

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In Re the Petition of)	DOCKET NO. UT-980948
)	
U S WEST COMMUNICATIONS, INC.,*)	FOURTEENTH
)	SUPPLEMENTAL ORDER;
for an Accounting Order)	ORDER DENYING PETITION
.....)	

Synopsis

1 In this order, the Commission addresses a request by U S WEST Communications, Inc., (USWC) for an accounting order ending the Commission's practice of imputing to USWC, for ratemaking purposes, certain "excess" income earned by an affiliate in publishing directories of USWC subscribers and associated "Yellow Pages" commercial classified directory listings. The Commission denies USWC's request for an accounting order ending imputation. The Commission rules that, *U S WEST Comm. Inc. v. Wash. Util. & Transp. Comm.*, 134 Wn2d 74, 949 P.2d 1337 (1997), does not require the end of imputation, that USWC has not shown the factual or legal existence of a permanent transfer of the publishing function, and that USWC has not shown a valid factual or legal reason to terminate imputation.

*The Commission notes that since this matter was presented, U S WEST has merged with Qwest Communications International, Inc. pursuant to the Commission's authorization in Docket No. UT-991358. Although the company is now authorized to use the name Qwest Corporation, we continue to use the names under which the matter was filed and presented.

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I. SUMMARY¹

A. Procedural Summary

2 **Hearing.** This matter came on regularly before the Commission on July 26 through 30, 1999, and August 26, 1999, at Olympia, Washington before Chairwoman Marilyn Showalter, Commissioners Richard Hemstad and William R. Gillis, and Administrative Law Judges Lawrence Berg and C. Robert Wallis upon due and proper notice to all interested persons.

3 **Appearances.** Petitioner, U S WEST Communications, Inc. (also called the Company, USWC or U S WEST in this order) appeared by Lisa Anderl and Douglas N. Owens, attorneys, Seattle. The Commission Staff appeared by Gregory N. Trautman, assistant attorney general, Olympia. Public Counsel appeared by Simon ffitich, assistant attorney general, Seattle. Intervenor Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER) appeared by Arthur A. Butler, attorney, Seattle. Intervenor American Association of Retired Persons (AARP) appeared by Ronald N. Roseman, attorney, Seattle.

4 **Nature of the Proceeding.** In this matter, U S WEST has asked the Commission for an order formally terminating an accounting practice that the Commission uses in calculating the proper rates USWC may charge its customers for regulated services. In that practice, the Commission attributes or "imputes" to the revenues of USWC (a subsidiary of U S WEST, Inc. or USWI) a sum that is related to the income that is actually earned from Yellow Pages publication by U S WEST Dex, another USWI subsidiary.

5 **Commission decision.** The Commission denies U S WEST's request, holding that the Commission is not required to approve the request by virtue of a Supreme Court decision,² and that the issues presented here have never been litigated; that the Commission has never approved the disposition of a valuable asset to an affiliate by means of an arrangement between the companies; and that the Commission retains continuing jurisdiction pending regulatory action at USWC's request.

B. Summary of Issues

¹ The purpose of this discussion is to provide a summary for the reader. Each of the elements summarized in this section is addressed at greater length elsewhere in the order, and it is the later discussion that includes our findings, conclusions, and reasoning in support of the Commission decision.

² *U S WEST Comm. Inc. v. Wash. Util. & Transp. Comm.*, 134 Wn2d 74, 949 P.2d 1337 (1997).

- 6 The issues in this proceeding are whether the Commission must or should end the practice of attributing – "imputing" – to U S WEST Communications, Inc., a portion of the earnings of its affiliate U S WEST Dex from publication of the U S WEST classified business telephone listings known as the "Yellow Pages." The value of imputation (i.e., the value of Yellow Pages operations to the local exchange company) is significant. It was fixed at \$50,934,378 per year at last calculation, in 1995, in Docket No. UT-950200.
- 7 The events giving rise to this litigation began late in 1983, as the divestiture from AT&T of its local exchange company business was being implemented. The local exchange company business was placed with seven newly created Regional Bell Operating Companies (the RBOCs or "Baby Bells"). Federal Judge Harold Greene, who oversaw the divestiture, decided that Yellow Pages businesses should remain with the regional operating companies to maintain their contribution to local company earnings.³
- 8 In late December 1983, Pacific Northwest Bell (PNB)⁴ asked the Commission for authority to transfer certain specified assets to Landmark Publishing Co. in exchange for a .21 share of Landmark stock.⁵ The application disclosed that PNB would not keep the partial share Landmark offered in exchange for the assets but would transfer it immediately to U S WEST. The shifting of assets among affiliated companies was thus without compensation to the local exchange company.
- 9 The application also sought approval for an intercompany arrangement between the two subsidiaries in which PNB authorized Landmark to publish telephone directories for PNB in exchange for what the application described as a guaranteed stream of payments to the local exchange company.
- 10 In the last days of December 1983, the Commission approved the January 1, 1984 transfer of the specified assets and the change in publication arrangements. Under the state's affiliated interest statute, however, the Commission reserved a ruling on the financial consequences for ratemaking purposes. The

³ *United States v. American Telephone and Telegraph Co., et al.*, 552 F. Supp. 131 (1982)

⁴ PNB, a local operating company that had been a wholly owned subsidiary of AT&T, was becoming a subsidiary of regional Bell operating company U S WEST. PNB eventually merged with Northwestern Bell and Mountain States Telephone companies to become U S WEST Communications, Inc. For purposes of this Order, the terms PNB and USWC are interchangeable terms referring to the Washington State operating company.

⁵ Landmark, like PNB a U S WEST subsidiary, was the parent of U S WEST Direct, which later became U S WEST Dex. For purposes of this order, the three names are interchangeable.

Commission also approved the publishing agreements. PNB agreed, five years later, without compensation, to the termination of the "guaranteed" payments, and USWC now contends that the entire directory business was transferred to Landmark with the transfer of physical assets in 1984.

- 11 PNB twice voluntarily agreed to imputation of yellow pages earnings. First, in 1989 it agreed to imputation on a temporary basis in settlement of an overearnings complaint and establishment of an Alternative Form of Regulation (AFOR). Later, also in 1989, it agreed to imputation in resolution of the merger of PNB, Mountain Bell and Northwestern Bell into the present local exchange company, U S WEST Communications, Inc.⁶
- 12 Despite the continuing imputation ordered in the merger docket, which the Company did not appeal, the Company challenged the Commission's authority to use imputation on some eighteen separate grounds in a major general rate case, which it filed in 1995, Commission Docket UT-950200. The Commission rejected the challenge in an order that was affirmed in all regards by the Superior Court and, on review, by the Washington State Supreme Court.
- 13 That brief history brings us to the matter before us. On the issue of whether the end of imputation is mandated, as U S WEST contends, the parties present the Commission with a single basic choice.
- 14 U S WEST bases its presentation upon its contention that the Washington State Supreme Court ruled that the transaction leading to imputation was a complete transfer of the business effective on January 1, 1984, and that imputation must end when the value of the imputation reaches the value of the business at the time of that transaction. The Company and its witnesses offer views of significant events and decisions that are consistent with their contentions arguing that the Commission must end imputation under the terms of the Supreme Court decision.
- 15 Commission Staff, Public Counsel, and intervenors respond that the Supreme Court decision did not need to, and did not, address the precise nature or timing of the transaction giving rise to imputation, and that contemporaneous features and descriptions of the transaction are inconsistent with the Company's view. They argue that the Commission need not and should not end the imputation of Yellow Pages revenue.
- 16 The Commission rejects the Company's view. A reading of the entire Supreme Court

⁶ The Company entered a settlement agreement in the merger proceeding, agreeing to imputation for a five-year period. The Commission refused to approve the merger unless the five-year limitation were removed. The Company accepted that provision.

decision, an examination of the issues that it resolved, and attention to its holding compel us to conclude that the Court did not rule as the Company contends and that the decision does not require us to end imputation. USWC's principal contentions about the meaning of the decision appear to be inconsistent with the Court's holding and with specific language in the decision.

- 17 Looking next at the record in this docket and at prior administrative and judicial decisions, the Commission decides that the evidence proves that USWC's first proposition – that a permanent transfer of the entire business was completed on January 1, 1984 – is incorrect. USWC's second proposition – that a valuation must occur on January 1, 1984, or any other date found to be the date on which the transaction was completed – fails when the Company's first proposition fails. The Company's arguments also fail to consider the nature of the transaction as one among affiliates and fail to consider the Commission's authority and responsibilities under the affiliated interest statutes.⁷
- 18 Finally, we find no credible evidence in the record of facts supporting the Company's contention that present circumstances render imputation improper or inconsistent with the public interest.
- 19 We hold that the Yellow Pages publishing activity has not been transferred

⁷ The Fifteenth Supplemental Order in Docket UT-950200 found the affiliated transaction imprudent. *U S WEST Comm., Inc. v. Wash. Util. & Transp. Comm'n*, Docket No. UT-950200, 169 PUR4th 417, 442-48 (April 11, 1996). While we do not base our decision on that rationale, because it is unnecessary, the following Company actions raise serious questions about the prudence of management under its theory of their case: agreeing to the transfer of the lucrative Yellow Pages activity to an affiliate without compensation and, insofar as this record shows, totally without documentation; and agreeing to the termination of payments for publishing rights without compensation. Although the decision does not use the terms "prudence" or "imputation," the U. S. Supreme Court found improper an analogous transfer without compensation to an affiliate during the 1920s, and approved imputation as a remedy to protect ratepayers without reference to any affiliated interest statute. *United Fuel Gas Co. v. Railroad Comm. Of Kentucky*, 278 US 300, 73 L.Ed. 390, 49 S.Ct. 150 (1929), affirming *United Fuel Gas Co. v. Railroad Comm. Of Kentucky*, 14 F.2d 209(D.W.Va., 1926); *United Fuel Gas Co. v. Railroad Comm. Of Kentucky*, 278 U.S. 322, 73 L.Ed. 390, 49 S.Ct. 150 (1929), affirming *City of Charleston v. Public Service Commission*, 95 W.Va. 91, 126 (1923), in which the state court said, "[T]he commission had the right to wholly disregard the [transaction] and in determining the question of rates to be allowed . . . to treat the matter as if [the regulated company retained the assets]." Permanent placement in an affiliate does not demand treatment as a sale. *United Fuel Gas Co. cases, supra*. The Commission has ordered imputation in such situations. *WUTC v. Continental Telephone Company of the Northwest, Inc.*, Cause No. U-82-41, Second Supp. Order, (August 12, 1983), *WUTC v. General Telephone Company of the Northwest, Inc.*, (Cause No. U-84-18, Second Supp. Order, (January 15, 1985). Approval of a permanent transfer thus does not make treatment as a sale, and amortization, a legally necessary result.

permanently to USWC's affiliate for regulatory purposes. We hold that the Commission may properly order continuing imputation under the facts and circumstances shown on this record. The Commission's order continuing imputation in the merger docket supplants earlier orders and defines the appropriate remedy for the transaction that the Commission has approved, and that it remains effective until changed. We hold that the Commission will consider altering imputation upon a showing of changed conditions that render such a change consistent with the public interest and with relevant affiliated transaction statutes on a going-forward basis.

20 Procedurally and historically, this docket is complex. Several motions were reserved for ruling at the conclusion of the proceeding. The discussion of the factual and legal contentions is made lengthy by their number. We will begin the discussion on the merits with a history of events based upon the contemporaneous statements of the parties and orders of this Commission. Then we will address the motions, describing their interrelationship with the principal contentions. We will conclude by determining the facts to be found from this record and by resolving the legal points argued to us.

II. HISTORY

21 The relationship of this telephone company or its predecessor to directory and Yellow Pages publishing functions has been an issue, and has thus been described in some detail, in at least five relevant Washington State proceedings, and in one proceeding at the federal level (the AT&T divestiture). The five Washington State proceedings were before the Commission, including one eventually heard in the State Supreme Court. These are PNB's 1983 application for property transfer and affiliate transactions (FR-83-159); the 1986 approval of a second publishing agreement (U-86-156); the 1989 Commission complaint against PNB for overearning that resulted in the alternate form of regulation (AFOR) and that included imputation as an element in the settlement (U-89-2698 and U-89-3245-P); the merger that resulted in the formation of U S WEST Communications, Inc. (U-89-3524-AT); and the 1995 general rate case (UT-950200) that USWC appealed, resulting in the December, 1997, Supreme Court decision cited above.⁸

A. AT&T Divestiture and the Modified Final Judgment

22 Prior to the implementation of the 1982 AT&T divestiture decision,⁹ telephone

⁸ In this Order, a citation to the "Supreme Court decision" without further citation is to the 1997 decision set out at 134Wn.2d 48.

⁹ *United States of America v. American Telephone and Telegraph Company, et al.*, 552 F. Supp. 131, (1982).

service in much of the United States was an integrated, regulated monopoly service provided by a dominant carrier, AT&T. That company owned a number of operating companies, including Pacific Northwest Bell, USWC's predecessor in the state of Washington. Historically, PNB published directories of subscriber listings (white pages) that included classified business listings and advertisements printed on yellow paper and called the "Yellow Pages." It reported revenues from the advertising and publishing business in its regulated results of operation, that is, its statement of income and expenses for regulatory purposes.

23 Upon the divestiture by AT&T of its operating companies, U. S. District Court Judge Harold Greene held that the resulting seven regional Bell operating companies (RBOCs) should retain publication of the Yellow Pages businesses in their operating territories, in large part because of the contribution of Yellow Pages revenues to local telephone rates. *USA v. AT&T, supra., note 8, at pp. 193-4.*

B. Transfer of the Publishing Function

1. PNB's Application for Transfer

24 As part of the reorganization of AT&T and its former subsidiaries, on December 22, 1983, PNB applied to the Commission for approval of the transfer of certain assets to its affiliate Landmark Publishing Company and of agreements under which Landmark would publish directories for PNB. PNB asked that the transfer of the assets, associated with its Washington Yellow Pages business, and valued at about \$13.7 million, be effective January 1, 1984.¹⁰ Because chapters 80.12 RCW (transfer of property) and 80.16 RCW (affiliated interests) require full disclosure and prior approval of all property transfers and all affiliated interest transactions, the Company was required to and did apply for approval of the transaction.

25 The Application specifically sought approval of three aspects of the agreement: (1) a publishing agreement between PNB and Landmark by which Landmark agreed to publish directories and Yellow Pages advertising for PNB; (2) a memorandum of understanding for administrative services; and (3) the transfer of certain assets (cash and a leasehold, principally):

. . . total company wide PNB assets in the amount of \$24,101,000 . . . in exchange for .21 share of the sole share of stock of LPC. . . The Washington assets shall consist of one leasehold, station equipment, office equipment and furniture. PNB will then transfer the LPC stock to U S WEST as a stock dividend payable

¹⁰ This allowed the Commission five business days to evaluate the matter and to prepare and enter its order.

January 3, 1984.

Application, Cause No. FR-83-159, at pages 2 -3. The cash was to satisfy the working capital requirements of the directory publishing operation.

- 26 The application specified that the publishing agreement would govern the terms by which Landmark would publish directories and Yellow Pages for PNB. PNB represented:

The Publishing Agreement is a good deal for PNB and its ratepayers because the Agreement effectively preserves a significant contribution from Yellow Pages revenue to PNB's earnings in the new more competitive marketplace after January 1, 1984. Further, **this revenue stream is guaranteed**, so that the risk and expense of this deregulated and increasingly competitive area of business are not borne in [*sic*] by PNB's ratepayers. [*Emphasis in original.*]

The purpose of the transaction is a rearrangement of USW's assets to internally provide from PNB and USW's other operating telephone companies the initial capitalization for USW's publishing subsidiary LPC. . . . This transaction does not negatively impact PNB's ratepayers since the leasehold, cash and other property to be transferred will be removed from the rate base.

Id., at page 3.

- 27 The Commission approved the transfer within the few days required by the timing of the application – but only on an interim basis. *In re PNB Tel. Co., Order Granting Application in Part, No. FR-83-159, (December 30, 1983), p. 2.* The Commission determined that the transactions between PNB and U S WEST Direct were not arms' length dealings, and stated its concern that PNB not undervalue the advertising revenues in the publishing agreement with its affiliate. The Commission reserved the right to determine reasonable revenues and expenses, together with their proper regulatory treatment, in any formal proceeding before the Commission dealing with the results of U S WEST's operation for ratemaking purposes. The Commission directed PNB to record and maintain all records needed to perform the eventual valuation.

2. Publishing Agreement, Cause No. FR-83-159

- 28 The 1983 Application included a Memorandum of Agreement (MOA) between PNB and Landmark, and a Publishing Agreement. In 1984, the Company sought authorization under the original docket to replace the MOA with nine contracts and a Publishing Agreement having a three-year term, with provision for two additional one-year extensions. The MOA stated the fees Landmark was required to pay to PNB: \$21.18 million (1984), \$62.7 million (1985), and \$67.55 million (1986).

29 The Commission approved the Publishing Agreement and the contracts, but again reserved ruling on the reasonableness of the specified fees Landmark was to pay PNB until a future time. *Fourth Supplemental Order, Cause No. FR-83-159 (January 16, 1985)*. The Commission also found again that the transactions between PNB and U S WEST Direct were not arms' length. The Commission's principal stated concern in approving the arrangement was to make it possible for PNB to do business with its affiliates legally and in an orderly way. The Commission was not able to determine the extent to which PNB was receiving full value for allowing Landmark to publish the directories, and expressly did not approve the reasonableness of the publishing fees nor any profit margin derived from them.

C. Revised Publishing Agreements

1. Revised Publishing Agreements, Cause No. U-86-156

30 On December 23, 1986, PNB filed an application seeking approval of ten separate agreements between PNB and U S WEST Direct¹¹ relating to various services to be provided by PNB. These included a new two-year publishing agreement for 1987 and 1988, which reduced the publishing fee to \$41.6 million for 1987. *Ex. 112 at p. 14*. The fee for 1988 was to be renegotiated between the parties, and was ultimately set at \$33.9 million. *Ex. 112 at 4. See also, Second Supplemental Order, Docket No. U-86-156 (October 12, 1988), at p. 6.*

31 The Commission again temporarily approved the agreements to permit the continued publication of directories, pending full review in the next PNB general rate proceeding, but it specifically found the amount of the publishing fees contained in the publishing agreement to be inadequate and improper for ratemaking purposes. *Id. at pp. 13-14.*

32 In that order, the Commission repeatedly acknowledged the temporary nature of the publishing arrangement when it noted that "the subject of the application under review in this proceeding is a group of ten agreements which govern the publication of telephone directories on behalf of PNB by U S WEST Direct." *Id. at p. 2.* [emphasis added] The Commission concluded that the publishing fee that PNB proposed to the Commission was "unreasonable and not in the public interest pursuant to RCW 80.16.020." The Commission ruled that appropriate compensation for PNB for allowing its affiliate to publish directories would be determined in the next Company general rate case.

¹¹ U S WEST Direct was a subsidiary of Landmark Publishing Co. It has been succeeded by U S WEST Dex.

- 33 The Commission listed three possible remedies that it would consider: (1) approval of the contracts with an appropriate adjustment to the publishing fees – affirming that PNB retained the rights to publish the Yellow Pages; (2) return of the publishing function to PNB; and (3) treatment of the transaction as the sale of a capital asset.
- 34 Near the end of 1988, after only five years of the "guaranteed" revenue stream it had committed to the Commission, PNB agreed to the termination of publishing fees without Commission approval and without any further financial consideration from its affiliate. In a letter dated December 12, 1988, U S WEST Direct's Vice President-Marketing, Max G. Johnson, wrote Dennis Okamoto, then Vice President-Treasurer of PNB, advising him that "the intercompany 'subsidy' payment [publishing fee] will cease to be effective 12/31/88." Ex. 609. Mr. Okamoto agreed to this action.

2. Further Revised Agreements, Cause No. U-86-156

- 35 USWC subsequently applied for an order approving a newly revised, extended publishing agreement. The Commission again partially and conditionally approved the agreement, subject to a future review of the appropriate level of publishing fees in a full rate case setting. *Third Supplemental Order, In re Application of PNB, Cause No. U-86-156 (February 7, 1989)*. Although it approved the publishing agreement, the Commission expressly stated its disapproval of the Company's "undisguised policy" of acting to "reduce and finally eliminate the publishing fee in order to enhance U S WEST's results at the expense of telephone subscribers." *Id. at pp. 1-2*.

D. Rate Complaint Case and AFOR, Cause Nos. U-89-2698-F, U-89-3245-P

- 36 In February 1989, the Commission filed a complaint against PNB alleging excessive earnings. As part of a settlement of the rate complaint and adoption of an alternative form of regulation (AFOR), PNB agreed by stipulation to imputation of a portion of Yellow Pages income as fulfilling a part of the Company's revenue requirement for regulated services. *WUTC v. Pacific Northwest Bell Tel. Co., WUTC Cause Nos.*

*U-89-2698-F and U-89-3245-P, Appendix A, at pp. 14-17 (Fourth Supplemental Order, January 16, 1990).*¹²

¹² The Commission ordinarily does not infer very much from settlement agreements. In Docket No. UT-950200, however, USWC charged that it was improperly coerced into accepting imputation. The Superior and Supreme Courts affirmed the order in which the Commission found no basis for USWC's contention. USWC's choice to accept imputation was entirely voluntary, a fact that is reflected in the pleadings and order of the merger docket, discussed at more length elsewhere in this Order.

E. The USWC Merger, Docket No. U-89-3524-AT***1. Second Supplemental Order***

37 In December, 1989, PNB sought the Commission's approval of the merger of PNB, Mountain Bell, and Northwestern Bell Telephone Company into U S WEST Communications, Inc.¹³ The Company entered a settlement agreement with other parties proposing to continue until the end of 1994 the imputation the Company had just accepted.

38 Commissioner A. J. Pardini dissented from the Commission's approval of the merger settlement, in part because the proposed settlement "forfeits an opportunity to, once and for all, resolve the issue of U S WEST's directory publishing revenues." *Second Supplemental Order, Docket No. U-89-3524-AT (November 9, 1990), Separate Opinion, Commissioner A. J. Pardini (dissenting), at p. 3 (unnumbered page)*. The dissent quoted Judge Greene's discussion of directory publishing revenues, which we have described above.

39 The Commission's majority opinion took note of the dissent and observed, "The Commission has always intended that the revenue stream from directory services be considered income due the operating company." *Second Supplemental Order, Docket No. U-89-3524-AT (November 9, 1990), at p. 8*. The Commission conditioned merger approval upon modification of the Settlement Agreement so that advertising revenues would be imputed "into perpetuity." *Id., at pp. 8, 10*.

2. Third Supplemental Order

40 PNB sought clarification of the Second Supplemental order, arguing that the merger and imputation were unrelated issues, and that the condition of imputation could be construed as an inappropriate and unilateral change to the Settlement Agreement. *Petition for Clarification, Docket U-89-3524-AT (November 20, 1990), at p. 2*. U S WEST proposed an alternative condition, replacing "in perpetuity" with "until changed by WUTC order." The rationale for this change was, "to reflect the reality that today's commissioners cannot bind future commissions in perpetuity, . . . [and because] fundamental fairness requires that U S WEST at least be able to request a commission to readdress this issue, if that becomes necessary due to changed conditions." *Id. at p. 3*.

41 The Commission accepted USWC's proposal, and the Commission's Third Supplemental Order stated that the Settlement Agreement would be modified to require that directory advertising revenues "will continue to be imputed accordingly

¹³ Second Supplemental Order, Docket No. U-89-3524-AT (November 9, 1990), at p. 1.

unless and until altered by subsequent order of the Commission." *Third Supplemental Order, Docket No. U-89-3524-AT, at p. 2 (November 30, 1990).*

F. 1995 General Rate Case, Docket No. UT-950200

- 42 On February 17, 1995, following completion in 1994 of the five-year AFOR, USWC filed a general rate increase for telephone services of approximately \$204 million a year. In calculating that revenue requirement, USWC proposed that imputation be discontinued. The Company there argued for the first time that imputation was illegal and advanced eighteen separate arguments for that conclusion.
- 43 The Commission rejected each of the Company's arguments against the imputation of Yellow Pages revenues. *Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Docket No. UT-950200, Fifteenth Supplemental Order, at pp. 30-39 (1996).*
- 44 USWC appealed the Commission's decision to the King County Superior Court and then to the Washington State Supreme Court which affirmed the Commission in all regards. Both the Superior Court and the Supreme Court upheld the Commission's Yellow Pages decision, ruling that the Commission acted lawfully to impute excess Yellow Pages revenue when calculating USWC's revenue requirement under both the affiliated interest laws (chapter 81.16 RCW) and statutory ratemaking authority (RCW 80.36.140). *134 Wn.2d 48, at p. 91.*
- 45 The Supreme Court decision specifically noted the Commission's continuing supervisory control over transactions among affiliates (RCW 80.16.050) and the power to disallow unreasonable compensation to an affiliated company for ratemaking purposes (RCW 80.16.030). *134 Wn.2d at p. 93.* The Court ruled that the Commission was within its statutory authority to disallow for ratemaking purposes the unreasonably low compensation USWC received from its affiliate, U S WEST Direct, for the profitable Yellow Pages operations. The Court stated:

No one represents to this Court that U S WEST Direct has paid U S WEST the fair price for the Yellow Pages business. . . . The imputing of revenue is the result of the fact that the Company gave away a lucrative ratepayer-funded asset to an unregulated affiliate in return for little or nothing.

134 Wn.2d at pp. 94, 96. The Court observed that USWC could "apply for an end to imputation when it can show that it has received fair value for the asset." *134 Wn.2d at p. 102.*

G. USWC's Current Request

46 In this Docket, USWC again asks the Commission to put an end to imputation.¹⁴ It argues that the Supreme Court decision ruled that a permanent transfer of the entire Yellow Pages business occurred on January 1, 1984, and that the imputation and publishing fees constitute full payment by USWC to ratepayers for the loss of the business that was transferred to Landmark without compensation.

III. PROCEDURAL MOTIONS

47 Three pending motions have been deferred for resolution until after conclusion of the evidentiary hearing. The first is a motion by U S WEST, earlier denied but renewed at the conclusion of the hearing, that would have us exclude certain responsive evidence filed by Public Counsel and Commission Staff on the basis of judicial estoppel. USWC contends that Commission Staff and Public Counsel made certain factual representations and prevailed on prior judicial review, and because of that they cannot in this proceeding make different representations. The second is a motion by Public Counsel and intervenors that asks the Commission to deny USWC's accounting petition on the basis that it fails to comply with the requirements or intentions of prior Commission orders regarding modification of imputation. The third is a Commission Staff motion for a ruling denying the element of USWC's petition arguing that imputation violates USWC's constitutional right of free speech. We will address each motion individually.

A. USWC's Motion to Strike Portions of the Testimony of Staff and Public Counsel

48 U S WEST argues that Commission Staff and Public Counsel are judicially and equitably estopped from characterizing the 1984 transfer of the directory publishing business from Pacific Northwest Bell to Landmark Publishing Co. as a renting of intangible assets or the "outsourcing" of the directory publishing function. It alleges that in arguments before the state Supreme Court, Public Counsel and the assistant attorney general representing the Commission on appeal of the rate case order, characterized the transaction as the transfer of the directory publishing business and the transfer of "an entire enterprise." U S WEST argues that the Court accepted the argument and, thus, Commission Staff is now estopped from making any argument (and the Commission is estopped from making any finding) that less than the entire enterprise was transferred in this case. USWC contends that the testimony of Staff and Public Counsel's witnesses supports USWC's argument that those parties now seek to reverse or contradict prior arguments made to the Supreme Court.

¹⁴ USWC does not petition to modify the merger order in which the imputation obligation is fixed, and it does not apply for approval of a sale or other divestiture of the asset or for any modification of the publishing agreement.

- 49 Commission Staff and Public Counsel respond that they have not taken "clearly inconsistent" positions in judicial proceedings involving the same question (an essential element required for the application of judicial estoppel). They argue that the word "transfer" can and often does encompass a much broader set of transactions than the transfer of ownership and title to property, including but not limited to rental or outsourcing arrangements. Although the parties to the prior proceedings asserted that a "transfer" of assets took place, they did not analyze the precise nature of that transfer as suggested by U S WEST. Staff and Public Counsel contend that such an analysis did not occur because the precise legal nature of the transfer was not at issue in the rate case.
- 50 Commission Staff and Public Counsel also respond that the allegedly inconsistent statements attributed to them – characterizing the legal nature and effect of the transfer of the Yellow Pages business – are conclusions of law, not assertions of fact, and argue that the doctrine of judicial estoppel applies only to bar inconsistent positions as to facts. U S WEST contends that the positions the respondents and the Commission took before the Court were factual assertions that U S WEST had transferred away a valuable asset to an affiliated company without obtaining fair value. U S WEST argues that Staff and Public Counsel must be estopped from denying the "fact" that the valuable asset was transferred away.
- 51 **The Commission denies U S WEST's motion.** First, the exact nature of the ownership of the directory function, and the exact nature of the transactions among USWI and its subsidiaries, were not at issue in the rate case proceeding. The only issue there was whether the Commission – given that USWC, for whatever reason, no longer recorded as its own the revenues of the U S WEST conglomerate's Yellow Pages business – had the power to impute revenues to the regulated entity. The Court answered that question in the affirmative. The business – that is, the directory and yellow pages publishing function – was conducted by Landmark after January 1, 1984 and not by PNB. The Court's decision could not approve imputation without first granting judicial recognition that in that circumstance, a sufficient transfer occurred to invoke the pertinent statutes. The Court's decision, however, did not require and did not produce a finding of complete, total, and irrevocable transfer of all rights as of any particular moment.
- 52 The Court did not make a finding, or remand to the Commission for a finding, that a complete transfer occurred. Passages in the decision appear to characterize the transfer as completed. On balance, however, we do not believe that the decision resolved the issue we now face, or that it prevents us from examining the issue. The Court observed at page 98 that USWC "has always been free to sell" the directory business "for a fair value" and it held at page 102 that "USWC may petition the Commission for an end to imputation if and when it can show *it has received* fair value for the transfer of the asset." [*emphasis added*] USWC argues that the decision rules that a complete and final transfer occurred in 1984. If the Court had ruled that

USWC had made a permanent and complete transfer of the business, it would be inconsistent to say that the Company always had the right to sell, or that it may in the future receive fair value for the business.

- 53 U S WEST's position also has telling legal and regulatory implications. U S WEST in making this motion would shift the obligation and the right of fact finding from the administrative agency to the parties in any given docket, and from the order itself to the briefs, as the effect of the motion would be to rely on parties' briefs for statements of fact, not on agency orders or judicial decisions. The principle that the Company argues states that parties who advance facts in one proceeding may not contest those facts in later litigation. The case that USWC cites for its argument is not directly analogous to the present situation, in that the result argued there in briefs was clearly a central element clearly resolved in the earlier litigation.¹⁵ Here, that is not the case, as the argued matter is not necessary to the result, had no factual basis in the prior litigation, was not clearly resolved in the cited decision, and arose under the state Administrative Procedure Act.
- 54 In the rate case, we see no factual or legal presentations of the sort received in this docket. There, the Commission made no finding of fact in the underlying administrative order that a complete and permanent transfer occurred on January 1, 1984. We see no findings of fact in the Supreme Court decision and no remand to the Commission so that appropriate findings could be made. USWC's argument rests on the premise that the Court found USWC's interpretation of the representations of Commission Staff and Public Counsel, on brief to be facts. U S WEST's position would give the power to make findings of fact to the parties to judicial review and to the Supreme Court, contrary to the requirements of RCW 34.05.461 and RCW 34.05.558.
- 55 We also see the definition of the relationship not as a matter of fact, but as a conclusion of law based on the application of narrow principles of law to specific facts. As Commission Staff and Public Counsel point out, the facts have been repeatedly recited in numerous contexts, including Commission orders. What is at issue is the interpretation of those facts. *Community College v. Personnel Board*, 107 Wn.2d 427, 434-35, 730 P.2d 653 (1986). The legal component is then reviewed under the "error of law" standard. U S WEST's challenge is addressed to an argument of law, not fact, in the manner of an agency's application of law to the facts of a case. See, *Franklin County v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982). It is therefore not subject to the principle that USWC posits.
- 56 Finally, the Company argument should be rejected on policy grounds, as well. The Commission grants parties some latitude to repeat positions previously denied or to back away from positions previously approved. Agencies are not bound so tightly by

¹⁵ *Tucker v. Brown*, 20 Wn.2d 740, 150 P.2d 604(1944).

the bonds of precedent as are the courts, and have a greater latitude in fashioning responses based on current circumstances. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808-09, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973). This result is consistent with an evolving regulatory environment in which an administrative decision might be rendered outdated by rapidly occurring events. See, *In re Burlington N. R.R. Co.*, 1994 Minn. App. 1001, 522 N.W.2d 371, 377 (1994). Granting the Company's motion could require the Commission to accept similar arguments in this or other dockets, requiring the exclusion of relevant testimony, and could pose negative consequences for the Commission's and parties' ability to deal with future circumstances.

57 The Commission denies the motion.

B. Public Counsel, TRACER, and AARP Motion for Summary Judgment.

1. Changed Conditions

58 Public Counsel, TRACER, and AARP ("Movants" for purposes of this discussion) ask for a summary determination that there is no basis upon which U S WEST's petition can be granted, and that it should therefore be denied. Movants rely on the Commission's Second and Third Supplemental Orders in Commission Cause No. U-89-3524-AT — the merger proceeding in which Pacific Northwest Bell, Northwestern Bell, and Mountain States telephone companies asked permission to form U S WEST Communications, Inc.

59 The Movants argue as follows. The Commission's Second Supplemental Order in the merger proceeding approved the merger on the stated condition that directory revenues be imputed "in perpetuity." U S WEST's subsequent Petition for Clarification stated its acknowledgment that the issue of imputation for ratemaking purposes was "best laid to rest." U S WEST proposed that the condition be clarified to state that revenues be imputed until changed by Commission order because "future changed conditions" could make changes to imputation necessary. Movants argue that the Third Supplemental Order responded to U S WEST's concerns, acknowledged the problem, and amended the condition as U S WEST requested. Thus, Movants argue, U S WEST must establish "future changed conditions" as a prerequisite to seeking a change in directory revenue imputation.

60 U S WEST responds that its reference to "changed conditions" in its Petition for Clarification does not foreclose other bases for ending imputation. U S WEST asserts that the Commission's Third Supplemental Order did not impose any prerequisite to consideration of the issue in the future, and argues that it is not required to show changed conditions. However, U S WEST goes on to argue that unforeseen changed

conditions do exist.¹⁶

61 The merger order should be given significant weight. It demonstrates the importance that the Commission attached to the continuation of imputation as an ongoing condition, necessary in order to realize the benefits the Company expected from the merger. It demonstrates equally well the Company's agreement to imputation for the indefinite future, expressed in an order that they did not appeal and that they agreed would "put the matter to rest."

62 We are concerned, however, that granting the motion could, (like the original order demanding imputation into perpetuity), restrict unduly the flexibility of this or a future Commission to address matters on a future record in light of future circumstances. The burdens imposed by RCW 80.04.200 on parties seeking a modification of an order are significant, but parties should not be deemed legally foreclosed from seeking modification, nor the Commission from granting it when circumstances warrant.

2. *Equitable Estoppel*

63 Movants also argue that U S WEST is equitably estopped from claiming that imputation of revenue constituted payments for the value of the Yellow Pages business, because the claim is inconsistent with U S WEST's position in the merger case¹⁷ that imputation is an acceptable condition for approval of the merger. U S WEST responds that neither Public Counsel nor TRACER acted to their detriment in reliance on U S WEST's "commitment" and thus a necessary element of equitable estoppel is not met.

64 The Commission has discussed the application of equitable estoppel in the regulatory context in several prior orders.¹⁸ The application of equitable estoppel requires the following:

"(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

¹⁶ We deal with this argument below.

¹⁷ Cause No. U-89-3524-AT

¹⁸ See, for example, *WUTC v. U S WEST*, Docket No. U-89-3245-P (1989); *WUTC v. Whidbey Tel. Co.*, Cause Nos. U-85-50, U-85-51, and U-86-30 (1986); *Order M.V. No. 133363, Seafair Moving & Transfer, Inc.*, Hearing No. P-69394 (1986); *Order M.V. No. 128063, Paul E. and P. Randal Savage*, Hearing No. P-66336 (1983).

to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission."

Mikhail Kramarevcky v. Department of Soc. & Health Servs., 122 Wash. 2d 738, 743 (1993), citing *Robinson v. Seattle*, 119 Wash. 2d 34, 82, 830 P.2d 318, cert. denied, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992).

65 Here, we find no reliance or injury in the nature of the reliance and injury discussed in the cases. While an order was entered based on the representation (U S WEST's agreement to imputation), that fact gives rise to a question of process as to the proper manner to change the order rather than a question of estoppel. See, *WUTC v. General Tel. Co. of the Northwest, Inc.*, Cause No. U-81-61 (1982). Principles of equitable estoppel do not apply.

3. Waiver

66 Movants also argue that U S WEST waived any right to challenge imputation on grounds other than "future changed conditions" because the Company accepted the merger settlement and did not appeal the final order in that case. U S WEST reiterates its arguments that it is not limited to relief based on changed conditions, but if it were, changed conditions exist. U S WEST also argues that there was no explicit requirement that its entitlement to challenge imputation be limited to "changed conditions," and that waiver cannot be based on an implicit condition.

67 Here, U S WEST's arguments are consistent with our views on the need for regulatory flexibility, stated above, and are persuasive. We see nothing in the earlier actions that would constitute a waiver of alternative approaches in the context of this proceeding. To find waiver, we believe that we must also find either an explicit representation or a factual setting the equivalent of an explicit representation. USWC agreed to the result and waived the immediate judicial review of that order. We see nothing in this situation that expresses USWC's waiver of all alternative legal positions for all time to come. The prior order did not specify changed conditions as the only means by which to secure a change in the ordered imputation, although that is the principal ground for reopening an order under RCW 80.04.200. The order did not limit grounds for review of the order to changed circumstances.

4. Collateral Attack on Prior Order

68 Movants argue that U S WEST's Petition for an Accounting Order constitutes an improper collateral attack on the Commission's Third Supplemental Order in the merger case. U S WEST argues that the Third Supplemental Order only requires that imputation continue until subsequent order of the Commission, and that there is nothing improper in U S WEST's request that the Commission enter such a "subsequent order" at this time.

69 We reject Movants' argument for purposes of this proceeding. USWC is not attempting to negate the entire merger order. Instead, it is seeking a review of the framework for imputation that is established in that order, after the passage of a considerable period of time.

5. Conclusion

70 U S WEST is not legally barred, by any of the legal principles advanced by Movants, from seeking a change to the Commission's imputation practices. This ruling is consistent with RCW 80.04.200, authorizing rehearing of Commission orders. The underlying principle that the Commission finds pertinent is that a regulatory agency must, within the bounds of the law, retain the flexibility to regulate reasonably, in the public interest, pursuant to the public service laws, over time. *See, Farm Supply v. Util. & Transp. Comm'n*, 83 Wn.2d 446, 452, 518 P.2d 1237 (1974); *see, also, Util. & Transp. Comm'n v. United Cartage*, 28 Wn.App 90, 621 P.2d 217 (1981), *cert. denied*, 95 Wn.2d 1017 (1981). We are concerned that the Movants' interpretation of the principles they advocate would unnecessarily restrict the Commission's flexibility in a given case to address matters of public concern reasonably, lawfully, and consistent with the public interest. We therefore deny the motion.

C. Commission Staff Motion for Partial Summary Determination

71 U S WEST contends that the practice of imputation violates free speech protections found in the First Amendment of the United States Constitution and Article 1, Section 5, of the Washington Constitution. It argues that Yellow Pages publication is an expressive activity protected by the Speech and Press Clauses of the First Amendment of the United States constitution, which applies to the State of Washington through the Due Process Clause of the Fourteenth Amendment. It also argues that the activity is protected by Article 1, Section 5, of the Washington Constitution. The essence of its contention is that Yellow Pages publishing involves the exercise of creativity and editorial discretion, and that imputing directory revenue directly and substantially infringes on this editorial discretion and on the constitutional rights of U S WEST Communications, Inc., U S WEST, Inc., and U S WEST Dex.

72 Commission Staff moves to dismiss this count of USWC's petition. Staff contends that there is no issue of material fact; that on the recited facts there is no violation of constitutional protections as a matter of law; and that even if imputation were seen as affecting commercial speech – which Commission Staff does not concede – there is no violation of constitutional protections.

73 According to Commission Staff, the issue, properly stated, is:

Where the Commission has engaged in a common and well-established regulatory practice, namely, imputation of revenues to protect captive ratepayers from the inequitable effects of affiliated transactions, is there a violation of the First Amendment merely because the imputation in question concerns U S WEST's Yellow Pages advertising business?

1. Standing

74 Commission Staff argues that USWC has no standing to raise this issue, in that it suffers no harm from imputation and that only U S WEST Dex as publisher would have the right to present it. USWC responds that it does have the necessary standing, but cites no authority for the proposition. While we find that Staff is correct and standing does not exist, we will address other elements of the issue because of its significance.

2. Burden on Speech

75 Commission Staff argues that imputation has nothing at all to do with speech. Rather, Staff contends that it is a general policy applied to all utilities to protect ratepayers when a regulated utility's transactions with its unregulated corporate affiliates produce results that are inequitable to the interests of ratepayers. In numerous cases, Staff continues, the Commission has applied imputation to various companies' affiliate transactions that either shift costs to the regulated affiliate or shift profits to a non-regulated affiliate. Imputation neither "targets" speech, nor is it based in any other way on the content of speech. Imputation does not in any way affect any activity of U S WEST Dex. Imputation, as applied in this case, simply involves an accounting adjustment to the financial books of U S WEST, Inc., the regulated entity, for ratemaking purposes, that happens to be measured by reference to Yellow Pages earnings. The Commission does not touch the other company's earnings or the disposition of its income in any way at all.

76 U S WEST argues the Commission's imputation of Yellow Pages advertising revenues to USWC does burden speech because the imputation formula is not a generally applicable regulation — it is an individually fashioned remedy. U S WEST argues that the Commission has some authority to engage in individualized regulation but it may not exercise that authority where First Amendment interests are at stake. It concludes that individualized imputation violates the First Amendment in this case. It argues that even though Dex and the parent, U S WEST, Inc., are not parties, their free speech interests must be considered. It contends that the imputation of Dex revenues acts per se as a disincentive to publishing by providing a disincentive to maximize profitability.

77 Commission Staff responds that the imputation of Yellow Pages earnings imposes no burden on any exercise of free speech. Staff contends that imputation of excess

Yellow Pages revenue would be constitutional even if it were viewed as a regulation affecting commercial speech. The Staff argues that Yellow Pages are overwhelmingly commercial speech. The imputation of Yellow Pages revenues directly advances a substantial government interest – compliance with the laws requiring that charges to ratepayers be fair, just, reasonable, and sufficient – and the imputation is no more extensive than necessary to serve that interest.

- 78 The Commission finds that imputation, both in principle and as applied here, has nothing to do with and does not affect the exercise of free speech, commercial or otherwise. Imputation is strictly a mechanism by which the Commission balances the financial interests of regulated utilities' stockholders and ratepayers. USWC's contention fails first because the Company has no standing to raise the issue, second because imputation has no effect on speech, and third because the imputation mechanism is clearly a principle of general application. It is applied irrespective of the underlying activity to correct situations in which the Commission finds that a regulated company has given an ongoing benefit to its owners to the detriment of its ratepayers. *See, e.g., Fourth Supp. Order Accepting Settlement Agreement, WUTC v. Washington Natural Gas Co., et al., Docket Nos. UG-931405; UG-931442 (1994).*
- 79 The existence of imputation and/or the details of its application in defining the income of USWC have no impact whatever on the sibling or on the activity generating the revenues that define the level of imputation. Neither do they have anything to do with how that activity is conducted. We find no connection at all between imputation and speech. Imputation addresses neither the content of underlying speech nor even the existence of speech, and it neither impinges on speech nor affects it in any way.
- 80 Imputation is a mechanism by which USWC's operating results are restated to reflect earnings as if the Yellow Pages directory business were retained within the company's Washington operations. That was where the directory business was traditionally conducted, as confirmed by Judge Greene in the passage cited above. During the entire history of that operation, free speech issues were never raised. The creation of an affiliated-interest relationship in itself could hardly create a free speech claim that did not previously exist.
- 81 As we discuss at greater length, below, imputation is strictly a mechanism by which the Commission acts to protect ratepayer interests when the regulated company acts in a manner detrimental to those interests. Imputation in this case has been no more extensive than necessary to serve that interest. The Commission uses imputation to implement the public service laws requiring that rates be fair, just, reasonable, and sufficient, for both ratepayers and regulated companies. The public service laws, in turn, reflect and implement constitutional principles that define and balance the rights and responsibilities of companies that choose to enter regulated businesses.

3. Discretion

82 USWC contends that because the application of imputation and its details are a matter within the Commission's discretion, risks to speech are particularly dangerous and Commission action must be foreclosed. Again, we disagree with the Company. Even if imputation affected speech, which it does not, the areas of the Commission's discretion are narrowly circumscribed and extend only so far as the Commission must act to protect the financial interests of ratepayers. The Commission has and exercises jurisdiction only to the extent that is necessary to produce rates that are fair, just, reasonable, and sufficient. RCW 80.36.080. Imputation does not vest the Commission with unbridled discretion to burden speech unconstitutionally but only with reasonable discretion to exercise financial regulation to the extent necessary under the Constitution to produce rates that are fair, just, reasonable, and sufficient.¹⁹

4. Washington Constitution

83 Finally, USWC argues that the Washington Constitution's free speech provision is more broadly protective of speech than the First Amendment, and it applies here to prevent imputation. Commission Staff responds that the State Constitution gives commercial speech no greater protection than the Federal constitution provides. Staff argues that USWC fails to demonstrate that USWC has standing to raise the issue, that speech is affected at all, or that courts have decided cases addressing comparable situations.

84 We reject the Company's contentions. We find no cases interpreting the Washington Constitution in a manner analogous to that before us to prevent the exercise of regulatory power. The only significant element appears to be that an unregulated entity operates a directory advertising business, which we find insufficient to call forth the constitutional provisions.

5. Conclusion

85 We grant Staff's motion for partial dismissal. We find in the evidence no burden on speech in the Commission's use of imputation in order to correct U S WEST's affiliated-interest transaction.

¹⁹ *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923). *Federal Power Commission, et al v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944).

IV. PARTIES' ARGUMENTS ON THE MERITS

A. U S WEST Communications, Inc.

1. *The Supreme Court Decision*

86 On the merits of this proceeding, U S WEST argues that the Washington State Supreme Court decision²⁰ determined that a complete transfer occurred on January 1, 1984, and decided that U S WEST is entitled to the end of imputation when it demonstrates that the value of imputation is equivalent to the value of the yellow pages directory business as of that date. USWC repeats arguments that it made in support of its motion to strike certain of its opponents' testimony. USWC contends that the Court's decision is based on parties' representations that the entire Yellow Pages directory business was permanently transferred on January 1, 1984, that the decision accepts that interpretation, and that this interpretation thus became "the law of the case." USWC bases its arguments on express language within the decision and notes that in fourteen separate instances the Court stated that the business had been "transferred" and that in ten instances the Court states that the transfer was for insufficient consideration. The Company also notes that the Court states that the Commission has the power to rectify the inadequacy of the compensation.

87 USWC concludes from these statements that the Court finds as a fact necessary to the decision's result that a complete and permanent transfer occurred in 1984. USWC also concludes that the Commission's power to "rectify" the disadvantage to ratepayers is limited, in light of such a finding, to securing compensation for ratepayers for the value of the asset that was transferred. The Company ends its argument by stating that, because it proved the value of the business on that date, and because it proved that the amount imputed for the benefit of ratepayers exceeds that value, it has demonstrated that imputation must cease.

2. *The Transfer of the Yellow Pages Business*

88 USWC acknowledges that no documents support its view that a complete transaction occurred, but contends that no documentation is necessary to support a complete transaction among affiliates. It also contends that there is no fact of record to support the argument of Commission Staff and Public Counsel that the 1984 transaction was actually a lease of the intangible going-concern value.

²⁰ *U S WEST Comm., Inc. v. Wash. Util. & Transp. Comm.*, 134 Wn.2d 74, 949 P.2d 1337 (1997).

- 89 USWC argues, by analogizing to arms' length transactions, that the 1984 transaction was in fact complete. It admits that it did license many of the intangibles associated with the directory operation, but argues that it could not have transferred intangibles such as a right to be permanently free from competition or exclusive access to subscriber lists without illegally restraining trade. It argues that it could not transfer its own name to Landmark permanently and still retain the name for its own operations. The remaining intangibles, such as skilled employees and relationships with advertisers, do constitute part of the "going concern value."
- 90 USWC argues that the Court has found that a complete and permanent transfer occurred as a gift or as part sale, part gift. The Company argues that a sale is not required to accomplish a permanent transfer, citing *Richardson Roller Mills v. Miller*, 99 Wash. 654, 170 Pac. 357 (1918), involving an arms' length transaction.
- 91 USWC argues that a sale occurred because Commission Staff admitted that the effect of imputation – reducing rates for ratepayers in a manner determined by the Commission – is the same as the effect of payments in a sale. It argues that Commission Staff made a crucial admission in acknowledging that imputation was undertaken in lieu of either a sale or publishing fees.
- 92 USWC contests Commission Staff's and Public Counsel's argument that the failure to design the 1983 intercompany transaction documents as a sale implies it was not a sale. USWC asserts that Staff's and Public Counsel's view is inconsistent with the law of the case decreed by the Supreme Court. USWC cites Prof. Perlman's testimony to the effect that among affiliates, no documentation may be needed at all to effect a permanent transaction. USWC argues that to the extent there was ambiguity in the written agreements, that has been resolved by the parties' subsequent actions (i.e., that the parties' later behavior demonstrates their intention to make a permanent transfer in 1984).
- 93 USWC argues that the transaction could not be a lease, which is for a defined period, because the assets (largely cash) and intangibles (such as employees) were transferred without a determinate period. USWC argues that the Company never held a beneficial interest on behalf of ratepayers and that the Company's position is supported by the *Democratic Central Committee* case.²¹
- 94 USWC also argues that licensing its name and trademarks are consistent with a sale, not a lease. It cites *Wilkinson v. Sample*, 36 Wn.App. 266, 674 P.2d 187 (1983), involving an arms' length transaction, for the proposition that goodwill is transferred

²¹ *Democratic Central Committee v. Washington Metro Transit Comm.*, 485 F.2d 786 (D.C. Cir., 1973).

merely by the new owner announcing the succession to customers, which Landmark did.

95 USWC argues that at all times it provided all information pertinent to the transfer that was required by law. It had no duty to disclose the value of the ongoing business concern, it says, because that is not subject to regulatory accounting. It argues that none of the Commission's orders is inconsistent with the result that USWC advocates.

3. Valuation

96 USWC argues that it has supplied in the testimony of Mr. Golden the only credible evidence of record to value the business as of the time of the of transfer. It argues that it has incorporated several suggestions from Commission Staff and Public Counsel in its valuation and that Staff has conceded the validity of the result. USWC argues that Public Counsel criticized the result, but offered no alternative.

4. Imputation Issue

97 USWC argues that the accumulated value of imputation to Washington ratepayers exceeds the value, with interest, of the directory business as of the time of the transfer in 1984. The company calculates that the accumulated value of imputation exceeded USWC's calculation of the 1984 value of the business at some time during 1995. Modified to accept Public Counsel's suggestions, the accumulated value of imputation exceeded the value of the business in 1997. In any event, USWC argues that this compensation to ratepayers satisfies the requirement that USWC receive fair value for the asset.

98 The transfer cannot be considered a temporary or lease transaction, USWC contends, stating that both Commission Staff and Public Counsel concede that imputation compensates ratepayers for the value of the asset. Therefore, the Company contends, imputation must cease.

5. Other Issues

99 USWC contends that imputation is forbidden by Section 253 of the Telecommunications Act of 1996 because it artificially lowers rates and thus constitutes a barrier to competitive entry. The FCC has ruled that regulations that hold rates below cost are such a barrier and are impermissible.

100 Finally, USWC contends that imputation is an unconstitutional taking of property without just compensation. It cites *Kimball Laundry Co. v. United States*, 338 U.S. 1, 93 L.Ed. 1765, 69 S.Ct. 609 (1949). The Company argues that the application of imputation takes property from U S WEST Dex and denies USWC, the opportunity to

earn a fair return. Even if imputation is found not to violate the Constitution per se, USWC argues, allowing imputation to continue after ratepayers have been compensated does constitute a violation.

6. Recommended Commission Action

101 USWC asks that the Commission enter an order ending imputation because there is no basis on which imputation can be continued. If the Commission finds that the valuation date is January 1, 1984, but that some portion of the fair value remains uncompensated, USWC suggests that the portion should be credited to rate base by crediting depreciation accounts.

B. Commission Staff

102 Commission Staff disputes USWC's arguments and contends that the Commission should continue to impose imputation. Staff contends that USWC has engaged in a consistent strategy to avoid paying fair compensation for the Yellow Pages business. Staff argues that the Commission approved the transfer of tangible assets, but did not approve the publishing agreements or the level of publishing fees. USWC agreed to imputation in the AFOR and merger dockets, but only challenged the Commission's right to impose imputation in the 1995 rate case, UT-950200. Never in the past has USWC argued or the Commission found that USWC transferred the complete ownership of the Yellow Pages business to Landmark, and never has USWC before this docket contended that imputation was compensation for the value of the Yellow Pages business.

103 USWC is attempting to create the illusion, Staff argues, that the Commission merely must ratify the Supreme Court decision to grant the Company's request. However, Staff contends that doing so is improper because the Court did not determine the ownership of the asset, it did not determine the date on which to make a valuation, and it did not determine that imputation constitutes payment for the transfer of the Yellow Pages business.

104 The proper date to make a valuation, according to Commission Staff, is the date on which USWC decides to treat the transaction as a sale and receives fair market value for the Yellow Pages business.

105 Commission Staff argues that while the Court did find imputation proper as a result of inadequate compensation in the transaction in question, the Court did not hold that imputation constitutes compensation for the value of the asset. It is not a payment at all, but merely an adjustment to the books of the regulated company. USWC's arguments are an exercise in revisionist history, Staff argues, seeking to rewrite the events of the past in order to excuse USWC from the imputation of Yellow Pages excess return.

1. History

106 Commission Staff contends that under the original publishing agreement in Cause No. FR-83-159, PNB in effect leased to Landmark the right to publish PNB's directories in exchange for publishing fees, providing a guaranteed revenue stream to PNB. PNB did no valuation study and provided the Commission with no valuation of the business. The Commission allowed the transfer of the tangible assets (principally cash) but reserved judgment on the financial aspects of the arrangement, requiring PNB to maintain pertinent financial records.

107 In Cause No. U-86-156, brought on by USWC's request for approval of ten separate agreements between USWC and U S WEST Direct (including a new Publishing Agreement), the Commission found the fee unreasonably low compared to the estimated reasonable value of the right to publish the Yellow Pages. The Commission ruled that the full value of the publishing enterprise must be available to PNB for ratemaking purposes. Remedies include, the Commission said, invalidation of the agreements and return of the Yellow Pages to PNB, determining an appropriate publishing fee, or treatment as the sale of a capital asset.

108 Commission Staff contends that the Commission Order in Cause No. U-86-156 was clear in finding that the initial 1984 transaction merely empowered Landmark to conduct the publishing operation on PNB's behalf. The Order was forward-looking, and stated some possible future consequences including treatment as a sale – should PNB elect that treatment. USWC has not yet made that election.

109 Commission Staff calls attention to the Company's agreement to imputation in the AFOR and rate complaint docket. Staff also notes that PNB agreed to imputation in the merger settlement. The Commission directed that imputation continue until further order of the Commission. Commission Staff describes the 1995 rate case, noting the Company's challenge of imputation in that docket, and analyzes the 1997 Supreme Court decision.

110 Commission Staff argues that the Court was not asked to and did not decide whether there had been a permanent transfer, and, if so, to determine the date of valuation. The Court noted correctly that the purpose of imputation is to treat Yellow Pages revenues and expenses as though the Yellow Pages transaction had never occurred.

2. The Nature of Yellow Pages Transactions

111 Commission Staff argues that the Yellow Pages transactions were interaffiliate transfers made without true negotiation, and were not arms' length transactions. Staff argues that it is improper, therefore, to apply standards of arms' length transactions to interpret or define the relationships among the participants. Also, it is improper to

call the transactions a "gift" of a lucrative asset when the Commission did not approve a gift. Staff concludes that there is no principled way to argue that the Yellow Pages business should be valued as of January, 1984. Rather, Staff contends, it should be valued at the time the Company elects treatment as a sale and demonstrates payment by U S WEST Dex of the fair market value at that (future) time.

3. Inadequate Disclosure

112 Commission Staff argues that if the Company were transferring the entire Yellow Pages business, it failed to disclose that intention. In that, the Company violated RCW 80.12.020, which forbids the disposition of properties without Commission approval and the Company violated WAC 480-143-010, which requires an application for authority to transfer property to "state in full detail" the facts and circumstances of the proposed transaction. Commission rules also require the submission of a full description of any unwritten provisions. The Company did not disclose that it was going to cede all rights in the Yellow Pages publishing business and did not submit to the Commission any document that so stated.

4. Prior Representations

113 Commission Staff points out that U S WEST has confirmed numerous times in other proceedings that it transferred only the physical and tangible assets in the 1984 transaction. Staff notes that USWC argued to the Commission on brief in Cause No. U-86-156, the proceeding in which the Commission considered revised publishing agreements, that because PNB could resume Yellow Pages publication at any time, *nothing* was transferred.

5. Necessary Steps Omitted

114 Commission Staff argues that no transfer occurred because PNB failed to take a number of steps that would have been necessary to transfer ownership of the Yellow Pages business in 1984. It conducted no valuation of the Yellow Pages business, and it prepared no documentation to support a full transfer of ownership. Staff states that Landmark paid no compensation for the fair market value of the business, and PNB leased valuable rights to Landmark under the publishing agreement in a manner inconsistent with the theory of a sale.

6. Beneficial Interest

115 Commission Staff argues that the theory of the *Democratic Central Committee* case, above, requires a beneficial interest in the Yellow Pages operations to be preserved for ratepayers. Because Yellow Pages operations affected the Company's operations, ratepayers were exposed to risk of loss. Staff contends that it is improper to focus on

the nature of the individual components, as USWC urges. Staff suggests that it is necessary instead to look at the business operations as a whole as an asset of PNB, as USWC's witness Mr. Golden did. Commission Staff argues that there is no barrier to recognition of capital appreciation, as USWC contends, as of January 1, 1984, because there was no transfer of the business effective at that time. Indeed, no transfer of the business has yet occurred.

7. Valuation Issues

116 Commission Staff presented a calculation of the business value as of January 1, 1999, through witness Dr. Lee Selwyn. The methodology the Staff witness used is comparable to Mr. Golden's, and returned a total valuation of \$5.6 to \$7.4 billion overall, or \$1.04 to \$1.35 billion on a Washington-separated basis.

8. Imputation Issues

117 Commission Staff contends that imputation is not compensation for the capital value of the business. Staff argues that U S WEST Direct has not paid anything for the fair market value of the business. Moreover, Staff argues, it is inconceivable that USWC could have believed that imputation constitutes payment for an asset, when the Company agreed to imputation in a way that did not specify a formula to amortize value; when it did not argue in the merger docket that imputation must end once amortization was complete; when it did not argue in the 1995 rate case that imputation should stop because it had paid for the fair market value of the business; and when it did not ask the Supreme Court to end imputation because the business had been paid for.

118 Staff argues that imputation is a means to rectify inadequate compensation arrangements and not for amortization of a capital asset. Prior Commission orders, Staff says, demonstrate that the Commission was concerned with, and later used imputation to rectify, inadequate compensation to PNB from Landmark for the publishing agreement and for services rendered. Staff points out that in a 1985 transaction, the parent of Continental Telephone of the Northwest sold its directory subsidiary, Mast Directory Company, to an unaffiliated interest. Prior to the sale, excess directory revenues were imputed to CTNW in the manner used for PNB despite the permanent placement of Mast as a separate subsidiary. The Commission computed the gain on the sale for regulatory treatment without reference to any capital offset from imputation, because imputation is not a regulatory means to recognize capital transactions.²² In another example, excess directory earnings of an

²²*WUTC v. Continental Telephone of the Northwest, Inc.*, Cause No. U-82-41, Second Supp. Order, (August 12, 1983).

affiliate were imputed to GTE-NW even though the commonly owned directory company merely owned, and was not acquiring or divesting, the directory business.²³

9. Other Issues

119 Commission Staff argues that there is no violation of Section 253 of the Telecommunications Act of 1996 because the Commission found in UT-950200 that no subsidy exists from imputation. The State Supreme Court affirmed that finding and noted that no competitor, who would presumably be hindered under USWC's theory had supported the Company.

120 Staff argues that Yellow Pages imputation is not an unconstitutional taking without just compensation. The Commission seizes no revenues from the affiliate, does not regulate the affiliate, and does not interfere in any way with the affiliate's conduct of business. Neither has the Commission "taken" revenue from USWC, Staff argues. Staff contends that USWC is wrong in its contentions that rates under imputation are set by reference to property in which "ratepayers have no interest" and for which "fair value has been received." Neither, Staff notes, has USWC demonstrated that the resulting overall rates are so low as to jeopardize the financial integrity of the Company, a requirement for a finding of unconstitutional taking under *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

C. TRACER, AARP and Public Counsel.²⁴

121 TRACER's brief begins with the observation that USWC's case rests entirely on a misreading of language in the decision of the Washington State Supreme Court and an attempt to revise history.

122 TRACER argues that the 1984 transaction was not a complete and permanent transfer of ownership of the directory publishing business. TRACER points out that at the time of the transaction there was no valuation, no buyer or seller, no consideration for the going-concern value of the business, no application for approval of the transfer, and no Commission disposition of the gain. In the absence of an application from PNB for approval of a sale transaction, the Commission implemented imputation. TRACER argues that USWC should not be allowed to characterize the transaction

²³*WUTC v. General Telephone of the Northwest, Inc.*, Cause No. U-84-18, Second Supp. Order, (January 15, 1985).

²⁴ Intervenors TRACER and AARP coordinated their efforts with Public Counsel to produce a joint brief. For convenience, we will refer to their combined brief in this docket using only TRACER's name. We acknowledge the considerable effort of each of the contributing parties. In many respects this brief parallels that of Commission Staff, and this Order for the sake of brevity and clarity will not repeat parallel arguments.

retroactively as a sale. TRACER contends that the imputation adjustments and publishing fees were not installment payments on a hypothetical sale, because no true sale occurred, no consideration was paid or received for the value of the business, no amortization schedule was established, no gain was available for Commission distribution, and publishing fees were never referred to as consideration. TRACER contends that ratepayers are entitled to the gain on the sale of the Yellow Pages business because they have continued to be at risk and are entitled to share in the growth of the value of the business. Finally, TRACER contends that imputation may cease only when the full current market value of the Yellow Pages business is determined, received by USWC, and credited to ratepayers.

1. History

123 TRACER's thorough recitation of the history of the transaction and the significant orders parallels that of Commission Staff and will not be repeated at length. TRACER notes that the Second Supplemental Order in Cause No. U-86-156 speaks prospectively about characterization of the transaction as a sale, saying "*if* U S WEST Direct seeks to ultimately acquire all of the opportunity for profit. . ." (emphasis added). Only at the time of an application, valuation, and credit to ratepayers, TRACER contends, may conditional treatment as a sale begin.

124 TRACER calls attention to language in the Supreme Court decision, observing that "The record shows the Company has always been free to sell the business for a fair value." TRACER argues that this observation, and the Court's observation that imputation may cease when the Company receives fair value for the business from its affiliate, demonstrate the fallacy in the Company's contention that the Court found a complete transfer to have occurred.

125 TRACER describes the details of the 1983 application packet and concludes that the 1984 transactions did not constitute and were never intended to constitute a permanent transfer of ownership of the directory business. TRACER notes that USWC's argument that the 1984 transaction was all or part gift causes the Company a problem because the Company has never asked the Commission to approve a transfer of the entire business operation without consideration, as it must under RCW 80.12.020. TRACER observes that the Company's version of history is incompatible with the requested and actual regulatory treatment, and concludes that no transfer of ownership occurred.

2. Valuation

126 TRACER argues that the central issue in valuation is selection of the proper time period. TRACER argues that there is no basis to conduct the valuation as of January 1984, because no change in ownership was disclosed, was approved, or occurred. TRACER cites to asserted errors in the methodology of Mr. Golden's proffered

valuation, but also argues that the basic premises of a sale as of that date were not met and that the extraordinary appreciation of the Yellow Pages business value since then offers strong motivation to the Company for insisting upon the 1984 date and valuation.

3. Imputation Issues

127 TRACER cites to the Commission's order in Docket No. UT-950200 and the Commission's observation there that it and other Commissions have used imputation to prevent regulated companies from transferring profitable assets to unregulated affiliates while saddling captive utility customers with the expenses of operation but reduced offsetting revenues from related services. TRACER concludes that imputation is not an installment payment for the transfer of the fair value of the publishing business. Similarly, TRACER finds no reason to consider publishing fees as payment for the value of the business as opposed to their stated purpose. TRACER also notes that USWC has never availed itself of the opportunity to secure treatment as a sale.

128 TRACER defends the accuracy of a "rental" analogy, and notes that even USWC's witness Golden uses the term "rent" in conjunction with the payment for temporary use of intangible assets. TRACER argues that ratepayers continue to bear the risks of the publishing function because they have remained at risk for the risks and costs of the publishing business under imputation. Ratepayers, argues TRACER, are entitled to the gain on sale when they have borne the risks. TRACER cites to Washington decisions, including one on the distribution of gain by USWC on the sale of Bellcore and another on the sale by Puget Sound Power and Light of certain assets in Cause No. U-85-53 (1986). TRACER disputes USWC's interpretation of TRACER's brief to the Washington State Supreme Court in the appeal of the Commission's orders in the rate case, and disputes USWC's interpretation of the testimony in this docket of Public Counsel and Intervenor witness Mr. Brosch.

4. Other Issues

129 On the same basis as Commission Staff, TRACER opposes USWC's contention that imputation is impermissible under the Telecommunications Act of 1996. TRACER also opposes USWC's contention that imputation constitutes an impermissible taking, arguing that imputation does not affect the publishing business in any way and citing a Colorado court decision holding that imputation in that state did not constitute an impermissible taking.²⁵

²⁵ *Mountain States Telephone and Telegraph Co. v. Public Utilities Commission*, 763 P.2d 1020 (Colo., 1988), cited with approval in the 1997 Washington State Supreme Court decision, 134 Wn.2d at p. 100.

V. DISCUSSION AND COMMISSION DECISION

130 The Commission has set out above a summary of the parties' arguments. In this segment of the order, we state our decision on the issues presented to us and our reasoning for those decisions.

A. Basis for USWC's Position

1. *The Supreme Court Decision*

131 U S WEST makes a number of representations about the meaning of the 1997 State Supreme Court decision affirming the Commission's rate case order. Consequently, we have read the decision closely and carefully.

132 USWC argues that the Court ruled, at least implicitly, that the January 1, 1984, transaction was complete and final; that a valuation must take place as of that date; that the purpose of imputation is to offset or pay for the capital value of the business; and that if the value of imputation exceeds the 1984 valuation of the directory business, imputation must cease.

133 USWC's argument is not without shortcomings. USWC takes its position despite the apparent context, holding, and language of the judicial decision to the contrary; despite the lack of administrative or judicial findings of fact supporting the theory; despite the Company's prior representations, actions, and litigation positions to the contrary; despite witnesses' prior sworn statements to the contrary; despite the prior Commission orders to the contrary; and despite the inherent admission that if its position were true it would be admitting its failure to disclose the total disposition of a lucrative asset to an affiliated interest, contrary to the requirements of chapters 80.12 and 80.16 RCW.

134 USWC and its witnesses acknowledged freely that the Company never in the past contended facts and legal relationships that it now argues control the transaction. Its positions are contrary to its prior representations to the Commission,²⁶ contrary to

²⁶ Brief of Applicant Pacific Northwest Bell Telephone Company, Docket U-86-156, at 23-24 (June 24, 1988).

prior Commission orders,²⁷ contrary to the prior sworn statement of a USWC witness,²⁸ and contrary to the holdings and observations of the Supreme Court decision.²⁹ USWC explains all of these inconsistencies by saying that it is only following the mandate of the state Supreme Court and what USWC calls "the law of the case."

135 We do not find that the Court's decision supports USWC's interpretation of the Court's decision. The Court ruled that the Commission acted properly within its discretion in using imputation as a means to rectify injury to ratepayers from an affiliated interest transaction. While the Court did refer to the transaction in some instances in the past tense – a transaction must have occurred to invoke the relevant statutes – it made no rulings on the timing or nature of any complete transfer of all rights to the Yellow Pages business or the proper valuation of that business because the issues were not presented.

2. USWC's Interpretation of the Supreme Court Decision

136 USWC argues that if there had been no "transfer," then the premise of the Court decision was wrong. USWC argues that the Court therefore ruled that a complete and final transfer occurred on January 1, 1984, that a valuation must be made as of that date, and that because the amounts of imputation now total more than the 1984 valuation, imputation is now illegal. The Commission disagrees.

137 USWC's first fundamental fallacy is to state that the Court's acknowledgment of a transfer of rights and benefits sufficient to invoke regulatory review and action was in fact a holding that a complete, total, and final transaction occurred as of a specific date. The Commission did not make a finding to that effect in the order appealed from nor in any prior case, and in fact over time made unambiguous holdings to the contrary, in orders that were never appealed. No record was made in the rate case to support such a finding. No party argued as much to the Court. The Court did not make a finding of fact to that effect nor did it remand the issue to the Commission for

²⁷ *In the Matter of the Application of Pacific Northwest Bell Company, Order Granting Application, Cause No. FR-83-159 (December 30, 1983); In the Matter of the Application of Pacific Northwest Bell Company, Second Supplemental Order, Docket No. U-86-156 (1988); Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Fifteenth Supplemental Order, Docket No. UT-950200, (1996).*

²⁸ Rebuttal Testimony of Max Johnson in Docket U-86-156; testimony of Ms. Koehler-Christiansen, transcript p. 1001

²⁹ *U S WEST v. Utils. and Transp. Comm'n, 134 Wn.2d 74, 89, 98, 102 (1997).*

an appropriate finding under RCW 34.05.558. The Court simply did not make the ruling that U S WEST contends the Court made.

- 138 Some of the confusion – or at least the missed communication – among the parties results from the difference in meaning, interpretation, and inference that the parties assign to the term "transfer."
- 139 USWC notes the term "transfer" in the parties' arguments on review of the Commission's Order in Docket No. UT-950200, and the Supreme Court's use of the term in its decision at 134 Wn.2d 49, and reads it to mean a complete, total, permanent transfer of all aspects of the Yellow Pages directory business.
- 140 All parties in the rate case acknowledged that after January 1, 1984 Landmark published the PNB directories and kept the proceeds from Yellow Pages advertising sales. All parties acknowledge the existence of contracts between PNB and Landmark regarding publication. The Commission ruled in orders that were not appealed that the consideration PNB received from Landmark was inadequate. No more was necessary to invoke the relevant statutes authorizing imputation and no more was necessary to decide the issues in the our order UT-950200 and its judicial review. While the parties in argument and the Court in ruling on the transaction did on occasion use the past tense, that was neither the argument nor the ruling that the transaction is complete and permanent for all purposes or that it was completed at any particular time.
- 141 The 1984 transaction in which certain assets changed ownership and in which responsibility for publication of the White and Yellow Pages directories moved from PNB to Landmark was a transfer, whether or not permanent, of the business operations. It was a sufficient transfer – shifting as it did the right to publish and to collect advertising revenues – to invoke the provisions of chapters 80.12 and 80.16 RCW. The term "transfer" need not, and did not, for the Commission or other parties, mean total and permanent transfer of the entire business. USWC's use of the term is not consistent with others' use.
- 142 In its appeal of the Orders in UT-950200, USWC did not challenge any lack of findings by the Commission as to whether the transfer was complete and final. It did not argue to the Court, so far as this record reveals, that the Commission's decision failed to make necessary findings or that the Court should remand the matter back to the Commission for necessary findings.
- 143 Courts can rule only on issues that are before them. The issue that USWC presented to the Court, on its challenge of the Commission Order in Docket No. UT-950200, was whether the Commission's use of imputation is legal to rectify adverse effects on ratepayers from what all parties acknowledged to be an affiliated interest transaction involving inadequate compensation. The Court ruled that the Commission's use of

imputation is legal under the pertinent statutes in those circumstances. It rejected, or found it unnecessary to reach, each of the 18 reasons that USWC posited as making imputation illegal.

144 USWC's theory of the decision appears to be inconsistent with significant portions of the Court's ruling. It is inconsistent with the Court's observation at page 98 that "[t]he record shows that the Company has always been free to sell the business for a fair value," because use of the present perfect progressive tense implies an ongoing, continuing ability to sell rather than a past, consummated sale.³⁰ The Court's observation at p. 102 that the Company is free to ask the Commission for an end to imputation "when it can show that it [USWC] has received fair value for the transfer of the asset" (emphasis added) is inconsistent with USWC's contention that it is ostensibly entitled to that result when it can show that it has provided a value to ratepayers.

145 USWC does not present evidence that it has received fair value for the asset. Instead it argues that the Court's decision makes the imputation of Yellow Pages revenues illegal because the value of the asset was "paid off" by imputation to USWC's earnings.³¹

146 USWC's theory is misguided. It is inconsistent with the factual record in this and prior dockets; it is inconsistent with the regulatory record; and it is inconsistent with the Supreme Court decision that it ostensibly seeks to implement.

B. The transfer of the Yellow Pages Business

147 U S WEST argues that the transaction was complete and final on January 1, 1984. We find that it was not. We find that the 1984 transaction was represented to be, and actually was, a transfer in which Landmark began publishing directories and engaging in the Yellow Pages business "for" PNB³² and agreed to make a guaranteed stream of payments for that privilege. That is what this record reveals, and that is what the Commission finds. Only in that context can the documentation presented by PNB,

³⁰ William A. Savin, *The Gregg Reference Manual*, (7th Ed. 1999).

³¹ USWC argues that the Company always took the position that imputation is illegal. USWC Opening Brief, at p. 26. A glance at prior Commission orders reveals that this statement is not supportable. In particular, in the merger dockets the Company accepted imputation on a continuing basis. This is inconsistent with the Company's new theory of illegality. In pleadings related to the merger order, the Company admitted that "it is time to put the issue (of imputation) to rest." It consented to the ongoing imputation as an integral element of the merger transaction, and it did not appeal the order.

³² Order of Dec. 30, 1983 in Cause No. FR-83-159.

the unappealed decisions of the Commission, and the Supreme Court decision be understood to make sense.

1. Indicators of Arms' Length Transactions

- 148 USWC argues that the transaction must be treated as a sale or other permanent transfer if there are certain indicia of a permanent transfer, according to the legal standards applied to arms' length transactions. Examples include the transfer of goodwill, copyright licensing, and use of trademarks.
- 149 The analogy and the citations are invalid, because this is not an arms' length transaction. Mr. Inouye confirmed at TR 492-3 what has been clear from the outset of this transaction in 1983 — that USWI controlled the negotiations regarding the Yellow Pages. Indeed, it was only sound business that USWI control the transaction in every regard. It did so in an attempt to shift the income of the lucrative directory publishing business from PNB, where it was a benefit shared by ratepayers and stockholders, to an unregulated subsidiary where the benefit could be enjoyed exclusively by shareholders. To the extent that witnesses represented that this was not the case, and that dealings between the companies *were* at arms' length, their testimony is not credible.
- 150 The Company repeatedly analogizes for selected purposes to standards applicable to third-party or arms' length transactions. The Commission gives those standards no weight in this context, as they are inapposite to this series of transactions. Every one of the incidents of this transaction was subject to the ultimate discretion, direction, and control of USWI and could be molded to resemble or not resemble an arms' length transaction at USWI's direction. USWC clearly concedes this when it strongly argues the reverse of this issue, for example, when it points out that the transaction needs no documentation because it is a transaction between affiliates, or when it states that it needs none of the indicia of a third-party transaction because affiliates are free to make gifts to one another.
- 151 Finally, some of Mr. Johnson's testimony relating to trademarks is not credible. We find no indication that the logo of U S WEST Communications, Inc., connotes in the popular view an entirely different company from that connoted by any other U S WEST corporate family logo.³³ We find it not credible that consumers see the U S WEST Communications logo, with its stylized U S WEST lettering, see the identical U S WEST lettering with the name "Dex," and view them as totally distinct and unrelated companies as opposed to related products under a single umbrella. In any event, the substitution of the U S WEST logo for that of PNB was a choice made by

³³Mr. Johnson, TR pp. 410-421.

U S WEST, Inc. and PNB and should not be used to justify the evaporation of any publishing rights or financial benefits previously held by PNB.

2. Gift Theory

152 All parties acknowledge the lack of contemporaneous adequate compensation for the transfer of the assets.³⁴ The Commission ruled on more than one occasion, without contest or appeal, that the compensation provided for the publishing agreements was inadequate or nonexistent. USWC argues that because the Court said that USWC "gave away" the asset for little or no return, it ruled that the transaction constituted a completed gift of the entire directory business on January 1, 1984. Therefore, the Company argues, the transaction was a fully executed gift of the entire Yellow Pages publishing business and no formal evidence of sale transfer is needed.

153 There was no gift because a gift requires donative intention.³⁵ Here, as the Commission has repeatedly noted, the intention was to enrich stockholders at the expense of ratepayers. It was not a permanent transfer of the entire publishing business, because the approved transaction was neither designed nor presented to effect a permanent transfer, nor did it effect a permanent transfer.

154 Moreover, the transaction is not a completed transfer of the entire publishing business because PNB did not receive Commission authorization under Chapters 80.12 and 80.16 RCW to give away the exceptionally valuable asset. A no-compensation transfer of the entire business would clearly have been subject to disclosure and Commission approval under both the transfer of property and the affiliated interest statutes. While the no-compensation nature of the asset transfer was disclosed, we find that USWC presented the transfer of the publishing business function as an outsourcing or a lease, with compensation over its term, in a way that clearly precludes treatment as a gift.

155 As we repeatedly note, the limited transfer of the publishing function that PNB described to the Commission and then effected in the 1984 transaction neither demands nor implies the relinquishment of all rights in a permanent transfer.

3. Regulatory Consequences

³⁴ Consideration for the asset transfer was nonexistent. PNB immediately transferred to U S WEST (the parent company) the entire 21/100 share in Landmark that it received for the capital assets and so far as the record shows derived no benefit from that transfer. *See, Cause No. FR-83-159 (Order of Dec. 30, 1983), and Second Supplemental Order, Cause No. U-86-156, pp. 11-12 (1987).*

³⁵ *Oman v. Yates*, 70 Wn.2d 181, 422 P.2d 489 (1967); *Tucker v. Brown*, 199 Wash. 320, 92 P.2d 221 (1939); *Dingley v. Robinson*, 149 Wash. 301, 270 Pac. 1018 (1928).

- 156 For regulatory purposes, as suggested by Commission Staff and other parties, we must look to the regulatory interpretation of the actions that the regulated company took and that it disclosed to the Commission. From a regulatory perspective, the following occurred or failed to occur.
- 157 PNB did not represent in its December, 1983, application that it was intending to part permanently with all aspects of ownership of the Yellow Pages business. Instead, it clearly stated that "This application concerns the implementation of the new Publishing Agreement between PNB and USWDC *for the publication of PNB's White and Yellow Page directories.*" Application, Cause No. FR 83-159, p. 3. (emphasis added) The application by its own terms was for an agreement for publication, and not for the transfer of a valuable business.
- 158 The relationship that was thereby created for regulatory purposes – the relationship that the Commission approved – was not a sale or other permanent transfer. Instead, it was the transfer of certain assets along with a license and series of agreements for services for a term of years. PNB's representation to the Commission was of a temporary outsourcing (in common parlance, as Mr. Selwyn notes, a "lease") of the publishing function, under a publishing agreement, in exchange for a fee. Only in this context do the contemporaneous representations, the contemporaneous regulatory treatment, and the relevant orders all make sense.
- 159 The Commission recognized the impermanence of the authorized relationship in a later order, telling PNB that it should make an election about the transfer. The Commission listed three possible means to treat the transaction:

The remedies to be considered include the approval of the contracts with appropriate adjustment of publishing fees, the return of the publishing function to PNB, or the treatment of the transaction as the sale of a capital asset. If, as the evidence appears to show, PNB and USWD intended a permanent transfer of the Yellow Pages, treatment as a sale may be most appropriate. Such treatment would allow for determination of consideration at the time of transfer that would fairly compensate PNB. PNB would assume none of the risk, and USWD would assume all of the risk attendant to the publishing enterprise. *Such a result is appropriate if U S West Direct seeks to ultimately acquire all of the opportunity for profit.* Treatment as a sale is very likely to reflect a result that might have been achieved by parties bargaining at arms' length.

Docket No. U-86-156, Second Supplemental Order, at p. 12 (emphasis added). It is clear from this discussion that the Commission had not authorized a permanent transfer. None of the discussion would make sense if a permanent transfer had been approved. USWC neither sought clarification nor appealed the order or its description of the transaction. Nor did it ever come back to the Commission with a request to treat the transaction as a sale.

- 160 U S WEST states that it always provided full disclosure about the transaction. *USWC Brief*, p. 33. In light of the record and USWC's earlier positions, this statement is difficult to understand. If it intended a transfer of the entire business, not only did it not tell the Commission it was transferring the entire business (nor the value of the ongoing business ostensibly transferred), its application stated that it was arranging for publication, and it subsequently represented through the sworn statements of witnesses (Ms. Koehler-Christianson³⁶ and Mr. Johnson³⁷) and legal positions³⁸ that no transfer of intangible assets occurred. Mr. Inouye states at transcript pages 263-264 and Ms. Koehler-Christianson acknowledges at transcript page 1001 that the changes in their statements are the result of the Company's desire to support the existence of a completed, permanent transfer that the Company contends is demanded by its interpretation of the Court's decision.
- 161 U S WEST's statements now about the facts and the meaning of its own actions are so clearly contrary to the events and representations at the time that they cast serious doubt on the credibility of the Company's case. If we are to believe that it did in fact transfer all rights to the business, it never once told the Commission that it was effecting the complete and total transfer of an immensely valuable asset, contrary to its obligation under law to seek approval for such a transaction. The Company failed to maintain the documentation ordered by the Commission that is essential to the valuation of the asset that it now seeks us to make. Again and again, the contemporaneous information that PNB and USWC provided and its arguments are inconsistent with the facts and the positions that USWC now espouses.
- 162 In summary, USWC asks the Commission to look at legal documents prepared by the Company's own lawyers in response to its legal obligation to define and disclose every relevant aspect of the transaction, and then to disregard the language of those documents, and to infer an intention that is not evident within the documents. We cannot find on the facts in this record that a transfer of the business occurred in 1984.

4. Regulatory Treatment

³⁶ Ms. Koehler-Christianson, Tr. 1001; Ex. 519, part 1 of 2, at 107-8 (referring to testimony in deposition in USWC's federal proceeding challenging imputation on First Amendment grounds).

³⁷ *See*, Tr. 378-79; Ex. 309 at 2-3 (referring to Rebuttal Testimony of Max Johnson in Docket U-86-156).

³⁸ "As noted above, the fact is that PNB could publish now if it chose, so nothing was actually transferred in 1984." Brief of Applicant Pacific Northwest Bell Telephone Company, Docket U-86-156, at 23-24 (June 24, 1988).

163 Regulatory requirements are the most telling argument regarding the transfer of the business. USWC has never asked the Commission to approve the permanent transfer of the entirety of the Yellow Pages business to Landmark or any other entity. As we have noted above, under RCW 80.12.020, USWC had no authority to dispose of property without receiving Commission authority to do so, and under RCW 80.16.020 it had no authority to consummate a transaction with an affiliate without receiving Commission authority to do so.

164 Chapter 80.12 RCW severely restricts public utilities' ability to transfer property without prior Commission approval. RCW 80.12.020 says, in part,

No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its . . . properties . . . without having secured from the commission an order authorizing it to do so.

165 The consequence of failure to do this is made clear in RCW 80.12.030:

Disposal without authorization void. Any . . . sale, lease, assignment, or any other disposition, merger, or consolidation made without the authority of the Commission shall be void.

166 RCW 80.16.020 requires a regulated company to

file with the commission a verified copy, or a verified summary if unwritten, of a contract or arrangement providing for the . . . purchase, sale, lease, or exchange of any property, right, or thing The filing must be made prior to the effective date of the contract or arrangement. Modifications or amendments to the contracts or arrangements must be filed with the commission prior to the effective date of the modification or amendment.

(Emphasis added.)

167 The 1983 application was for approval of the transfer of certain assets worth \$13.7 million (for which the Company received nothing) and the approval of publishing agreements under which Landmark agreed to publish directories including company listings and Yellow Pages for PNB and to pay PNB a guaranteed stream of income.

168 The Company in this docket does not ask the Commission to approve the transfer of the entirety of the Yellow Pages business to Landmark. Instead, it merely asks the termination of imputation – allegedly pursuant to order of the Washington State Supreme Court. The Company's current request for regulatory treatment retroactive to 1983 is incompatible with regulatory requirements. The Company never asked the Commission to treat the transfer as a sale or any other completed transaction or otherwise give regulatory approval or regulatory permission for a permanent transfer

(which would require a modification or amendment of the original approved agreement under the terms of the statute) even after the Commission invited it to do so. It never asked the Commission to distribute the realized gain from a sale. It never kept the necessary records that the Commission directed it to keep.³⁹ USWC has not received authority to transfer the business asset. We find that for regulatory purposes any arrangement or disposition that purported to effect a transfer other than the limited transaction approved in 1983 is void. RCW 80.12.030

169 We conclude that USWC retains the asset, both by the factual history of the transaction and as a matter of law. We will continue to regulate USWC as though it retains all rights to the asset. No complete transfer occurred in 1984, and we have no evidence of any later sale or other disposition to which PNB or USWC was a party. Neither PNB nor USWC applied for approval of such a transaction, and we have not approved such a transaction. Any such transaction would therefore be void in any event. The Commission has continuing jurisdiction over any such arrangement, dating back to the original application. The Commission can, but is not required to, institute an investigation. "At any time after receipt of the contract or arrangement," the Commission may disapprove such a contract or arrangement if the Commission finds that the public service company has failed to prove that contract or arrangement is reasonable and consistent with the public interest. RCW 80.16.020.

5. *Consequences of a Transfer*

170 The first fundamental fallacy in USWC's position is that a transfer occurred. Its second fundamental fallacy is its assumption that proof of a transfer removes imputation as an appropriate remedy for the inter affiliate transaction. It is clear that this is not the case.

171 The Commission's Order of October 12, 1980 in Cause No. U-86-156 sets out three potential means of rectifying the consequences of the transaction. That list is not exclusive.

172 Imputation is the implementation of "Imputed Value," i.e., the logical or implicit value that is not recorded in any accounts. *ATTORNEYS' DICTIONARY AND HANDBOOK OF ECONOMICS AND STATISTICS*, by Les Seplaki, New York: Professional Horizons Press, 1991, p. 121. It is the ascription or attribution to another. *Webster's II New Riverside University Dictionary*, Boston, 1984. Here, imputation is the ascription or attribution of income, not recorded otherwise on any of USWC's accounts, implemented by an accounting adjustment. It revises USWC's earnings for regulatory purposes (that is, for setting rates), to reflect a portion of

³⁹ *In the Matter of the Application of PNB*, Cause No. FR-83-159, Fourth Supp. Order, at 7 (January 16, 1985).

affiliate U S WEST Dex's earnings. It is a means by which the Commission may exercise the authority granted in Chapter 80.16 RCW to protect ratepayer interests affected by affiliated transactions.

173 There is no principle of law or policy that constrains the Commission from using imputation on an ongoing basis when the affiliate of a regulated telecommunications company owns and operates a directory publishing business that serves the regulated company. The Commission has used imputation in such settings. *See, Second Supplemental Order, WUTC v. Continental Telephone Company of the Northwest, Inc., Docket No. U-82-41 (August 1983); Second Supplemental Order, WUTC v. General Telephone Company of the Northwest, Inc., (January 1985)*. Imputation is thus an alternative to a distribution at the time of a transfer, when the transfer is to an affiliate. Its application to U S WEST has been to substitute the earnings imputation, for ratemaking purposes, for the actual payments (if any) by Dex for rights or services that USWC provides and that allow Dex to publish directories containing Yellow Pages advertising on behalf of USWC. That repricing of affiliated payments offsets the loss to ratepayers of the benefit they would have received if PNB had not transferred the business operation. The loss to ratepayers occurs on an ongoing basis, and the offsetting benefit from imputation of "excess" earnings compensates ratepayers for the immediate period's loss, not for the capital value that might be distributed in the event of a sale to a third party in an arms' length transaction. Imputation is not a substitute for, nor is it a means to implement, the amortization of any value to be distributed.

174 The Court appears to have understood this perfectly, for it stated that USWC could ask for an end to imputation when *it received* consideration for the asset, not when it *paid* or when *ratepayers received* consideration for the asset.

175 The Commission does not rule out any Yellow Pages treatment, nor does it predict what the Commission will do given the facts of any possible future record. The Company may come forward in a proper procedural setting to ask for a change in imputation. If that occurs, the Commission will receive evidence, hear arguments, and make a responsible decision, under law, on the facts of record.

6. Conclusion

176 U S WEST's arguments about the actual nature and timing of the transaction are factually incorrect. The transaction and the pertinent documentation that PNB represented to the Commission, and that the Commission approved, was for the transfer of certain assets and the temporary outsourcing of the directory publishing business in exchange for a guaranteed stream of payments from the temporary publisher for the right to conduct the publishing business. The Commission has approved no other transaction and it expressly refused to approve the adequacy of the publishing fees. For regulatory purposes, no other transaction has occurred.

177 When we examine the evidentiary record, we see no objective indicators demonstrating that the publishing business was formally transferred. We see none of the indicators of an arms' length transaction – even of a receipt for a transaction without consideration – that might constitute a part of the evidence that the transaction occurred as USWC contends. We see no request for other regulatory approval, and no summary of any unwritten agreements. We conclude on the facts of record that no permanent transfer occurred, factually or legally.

C. Valuation

178 USWC argues that because the complete and permanent transaction was consummated on January 1, 1984, the value of the transferred asset must be valued as of that date. We have found that the transaction did not occur on that date and that there is neither evidence of a transaction at any other date nor of regulatory approval of a transaction for regulatory purposes. Consequently, we need not discuss the issue of valuation and we cannot without a transaction to approve determine whether valuation is needed or what is the proper date for valuation of the ongoing business.

179 The Commission will continue to use imputation to preserve and balance the positions of stockholders and ratepayers until the Company demonstrates a change in conditions that warrants a change in imputation.

180 The Commission will then have the opportunity to determine whether to end imputation and, if so, determine the appropriate disposition of any gain.

D. Other Issues

1. Publishing Fees as Payment for an Asset

181 USWC urges that the publishing fees should be considered payment for the capital asset that has been transferred. It is clearly improper to do so. We find and conclude above that the purpose of the 1984 transaction, as expressed in the supporting documents and in Commission orders, was to authorize and require Landmark to publish directories and conduct the classified advertising business for PNB for a limited period in exchange for the publishing fees. The fees were established and represented as compensation for the rights to perform that activity and for other services rendered by PNB.

2. Barrier to Entry

182 USWC contends that imputation is a barrier to entry forbidden by Section 253 of the Telecommunications Act of 1996 because it subsidizes rates and makes it more difficult for competitors to enter the market. The Commission disagrees.

183 The question of subsidy was resolved by the Supreme Court when it upheld
imputation against USWC's challenge in the rate case. *134 Wn.2d at p. 83*. No
competitors challenge imputation or contend that it constitutes a barrier. There is no
evidence, as opposed to the mere allegation, that imputation constitutes a barrier to
competition. The Commission rejects this challenge.

3. *Unconstitutional Taking*

184 USWC again contends that imputation is unconstitutional, this time as a taking of
Landmark's revenues without compensation under the Fifth and Fourteenth
Amendments to the United States Constitution and Article I, Section 16 of the
Washington State Constitution. We reject the argument.

185 First, neither USWI nor Landmark is a party, and USWC does not have standing to
raise the issue as to the rights of others.

186 Moreover, as we have previously held and the State Supreme Court affirmed,
revenues of the nonregulated company, Landmark, are not affected. Imputation is
established for a limited purpose, authorized by statute, and for a purpose that has
been found fully lawful by the United States Supreme Court.⁴⁰

E. Conclusion

187 USWC's petition for an accounting order is premised on a selective reading of the
Washington State Supreme Court's decision and on alleged facts that are contrary to
the facts that we find on this record. Imputation is merely a means to preserve the
relative benefits of Yellow Pages operation to ratepayers and stockholders that existed
prior to the Commission's authorization of the temporary transfer of the publishing
function from PNB to Landmark in January 1984. Imputation also operates to reprice
the ongoing affiliated transactions in an equitable manner. There is no evidence of an
actual transfer from PNB or USWC to Landmark, and there has been no regulatory
approval of any permanent divestiture of ownership of the publishing function from
PNB or its successor, U S WEST Communications, Inc. The Commission denies
USWC's petition for an accounting order ending imputation.

VI. FINDINGS OF FACT

188 Having discussed above all matters material to our decision, and having stated general
findings and conclusions, the Commission now makes the following summary
findings of fact. Those portions of the preceding discussion that include findings

⁴⁰ *United Fuel Gas Co. v. Railroad Comm. of Kentucky*, 278 U.S. 300, *Supra*.

pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 189 1. The Washington Utilities and Transportation Commission is an agency of the State of Washington that is vested by statute with the authority to regulate telecommunications companies offering service to the public for compensation.
- 190 2. U S WEST Communications, Inc., is a subsidiary of U S WEST, Incorporated. USWC is engaged in providing telecommunications services to the public of the state of Washington. It is the successor in interest to Pacific Northwest Bell Telephone Company, which disappeared as a separate entity upon its merger with two other local exchange telecommunications companies to form U S WEST Communications, Inc.
- 191 3. Landmark Publishing Company is a subsidiary of U S WEST, Incorporated. Landmark is the owner of U S WEST Dex, formerly called U S WEST Direct, a subsidiary engaged in the business of publishing telephone directories.
- 192 4. On December 22, 1983, PNB filed an Application for authority under Chapter 80.12 RCW to transfer as of January 1, 1984, Washington assets valued at \$13.7 million to Landmark Publishing Co., in exchange for a 21/100 share in Landmark. The application disclosed that PNB would immediately transfer that compensation to its parent, U S WEST.
- 193 5. The Application also sought approval of the asset transfer as an affiliated interest transaction under Chapter 80.16 RCW along with approval to enter a publishing arrangement in which Landmark would publish PNB's directories, including Yellow Pages advertising, under contract, in exchange for a guaranteed stream of payments.
- 194 6. The Commission allowed the transaction to proceed, reserving the right to determine the ratemaking effect of the transaction at a later time. Assertions that the transaction was intended to effect a complete transfer of the directory publishing business, and that it did so, are not credible.
- 195 7. In 1988, U S WEST Dex proposed and PNB consented to the termination of the publishing fee that was an element of the 1984 transaction.
- 196 8. The Yellow Pages directory publishing business as of Dec. 31, 1983, was a valuable asset of Pacific Northwest Bell Telephone Co..

- 197 9. Neither PNB nor USWC has sought, and the Commission has not granted, regulatory approval for any transaction involving Yellow Pages publishing except the one described in the application in Cause No. U-83-159.
- 198 10. U S WEST in 1989 accepted the imputation of Yellow Pages publishing excess earnings until the practice is changed or terminated by later Commission order.

VII. CONCLUSIONS OF LAW

- 199 1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 200 2. Chapter 80.12 RCW requires regulated public utilities to secure prior Commission approval of any sale or other disposal of an asset and provides that any sale or disposition without such approval is void.
- 201 3. Chapter 80.16 RCW requires regulated public utilities to secure prior approval for certain transactions with affiliates, and provides that the Commission has continuing jurisdiction over such transactions.
- 202 4. The transaction that the Commission approved in 1983 in Cause No. U-83-159 was a temporary transfer from PNB to Landmark of the right to publish directories on behalf of PNB that include Yellow Pages advertising, coupled with PNB's agreement to provide certain services to Landmark.
- 203 5. Neither PNB nor USWC has sought, and the Commission has not granted, regulatory approval for any transaction involving Yellow Pages publishing except the one described in the application in Cause No. U-83-159.
- 204 6. The transaction involving the Yellow Pages publishing function that the Commission approved in Cause No. U-83-159 did not vest Landmark with the complete and total permanent right to engage in the publishing business theretofore operated by PNB.
- 205 7. The Commission is not required by virtue of the Supreme Court decision of December 24, 1997, to terminate imputation to USWC of excess earnings from Yellow Pages publishing.
- 206 8. No facts appear of record that would render termination of the imputation to USWC of excess directory earnings consistent with the public interest.
- 207 9. The application for an accounting order terminating imputation should be denied.

VIII. O R D E R

208 The Commission denies U S WEST's request for an accounting order.

209 Dated and effective at Olympia, Washington this __ day of July, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).