BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re: U S WEST's Petition for a Declaratory Order Ending Imputation of Revenues Derived from Transferred Yellow Pages Publishing Business	))))))))	DOCKET NO. UT-980948 U S WEST's Separate Brief on Judicial Estoppel and Equitable Estoppel Issues

INTRODUCTION

On May 20, 1999, U S WEST Communications, Inc., (U S WEST) moved to strike portions of the responsive prefiled testimony of Staff and Public Counsel (including TRACER and AARP). It renewed that motion as to surrebuttal testimony and exhibits and live testimony during the hearing (Tr. 226-227). The evidence to be stricken is that which characterizes the effect of what the Supreme Court found in *U S WEST Communications v. Wash. Util. & Transp. Comm.*, 134 Wn.2d 74, 949 P.2d 1337 (1997) was the January 1, 1984 transfer of the directory publishing business from Pacific Northwest Bell to Landmark Publishing Co. as a renting of intangible assets

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or the “outsourcing” of the directory publishing function.

The basis for this motion is that the doctrines of judicial estoppel and equitable estoppel preclude these parties from taking the positions set forth in this testimony. Those doctrines likewise preclude the Commission from making findings based on such testimony that repudiate the representations that this Commission made to the Court as a party to the appeal. In the Twelfth and Thirteenth Supplemental Orders, the Commission denied the motion to strike the evidence on the basis that it would not rule as a matter of law that it was precluded from making certain findings but indicated that it had not ruled on the merits of the estoppel claims and that U S WEST was free to renew those claims after the close of the evidentiary record. U S WEST hereby renews those claims.

1. The Commission Is Bound By Its Representations To The Supreme Court On The Characterization Of The Transaction Between PNB And U S WEST Direct In 1984 Where The Court Accepted Those Representations.

In Exhibit 103, U S WEST reproduced portions of the Commission’s brief to the Supreme Court in *U S WEST, supra.* In that brief, filed by the Attorney General as the attorney for the Commission (RCW 43.10.040), the Commission characterized the transactions it had approved years before between PNB and U S WEST Direct as the transfer of the directory publishing business. The Commission had appeared in the judicial review proceeding as a respondent. The Commission defended its order in Docket No. UT-950200 against U S WEST’s arguments that the affiliated interest statutes did not authorize imputation because U S WEST Communications was not reflecting any expense on its books that the Commission could disallow, and that the general

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ratemaking power did not authorize imputation.[1] Based specifically on the Commission's characterization of the *transfer* of the "profitable yellow pages business" to its affiliate for grossly inadequate compensation, the court held that such a transfer was "unreasonable compensation" within the meaning of RCW 80.16.030. The Commission had elaborated in its brief on why the consideration was grossly inadequate:

> By this measure, USWC has clearly provided unreasonable compensation to USWD. The transaction between the two entities is in no way a transfer of equivalent value. One entity receives *an entire enterprise*, the other a grossly inadequate publishing fee and, in the test year, virtually nothing (WUTC brief at 20-21, Ex. 103 at 1) [emphasis added].

The Supreme Court agreed with the Commission's analysis of its authority. The court specifically noted the relationship between the Commission's determination that the transfer had not been of equivalent value and the statutory concept of compensation, at 134 Wn.2d at 94 n.7. Therefore, the Supreme Court relied on the Commission's identification of the inequality of value that constituted unreasonable compensation, as the relationship between U S WEST Direct receiving "an entire enterprise" in exchange for a "grossly inadequate publishing fee and, in the test year, virtually nothing."

There is no basis for assuming that the court would have sustained the Commission if the Commission had told it that something less than "an entire enterprise" was what U S WEST Direct received. There is no basis on which the court could have sustained the Commission's imputation if, as Staff and Public Counsel now claim, only tangible assets and cash were transferred because there is no evidence of any disparity in the value of what was transferred for those items (Tr. 1169).

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[1] *U S WEST, supra,* 134 Wn.2d at p. 93.

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The Commission received the benefit of having its order upheld. That benefit is directly linked to the Commission's representation to the court of what U S WEST Direct received, namely "an entire enterprise." That benefit resulted in U S WEST having to refund over two hundred million dollars that it had collected for service provided, and rates continue today at levels that are depressed compared to what they would be if the Commission's order had not been upheld.

U S WEST submits that the Commission is bound by its prior representations to the court and its prior orders to find that the directory business has been transferred and that such transfer occurred some time before the close of the record in Docket No. U-86-186 at the latest.[2] In fact, no party introduced evidence of any possible date that the business was transferred before the close of the record in Docket No. U-86-156, other than January 1, 1984.

As a tribunal considering a proceeding that is based on a determination by the Supreme Court that specifically contemplated further fact finding, the Commission is bound by the judgment of the Supreme Court under the law of the case doctrine. Any change in that judgment to correct what the Commission may now perceive as errors must be through proceedings before the Supreme Court. *Tucker v. Brown,* 20 Wn.2d 740, 773, 150 P.2d 604 (1944). U S WEST separately analyzes this doctrine in its brief on the record filed simultaneously with this brief. The Commission was a party that appeared before the court and made affirmative representations through legal counsel on which the court specifically relied in ruling to uphold the Commission's position. The Commission is now barred by judicial estoppel to issue any determination that contradicts the representations that the Commission made to the court. U S WEST incorporates by

[2] The Second Supplemental Order in Docket No. U-86-156 reflected the Commission's recognition that the effect of the transaction was the transfer of the directory publishing business.

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reference its analysis of the case law on judicial estoppel and equitable estoppel which it filed in its May 20, 1999 motion.

2. The Commission Is Bound By Representations It Made Through Counsel To The Court.

In the Twelfth Supplemental Order, the Commission implicitly raised the issue whether statements that the Attorney General made on behalf of the Commission to the court in obtaining a favorable ruling for the Commission are binding on the Commission. U S WEST submits that such statements do bind the Commission, just as statements of a lawyer bind any other client. The Attorney General is the statutory lawyer for the Commission. RCW 43.10.040. The Commission has not suggested that the Attorney General misrepresented the Commission during the appeal, and indeed has not requested the Supreme Court to recall its mandate on that basis or any other. The general rule is that "An attorney has full power to represent her client." *Furman v. Bon Marche*, 71 Wash. 238, 128 P.210 (1912). The court has also held that

> An attorney appearing on behalf of her client is her client's representative and is presumed to speak and act on her behalf.

Clay v. Portik, 84 Wn. App. 553, 561, 929 P.2d 1131 (Div. 2 1997). In *Clay, supra*, the court held that a lawyer's affidavit of compliance with statutory procedures to invoke the nonresident motorist statute met the requirement that the affidavit be executed by the "person bringing the action."

3. There Is No Dispute Over Factual Issues Other Than The Very Issue On Which Judicial Estoppel Applies. Estoppel Precludes The Parties From Asserting That The

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1984 Transaction Was Not The Transfer Of The Entire Business.

There is no factual dispute that would prevent the application of the estoppel doctrines; the dispute is over precisely the characterizations of past transactions that this Commission and Staff and Public counsel relied on to their benefit before the Supreme Court. During a scheduling conference which preceded the issuance of the Twelfth Supplemental Order, Staff and Public Counsel claimed that there were unspecified factual disputes over the "nature of the underlying transaction." In the Twelfth Supplemental Order, the Commission noted these claims and relied on them to deny U S WEST's motion to strike. U S WEST submitted data requests seeking to have Staff and Public Counsel identify the disputed facts. Staff and Public Counsel refused to respond to these data requests and their refusal was upheld by the Commission in the Thirteenth Supplemental Order. The Commission in the Thirteenth Supplemental Order indicated that U S WEST would have to look to the testimony of Staff and Public Counsel's witnesses to discern the disputed facts.

The only dispute on the record is as to the effect of the Commission's conditional approval of the applications in Cause No. FR-83-159 and Docket No. U-86-156. U S WEST's estoppel claim is based on the characterizations in Exhibit 103 of these past events by the Commission, Staff and Public Counsel in Commission orders and briefs to the court, and Staff and Public Counsel briefs and testimony. The Supreme Court adopted the Commission's, Staff's and Public Counsel's characterization of the effect of that past conditional approval as the transfer of the directory publishing function, an immensely valuable regulatory asset, without adequate compensation.

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Dr. Selwyn admitted that if Staff's current interpretation of the effect of that past conditional approval were correct, then the Supreme Court was wrong in holding in 1997 that the intangible assets had been transferred (Tr. 854-856). Yet it was the Commission's repeated representation to the court that the "entire enterprise," the "profitable yellow pages business" and the "lucrative yellow pages operations" were descriptions of the thing that had been transferred (Ex. 103 at 1-2). Mr. Brosch testified that he disagreed with the specific recommendation that Public Counsel had made to the Supreme Court that U S WEST could petition for a valuation of the asset and a determination of how much value had been received from imputation to decide whether imputation to continue (Ex. 103 at 2; Tr. 692-694). The Supreme Court specifically held that this was a proper mechanism to use to end imputation. *U S WEST, supra*, 134 Wn.2d at 101, 102.

These are not factual disputes on the nature of the underlying transaction. They are exactly the kind of reversal of a previously successful litigation position that the doctrine of judicial estoppel was created to prevent. *Markley v. Markley*, 31 Wn.2d 605, 198 P. 2d 486 (1948), discussed in U S WEST's previous motion, prevents this reversal of position. It is immaterial that the date of the transfer was not discussed in the Supreme Court's opinion. The fact of a past transfer of "the yellow pages publishing business," a "lucrative revenue-producing asset" which was developed as a result of the Company's long, de facto monopoly dominance of the telephone business in Washington" was relied on by the court as justification for the use of imputation as compensation for the "transfer of an undervalued asset." *U S WEST, supra*, 134 Wn.2d at 102. The only past transfer was the January 1, 1984 transfer. There is no way that the asset in question

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could have been undervalued unless it included the going concern value that Staff and Public Counsel claim was never transferred. There is no way that the court could have been referring to only tangible assets and cash when it used the terminology above that the business was a "lucrative revenue-producing asset."

Public Counsel's witness testified in Docket No. UT-950200 that at divestiture U S WEST Direct was established with "tremendous going concern business value associated with long term customer relationships and the cumulative know how of the Bell System's proven methods of directory operations" (Ex. 103 at 6). The Supreme Court relied on this evidence in finding in *U S WEST, supra,* 134 Wn.2d 99, that "this lucrative business," contrary to U S WEST's argument, was a "regulatory asset," noting that the business was developed due to the fact that U S WEST was the sole provider of local telephone service and so "had established business relationships with all of the potential advertisers in the yellow pages."

Judicial estoppel applies to prevent Staff and Public Counsel to reverse the position that won the case for them and the Commission in *U S WEST, supra,* and prevents them from claiming that the reasons that the court used to justify its ruling never existed.

4. Equitable Estoppel Also Applies To Prevent A Determination That Contradicts The Prior Determinations Of The Commission That Were Relied On By The Court.

Fundamental fairness in the doctrine of equitable estoppel should prevent the Commission from considering and making findings on the evidence that Staff and Public Counsel have introduced to support their new position about the nature of the 1984 transaction. These parties previously litigated successfully that ratepayers were entitled to imputation because of the

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inadequate compensation that had been provided for the *transfer* or *abandonment* of the valuable regulatory asset. These parties never disclosed over the past fifteen years the claim that they now make, that the really valuable regulatory asset was never abandoned or transferred, but was merely rented. *Lybbert v. Grant County*, 93 Wn. App. 627, 969 P. 2d 1112 (Wash. App. Div. 3 1999), which was analyzed in U S WEST's motion, supports application of equitable estoppel in this case.

CONCLUSION

For the reasons discussed above, U S WEST respectfully requests that the Commission rule that the evidence of Staff and Public Counsel that asserts that the intangible assets that constitute the actual value of the directory publishing business were not transferred from PNB to Landmark Publishing January 1, 1984, will not be considered because the Commission could not make findings consistent with that evidence without violating the law of the case and judicial estoppel and because the Staff and Public Counsel are judicially and equitably estopped to make this claim.

Respectfully submitted,

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