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NOTE: An important notice to parties about administrative review appears at the end of this order.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STS, LTD.,	)	
	)	
Complainant,	)	DOCKET NO. UT-921213
	)	
vs.	)	FIRST SUPPLEMENTAL ORDER
	)	
U S WEST COMMUNICATIONS, INC.,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND INITIAL ORDER
.....	)	

NATURE OF PROCEEDING: On October 20, 1992, Complainant Washington STS, Ltd. ("STS" or "Complainant") filed a complaint for declaratory and injunctive relief against Respondent U S WEST Communications, Inc. ("USWC" or "Respondent"). Complainant STS seeks compliance of USWC with an alleged contract between the two parties and a declaratory order which would require USWC to be bound by that alleged contract. STS further alleges violations by USWC of various statutes and regulations. On November 12, 1992, USWC filed an answer and counterclaim alleging, inter alia, violations by STS in providing service across Extended Area Service ("EAS") boundaries without purchasing from USWC's access tariff.

APPEARANCES: STS appeared through its president, Robert Leppaluoto, Vancouver; USWC was represented by Molly Hastings, Attorney at Law, Seattle; and Commission Staff was represented by Robert E. Simpson, Assistant Attorney General, Olympia.

HEARING: Administrative Law Judge Elmer E. Canfield from the Office of Administrative Hearings conducted the hearing in Olympia on January 7, 1993. Complainant and Respondent filed briefs on or before the due date, February 12, 1993; Commission Staff did not file a brief.

ISSUES: Is STS a private shared telecommunications services provider and thus exempt from Commission regulation? Is STS providing an EAS bridging service? Should STS be required to pay access charges and is it liable for back access charges? Did USWC violate statutes and regulations? Should the Commission enter a declaratory order setting forth the parties' rights and obligations under an alleged contract between the parties?

SUMMARY: The Commission should deny the complaint of STS due to its failure to sustain its burden of proving that USWC violated any statute, regulation or tariff requirement. The Commission should allow the counterclaim of USWC. The Administrative Law Judge finds that STS has been providing an EAS

bridging service and that it should be required to pay access charges from the time it started the operations in question. STS is not exempt from Commission regulation as a private shared telecommunications services provider. The request for a declaratory order by STS is not appropriate and should be denied.

#### MEMORANDUM

Overview: Upon becoming aware that STS was not using telephone lines supplied by USWC in the shared tenant manner for which they were intended, USWC notified STS that the service would have to be converted to switched access service. To avoid disconnection, STS pursued a complaint with the Commission alleging, among other things, that USWC's actions violated statutes and regulations. USWC counterclaimed that STS was providing EAS bridging services and should be required to purchase from USWC's access tariff.

Background: Complainant STS is a Washington corporation. STS has recently become involved in the provision of telecommunications services in the State of Washington. It has a switch located in the Westin Building, Seattle.

In a letter to USWC dated June 11, 1992, STS expressed an intent to provide private shared telecommunications services as defined in RCW 80.04.010. Specifically, STS was to provide intraLATA connections to local USWC exchanges only to customers located in the Westin Building. As evidenced by this letter, Exhibit No. 1, STS ordered 48 Complex Flat Lines for the Seattle intraLATA area. USWC installed these 48 Seattle exchange trunks on July 14, 1992.

USWC determined that STS was not using the 48 Seattle exchange trunks to provide local exchange dial tone in a shared tenant mode, but that STS rather, was providing access to customers in surrounding communities. USWC advised STS that STS must provide such service from USWC's access tariff, not the exchange service tariff. See USWC letter to STS dated August 24, 1992, Exhibit No. 3. STS denied that it was providing access to customers in surrounding communities and objected to being changed to switched access. By letter dated September 21, 1992, USWC notified STS that service would be disconnected effective September 24, 1992, see Exhibit No. 5.

Prior to the scheduled disconnection, STS filed with the Commission an informal complaint against USWC. After its investigation, Commission Staff resolved the informal complaint against STS. USWC then notified STS that service would be disconnected effective October 21, 1992. On October 20, the day before the scheduled disconnection, STS filed a formal complaint with the Commission.

STS pursued the informal and formal complaints in order to prevent USWC from disconnecting its service, see Complaint,

paragraph 3, and Transcript, page 29. STS relied on WAC 480-120-081(4)(g) to prevent USWC from disconnecting service while STS had a complaint pending before the Commission.

USWC brought a motion requesting waiver of WAC 480-120-081(4)(g) as it applies to this docket. USWC sought to terminate service to STS pending resolution of this docket. STS filed an answer opposing the motion. Following a hearing on the motion during which all parties were heard, the Administrative Law Judge granted the requested waiver. USWC thereupon disconnected service to STS.

Complaint: In its complaint, STS noted that it brought the complaint to prevent USWC from terminating service to STS and to obtain a declaratory order "of the parties respective rights and obligations" under an alleged contract between the two parties. STS alleged that a contract was entered into, that USWC notified it of USWC's wish to "renegotiate" and place STS under USWC's access tariff. STS alleged that USWC's actions were anticompetitive, discriminatory and in violation of its lawful tariff; see Complaint for Declaratory Relief filed October 20, 1992.

Complainant STS took the position that it is not a telecommunications company in that it does not sell telecommunications to the general public. Instead, STS argued that it is a private shared telecommunications services provider as defined in RCW 80.04.010 and thus exempted from Commission regulation.

Counterclaim: The respondent counterclaimed that STS provided or facilitated service across extended area services boundaries without purchasing from USWC's access tariff. USWC requested the Commission to so find and to also require STS to pay past access charges. USWC requested the Commission to dismiss the complaint of STS for failure to state a claim and failure to present sufficient evidence to substantiate the allegations in its complaint. USWC denied that it entered into a contract with STS and further denied the allegation that it attempted to renegotiate the alleged contract.

In its counterclaim, USWC explained how it first learned that STS might not be using the lines assigned to it in a shared tenant mode. USWC explained the circumstances as follows: that in August, 1992, it attempted to contact STS at STS's Seattle bill telephone number to inquire about an overdue initial bill. Instead of reaching Mr. Leppaluoto, the USWC representative reached an individual in Everett who was in the process of making an outgoing call. USWC then made test calls to numbers assigned to STS and experienced the same thing; one call was intercepted from a caller in General Telephone's Halls Lake exchange who was in the process of calling a number in the Renton exchange and another call was

intercepted calling from Renton to Halls Lake. See Answer and Counterclaim filed November 12, 1992.

Additional evidence: USWC then made test calls to all of the 48 numbers assigned to STS. John Riley, USWC's representative, attempted to call all 48 lines and did not once reach a person in the Westin Building. As reflected in the testimony of Mr. Riley and his exhibit, seventeen of the calls to the STS numbers resulted in his being connected with persons who were in the process of making outgoing calls from a variety of different locations in Washington. Mr. Riley questioned the people and learned the origination and destination of these calls to be: Bellevue to Edmonds, Tacoma to Seattle, Sumner to Bellevue, Kirkland to Tukwila, Black Diamond to Des Moines, Bothell to Bremerton, Bellevue to Auburn, Federal Way to Woodenville, Kirkland to Issaquah, Edmonds to Redmond, Bellevue to Bothell, Vancouver to Seattle, Enumclaw to Renton, Tacoma to Federal Way and Issaquah to Carnation. The responding callers also uniformly identified their local long distance carrier as Network Communications, a company with which Mr. Leppaluoto, the owner of STS, is associated. Five of the calls resulted in busy signals and twenty-six resulted in no answers after a series of rings. See affidavit and call log, Exhibit No. 7.

Robert W. Leppaluoto testified on behalf of complainant STS. Mr. Leppaluoto is the president and owner of STS. The 48 lines STS received from USWC were used to serve the general public through an arrangement with SVV Sales, another company of which Mr. Leppaluoto is President. This affiliate, SVV Sales, is an interexchange carrier and is the only "customer" of STS. Mr. Leppaluoto is on the SVV board of directors which is in charge of setting policy. According to Mr. Leppaluoto, the business of SVV Sales is "trying to make money in the telephone business, long distance carrier." Transcript, page 75. SVV offers fixed-rate and per-minute-rate long distance services. It advertises the "very lowest possible rate". It offers a variety of packages and options to the general public within the State of Washington; the customers are charged activation fees, services charges and other additional charges. One of the packages offered "provides long distance calling privileges anywhere in Washington State at a fixed rate." Personal Identification Number (PIN) codes are provided to customers. See sales brochure (under the name of Network Telecommunications Services), Late-filed Exhibit No. 6.

STS receives the 48 lines at its Harris 20/20 switch in the Westin Building. These lines are in turn hooked to another switch (a Stromberg Carlson) owned by SVV Sales, which, as mentioned above, is the only "customer" of STS. Through some method, the switches allow calls to be made across EAS boundaries without the incurrence of toll charges. STS did not purchase from USWC's access tariff.

Mr. Leppaluoto maintained that STS is a shared tenant provider serving only customers in the Westin Building, however, this position was not established by credible evidence. At one point, Mr. Leppaluoto represented the service offered by STS as "...basically we can offer local exchange dial tone to anybody in the Seattle area and within the Westin Building..." Transcript, page 39. STS has never advertised its Westin Building service offerings and was not involved in solicitations of any other customers in the Westin Building. STS provided its affiliate, SVV Sales, the use of all 48 lines. Through its arrangements with SVV, STS was serving customers in the general public of the State of Washington. STS did not establish itself to be a private shared telecommunications services provider as defined in RCW 80.04.010.

STS, in conjunction with SVV, provided telecommunications services across EAS boundaries. As mentioned above, these companies are affiliated through their common officer, Mr. Leppaluoto, who is president of both STS and SVV. Both companies are small and are owned by members of the same family. Mr. Leppaluoto was not forthright when testifying about the companies' operations. When asked how SVV's switch is connected to STS's switch and how the switch works, Mr. Leppaluoto responded that SVV Sales would be the one to ask. He was then asked the question as president of SVV Sales, but Mr. Leppaluoto still professed not to know. Transcript, page 56. Upon further questioning, Mr. Leppaluoto responded that he doesn't have "the slightest idea how it works." Transcript, page 73. Additional questions about his operations were asked. When asked what he meant about STS providing intraLATA service to the Seattle area, Mr. Leppaluoto responded that he was not sure. Transcript, page 42. When asked if an intraLATA call could be a long distance call, Mr. Leppaluoto responded that he did not know. Ibid. When asked if an intraLATA call could be a local call, Mr. Leppaluoto responded that he did not know. Transcript, page 43.

As mentioned above, an attempt was made to complete calls to all 48 STS lines in the Westin Building and not one was completed to a person in the Westin Building. Mr. Leppaluoto was questioned about this. According to Mr. Leppaluoto, his equipment would recognize a call to STS as an incoming call and answer it if the caller had a PIN code. When asked how to get a PIN code, Mr. Leppaluoto responded, "Oh, I don't know. We don't supply them, so --" Transcript, page 47. In large part, the testimony provided by Mr. Leppaluoto was not deemed to be credible.

Mary S. Owen, Director of Product and Market Issues for USWC, analyzed the situation and found the normal shared tenant service provider functions to be lacking. She pointed to the test calls as evidence that the 48 lines do not terminate on any customer premise in the Westin Building. None of the test calls were completed to a person in the Westin Building. Instead,

interceptions of calls between various exchanges were experienced. PIN codes were not used in the test calls. The call interceptions happened as a result of the switch not recognizing the test calls as incoming calls. The use of the two switches allowed calls to bypass applicable access charges. These calls would have otherwise been toll calls.

### Discussion

Shared tenant provider: The complainant alleges that it is a private shared telecommunications services provider within the definition of RCW 80.04.010 and thus exempt from Commission regulation under RCW 80.36.370. The Administrative Law Judge does not agree. RCW 80.04.010 defines "private shared telecommunications services" as:

the provision of telecommunications and information management services and equipment within a user group located in discrete private premises in building complexes, campuses, or high-rise buildings, by a commercial shared services provider or by a user association, through privately owned customer premises equipment and associated data processing and information management services and includes the provision of connections to the facilities of a local exchange and to interexchange telecommunications companies.

Clearly, Mr. Leppaluoto's operations do not constitute private shared telecommunications services. STS has only one "customer" in the Westin Building--this being its affiliate, SVV Sales. As was the Commission's approach in Metrolink, Infra., the totality of the operation is to be looked at. STS, in conjunction with an affiliate, provides telecommunications services to the general public. Although the president of both companies, Robert Leppaluoto, would argue otherwise, the Commission should examine the operation of both STS and SVV, not just one in isolation of the other. The affairs and operations of STS and SVV are so related and intertwined that they should be considered as a single entity for regulation purposes. Upon considering the totality of the operation, the evidence is clear that STS is not providing telecommunications services "within a user group located in discrete private premises in building complexes, campuses, or high-rise buildings" as required for a private shared telecommunications services provider under RCW 80.04.010. Instead, STS, in conjunction with its affiliate, is providing interexchange service for a fee, to the general public in the State of Washington. The proper classification of STS may be the subject of a later Commission proceeding.

As indicated above, STS is not a private shared telecommunications services provider under RCW 80.04.010.

Accordingly, STS is not exempt from Commission regulation under RCW 80.36.370.

EAS bridging service: STS, in conjunction with SVV Sales, offers and sells services that allow its customers to make interexchange telephone calls by bridging local calling areas without paying toll charges. This service is offered and sold to the general public within the State of Washington for a charge. USWC installed the 48 Seattle lines on July 14, 1992. STS thereafter provided such interexchange services.

The details of the operation are not clearly established on this record; as mentioned above, Robert Leppaluoto, president of STS and SVV Sales, professed not to know how the switch connections were made or how the service worked. However, the record sufficiently established that STS, in conjunction with SVV, was providing an EAS bridging service. Through its connections and switch programming, STS, in conjunction with SVV, was allowing the lines to be used by the general public in this state to make interexchange toll calls as though they were local calls without paying applicable toll charges; it was using the 48 Seattle lines contrary to their intended use and in violation of USWC's tariffs.

The Commission has previously considered this issue. In the case of U S MetroLink, Docket No. U-88-2370-J, 2nd Supp. Order, the Commission dealt with MetroLink, a company that "...holds itself out to the public to interconnect access lines provided by local exchange companies and thereby provide interexchange service commonly known as toll." At page 17, the Commission described the function of MetroLink's facilities as follows:

MetroLink manufactures, sells and leases a device known as a Telexpand. The Telexpand receives, translates, controls and directs transmission of signals to and through the central office switching equipment of the local exchange company to recreate a call conferencing or call forwarding function. MetroLink markets a service which allows subscribers to bridge overlapping EAS areas, thereby avoiding toll charges. The subscriber places a call to the Telexpand number. When the Telexpand answers, the subscriber enters a personal identification number which is checked for authorization and recorded for billing purposes. The Telexpand forwards the number to the U S WEST central office, which treats the request as an original local call and dials the requested number. The Telexpand then drops off the line. The net result is that toll charges are avoided by the caller.

The Commission ruled that MetroLink was indeed a telecommunications company within the meaning of RCW 80.04.010 and ordered it to register with the Commission as a telecommunications company as

required by RCW 80.36.350. The evidence in this docket shows that the service provided by STS, in conjunction with SVV, is analogous to the service provided by MetroLink.

In view of the findings in this matter, the Commission may wish to bring appropriate classification proceedings against STS.

Access charges: The evidence has shown that STS, in conjunction with SVV, has been providing interexchange service. It has been using USWC's network to provide this interexchange service. Clearly, STS must purchase access service from USWC's access tariff. Such a company has an "...obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network." MetroLink, Supra., at page 4. In the order approving the access tariff, Docket No. U-89-1719-F, on page 6, the Commission held as follows:

The Commission finds that it is appropriate that users of the local exchange network, such as Metrolink compensate local exchange companies for such usage. This tariff will assure that the local exchange network is maintained for the benefit of all customers. The Commission will adopt the U S WEST access service tariff revisions filed in Docket No. U-89-3175-T, effective July 1, 1990.

USWC's access service tariff applies to the services provided by STS. An interexchange carrier is defined in USWC's access service tariff as "...any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in intrastate communication by wire or radio between two or more exchanges." Further, interexchange carriers providing service between local calling areas must purchase services from USWC's access service tariff "...for their use in furnishing their authorized intrastate telecommunications services to end user customers, and for operational purposes directly related to the furnishing of such services;..." Thus, from the time the lines were installed on July 14, 1992, STS in providing interexchange service using USWC's network, was required to purchase access service from USWC's tariff.

It follows that STS must compensate USWC for all of its past violations of USWC's access charge tariffs, i.e., the usage by STS of the USWC network since July 14, 1992. The extent and amount of such usage cannot be determined on this record.

Declaratory Order: The complainant requested the Commission to enter a declaratory order holding USWC to be bound by the terms of an alleged contract between the two parties. The



Administrative Law Judge proposes that the Commission decline to enter the requested declaratory order.

A contract dispute between the parties is outside the Commission's jurisdiction. Determination of the parties' contractual rights does not fall within the definition of a "rule, order, or statute enforceable by the agency" over which the Commission can properly enter a declaratory order, see RCW 34.05.240 and Declaratory Order in Docket No. UE-901596, In re Tanner Electric Company, (Mar. 1991). The parties can pursue such matters in the proper forum.

USWC to apply tariffs: Further, USWC was bound by statute to charge its published tariff rates. RCW 80.36.130. It acted reasonably and correctly in applying its access tariff to the facts in this case. USWC's disconnection of service under the circumstances was proper. Complainant STS failed to establish a violation of tariffs or applicable statutes and regulations. The Commission should deny the complaint of STS.

#### FINDINGS OF FACT

Having discussed in detail all material matters inquired into, and having stated findings and conclusions, the Administrative Law Judge now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated by this reference.

1. The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

2. U S WEST Communications, Inc. ("USWC") is engaged in the business of furnishing telecommunications services within the State of Washington, and, as such, is a public service company subject to regulation by the Washington Utilities and Transportation Commission.

3. Washington STS, Ltd. ("STS"), in conjunction with an affiliate, has used local exchange lines provided by USWC contrary to their intended use and in violation of USWC tariffs. The 48 Seattle exchange trunks in question were installed on July 14, 1992. Through an arrangement with SVV Sales, STS thereafter used such lines for the provision of interexchange service without paying applicable access charges.

4. STS, through its arrangement with SVV, its affiliate, provided the telecommunications services in question to paying members of the general public within the State of Washington. STS did not limit its service to that of a private shared telecommunications services provider.

5. STS has thus provided telecommunications interexchange services since July 14, 1992. STS did not purchase access service from USWC's access service tariff for these services.

6. On October 20, 1992, STS filed a complaint with the Commission against USWC in Docket No. UT-921213 alleging violations by USWC of its tariffs and various statutes and regulations. STS further requested the Commission to enter a declaratory order holding USWC to be bound by the terms of an alleged contract between the parties and further holding that USWC had violated various statutes and regulations. STS failed to prove that USWC violated its tariffs or applicable statutes and regulations. The declaratory order requested by STS cannot properly be entered by the Commission in this case.

7. On November 12, 1992, USWC filed a counterclaim with the Commission against STS in Docket No. UT-921213 alleging that STS was providing telecommunications services across EAS boundaries without purchasing from USWC's access tariff. USWC established this violation by STS. STS should have been purchasing out of USWC's access tariff and owes back access charges to USWC. The amount of back access charges STS owes to USWC cannot be determined on this record.

#### CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the parties and subject matter of this proceeding.

2. Washington STS, Ltd. (STS) is not a private shared telecommunications services provider as defined in RCW 80.04.010, thus it is not exempt from regulation pursuant to RCW 80.36.370.

3. The counterclaim of USWC should be allowed.

4. STS, in conjunction with an affiliate, used Seattle exchange lines in the provision of interexchange service in violation to their intended use and in violation of USWC tariffs.

5. Since STS provided EAS bridging services using USWC's network, STS should have purchased access service from USWC's access tariff. STS shall compensate USWC pursuant to USWC's

access tariff for all such usage of USWC's network since July 14, 1992.

6. STS failed to establish that USWC violated its tariffs or applicable statutes and regulations. Under the circumstances, USWC's disconnection of service to STS was proper. The Commission should not enter the declaratory order requested by STS. The complaint of STS should be denied.

7. All motions made in the course of this proceeding which are consistent with findings and conclusions made in this order should be granted, and those which are inconsistent should be denied.

On the basis of the above analysis of the evidence, and the above findings and conclusions, the Administrative Law Judge proposes the following order.

O R D E R

IT IS ORDERED That the complaint filed by Washington STS, Ltd. against U S WEST Communications, Inc. in Docket No. UT-921213 is denied; and

IT IS FURTHER ORDERED That the counterclaim filed by U S WEST Communications, Inc. in Docket No. UT-921213 is allowed; and

IT IS FURTHER ORDERED That STS provided interexchange service using U S WEST's network in violation of USWC tariffs. STS should have purchased access service for such usage from U S WEST's access tariff effective July 14, 1992; and

IT IS FURTHER ORDERED That STS shall compensate U S WEST pursuant to U S WEST's access tariff for all such usage of U S WEST's network since July 14, 1992.

DATED at Olympia, Washington and effective this 1st day of March, 1993.

OFFICE OF ADMINISTRATIVE HEARINGS

  
\_\_\_\_\_  
ELMER E. CANFIELD  
Administrative Law Judge

**NOTICE TO PARTIES:**

This is an initial order only. The action proposed in this order is not effective until a final order of the Utilities and Transportation Commission is entered. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within a time limit as outlined below.

Any party to this proceeding has twenty (20) days after the service date of this initial order to file a Petition for Administrative Review, under WAC 480-09-780(2). Requirements of a Petition are contained in WAC 480-09-780(4). As provided in WAC 480-09-780(5), any party may file an Answer to a Petition for Administrative Review within ten (10) days after service of the Petition. A Petition for Reopening may be filed by any party after the close of the record and before entry of a final order, under WAC 480-09-820(2). One copy of any Petition or Answer must be served on each party of record and each party's attorney or other authorized representative, with proof of service as required by WAC 480-09-120(2).

In accordance with WAC 480-09-100, all documents to be filed must be addressed to: Office of the Secretary, Washington Utilities and Transportation Commission, 1300 South Evergreen Park Drive S.W., PO Box 47250, Olympia, Washington, 98504-7250. After reviewing the Petitions for Administrative Review, Answers, briefs, and oral arguments, if any, the Commission will by final order affirm, reverse, or modify this initial order.