC is pursuing judicial review of that order.

The Commission grants the motion. USWC's arguments are not well-taken. Some of the depreciation issues have been recently considered and resolved, and others are to be considered in a multi-state process that is scheduled to begin in March 1996. Public Counsel points out that Mr. Easton's testimony is a verbatim copy of testimony he presented in the UT-940641 proceeding, and the Company does not argue that any change in circumstances requires addressing the matter anew. The Company has appealed the matter to Superior Court; the Commission also is concerned, because of the identity of the Company's presentations, that hearing the depreciation issues could be seen as usurpation of the Court's jurisdiction.

Litigating the issues in this proceeding would be inefficient, contrary to the Company's contention, because it would require unnecessarily re-litigating the exact same matters recently resolved after extensive hearings held at USWC's request -- and that remain the subject of judicial review -- or unnecessarily litigating matters that will be considered anew, shortly, in the represcription process. USWC may choose to file another general rate case after the March 1996 represcription process -- or may pursue other appropriate relief.

The Company's argument that granting the request deprives it of timely rate recovery is inaccurate because the Company has very recently, or will very soon, receive the consideration that it asks. Its arguments regarding single-issue ratemaking are faulty; the Commission did consider depreciation issues in the just-concluded case. Rates determined herein will not be confiscatory because they will be based on determinations recently made that need not be duplicated, and because the Commission acknowledges that the soon-to-be-begun represcription process is an appropriate multi-jurisdictional setting to decide such matters.

The Company has not demonstrated that the service quality issues being explored in this proceeding have any relationship to depreciation whatsoever. Depreciation is designed to allow a business to recover its investment in capital assets over the life of those assets. It is not designed to provide cash for other purposes. The Company's use of its earnings, once earned, is of limited relevance.

The same is true of the Company's use of cash from depreciation. The Company is free to reinvest its cash--or its earnings--in capital assets providing service; to borrow money for that purpose; or to secure additional funds for that purpose from

the sale of stock.<sup>2</sup> The Commission has the responsibility to determine that the Company has the opportunity to earn a fair return on its investment, and that it is making sufficient investment -- from whatever sources -- to provide adequate service. The two matters, however, are not inextricably linked.

USWC's arguments contending efficiencies in addressing the issue in this matter run exactly counter to the Commission's perceptions of a lack of efficiency in re-litigating matters just decided, or anticipating a process to begin shortly. The Commission agrees with USWC that the Commission does have the discretion to address depreciation issues in a forward-looking proceeding such as this, should it choose to do so. It believes, however, that there is no showing of reasons requiring the duplication of effort and expense that re-litigating some issues and anticipating rescription would require.

## II. USWC MOTIONS

### A. MOTION TO EXCLUDE YELLOW PAGE REVENUES

USWC moved to exclude revenues from Yellow Page advertising from attribution to regulated results of operation. It argues that the Commission has no statutory jurisdiction to do so; that it received insufficient notice of such a possibility; and that the Commission has no authority to impute non-telecommunications revenues to regulated telecommunications activities.

Commission Staff and Public Counsel/Tracer answered the petition. They note that the present Yellow Pages arrangement was agreed to by the Company in Docket No. UT-89-3524-AT, the merger proceeding resulting in the creation of U S WEST; that the Company remains bound by the terms of that Order, and that the arrangement has been an accepted element of ratemaking since that Order. The Commission does have statutory authority to consider the revenues under chapter 80.16 RCW<sup>3</sup> and under RCW 80.36.140. The arrangement is specifically permitted under the MFJ (Modified Final Judgment)<sup>4</sup> decree, and the courts reviewing such transactions have not found fault with them.

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<sup>2</sup>Subject, of course, to the Commission's oversight of its capital structure for ratemaking purposes.

<sup>3</sup>Docket No. U-86-156, Second Supp. Order (Oct., 1983).

<sup>4</sup>United States v. AT&T, 552 F.Supp. 131, 194 (D.C. Cir. 1982).

The Commission denies the Company motion to exclude consideration of the issue as a matter of law. The Company remains bound by its agreement, pursuant to the Order in Docket No. UT-89-3524-AT. The Federal Court made specific provision for it; it is practiced in at least 13 of the 15 states in which USWC operates, and courts reviewing it find it permissible. We find the notice to be sufficient and find that we do have statutory authority to consider the revenues.

**B. MOTION LIMITING NORTHWEST PAY PHONE ASSOCIATION PARTICIPATION**

USWC moved to limit participation by the Northwest Payphone Association and to exclude issues presented in the prefiled testimony of NWPPA's witness Murray relating to an asserted price squeeze imposed on NWPPA members, who are USWC competitors, as a result of USWC's pricing structure.

This is not a dispute between a regulated utility and competitors who are totally independent of the utility's actions. The State Supreme Court approved the Commission's determination that it would not consider the effects of regulated utilities' actions on totally independent unregulated competitors. Cole v. WUTC, 79 Wn.2d 302, 485 P.2d 71 (1971). Here, however, we have a dispute between a utility and competitors who are the utility's customers, wholly dependent upon the utility for underlying services that enable them to be competitors, and the utility has the power to determine the viability of that competition. It is clear that the Commission may properly consider competitive issues in an evolving competitive market. See, RCW sections 80.36.080; 80.36.140; 80.36.170; and 80.36.186.

The Commission previously has determined its jurisdiction with respect to the issues raised by the NWPPA. Therefore, the Commission will deny the motion of USWC to exclude the testimony and exhibits proffered by the NWPPA in this proceeding.

**C. MOTION TO COMPEL AT&T TO RESPOND TO DATA REQUESTS**

USWC moved to compel AT&T to respond to data requests or, in the alternative, to strike testimony. It notes that AT&T objected to USWC's Data Requests Nos. 2 and 3, and refused fully to answer them. USWC argues as to Request No. 3 that the asserted reason for failure to comply -- uncertainty as to a term -- is insufficient because the term is drawn from AT&T's witness Mayo's own testimony. Request No. 2 sought information relating to AT&T's intrastate pricing discussed in the testimony of AT&T witnesses Kargoll. In addition, AT&T failed to respond at all to Data

Request No. 1, requesting information regarding certain advertising expenditures.

AT&T responds that the requests are intended to harass it; to seek information as to matters that are beyond the scope of the issues in the proceeding; and are not reasonably calculated to lead to the discovery of admissible evidence. AT&T contends that USWC cannot seek a Commission determination of a discovery dispute because it has failed to seek informal settlement of the dispute. It urges that requested information is similar to information it was previously compelled to provide, that was used to impeach AT&T's witness, and that competitively classified inter-exchange carriers' pricing structure is irrelevant to a regulated Company's pricing. Finally, AT&T argues that others' answers to similar questions are not challenged and it is unfair for USWC to pursue AT&T.<sup>5</sup>

The Commission grants USWC's request. The Commission expects the parties to a proceeding to be responsible. AT&T argues that USWC should not be allowed relief under a rule provision requiring "parties" to a dispute to attempt to resolve it, and says that it was willing to provide some information. AT&T does not demonstrate that it sought informally to resolve the dispute or that it offered the information.

It is too late in this proceeding for the Commission to order the parties to enter discussions, so the Commission will rule directly. Both parties to a dispute bear responsibility to act responsibly to settle it; when they fail to do so, the Commission may resolve it.

It is not clear that the requests are beyond the purview of acceptable discovery. AT&T does not argue that the requests are unreasonable or burdensome. AT&T argues that the information sought may not be relevant or admissible, but that is not the exclusive test.<sup>6</sup> Competitively classified pricing, for example,

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<sup>5</sup>At the prehearing conference where the motions were argued, AT&T asked the Commission to impose sanctions upon USWC. The request is denied.

<sup>6</sup>The Commission does not adopt Civil Rule No. 26 for application to its proceedings because of the differences between civil litigation and the Commission's administrative process. In this particular matter, however, we believe the rule provides guidance. Given the nature of the information sought, the identities and roles of the parties, and the nature of this

is not irrelevant to the respondent's pricing requirements in the present proceeding, irrespective of whether it would be admissible at the hearing. Finally, whether or not others' answers to data requests were challenged is totally irrelevant to whether a discovery request made to one party is permissible.

The motion is granted, and the discovery is required or, in the alternative, the testimony of witnesses Mayo, Mercer, and Kargoll will be excluded.<sup>7</sup>

**D. MOTION TO STRIKE TESTIMONY OF DIANE TOOMEY**

USWC moves to strike the testimony of AT&T witness Diane Toomey. Her prefiled testimony addresses USWC's use of its income from regulated telecommunications operations to invest in foreign and domestic unregulated businesses. USWC contends that the information offered through Ms. Toomey concerns only USWC's unregulated activities and that it is outside the scope of the proceeding.

AT&T responds that the proffered evidence analyzes revenues generated from Washington ratepayers of USWC's regulated activities. AT&T contends that USWC's use of revenues generated from Washington ratepayers is an important consideration in assessing USWC's need for rate increases.

The Commission rejects USWC's contention that Ms. Toomey's evidence relates exclusively to unregulated operations. It determines, however, consistent with its above ruling on depreciation, that USWC's use of its income, wise or unwise, is not sufficiently relevant to this proceeding to warrant expenditure of time and effort in its exploration. The underlying issues are whether depreciation reasonably recovers capital investment over the life of the asset, whether the Company's opportunity to earn meets the pertinent tests, and whether the Company is investing sufficiently in capital assets to provide adequate service. The uses to which the Company actually applies its income, though perhaps very interesting and illuminating, could distract effort and attention from the purposes of the proceeding. The motion should be granted.

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proceeding, the information sought is within an appropriate scope and answers should be required. See, CR 26(1).

<sup>7</sup>If AT&T fails to provide the requested information, the Commission will consider the extent to which the proffered evidence will be excluded.

III. CONCLUSION

The Commission grants Commission Staff's motion to exclude depreciation issues from this proceeding; it denies USWC's motion to exclude Yellow Page revenues from consideration and to exclude testimony and evidence of the NWPPA; it grants USWC's motion to compel AT&T to respond to data requests or, in the alternative, to exclude evidence; and it grants USWC's motion to exclude the testimony of Diane Toomey.

ORDER

THE COMMISSION ORDERS That the motion of Commission Staff to exclude consideration of certain depreciation issues is granted; that the motions of USWC to exclude Yellow Page revenues from consideration in this proceeding, and to exclude the testimony and exhibits of NWPPA are denied; and, that the motions of USWC to compel AT&T to respond to data requests or, in the alternative, to exclude testimony, and to exclude the testimony of AT&T witness Toomey are granted.

DATED at Olympia, Washington, and effective this 3rd day of January 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*Richard Hemstad*  
RICHARD HEMSTAD, Commissioner

*Wm. R. Gillis*  
WILLIAM R. GILLIS, Commissioner