

SERVICE DATE

JUN 29 1993

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STS, LTD.,	)	
	)	
Complainant,	)	DOCKET NO. UT-921213
	)	
v.	)	SECOND SUPPLEMENTAL ORDER
	)	
U S WEST COMMUNICATIONS, INC.,	)	COMMISSION DECISION AND
	)	ORDER DENYING REVIEW;
Respondent.	)	AFFIRMING INITIAL ORDER
.....	)	

NATURE OF PROCEEDING: Washington STS, Ltd. ("STS" or "Complainant") filed a complaint for declaratory and injunctive relief against Respondent U S WEST Communications, Inc. ("USWC" or "Respondent"), seeking to prevent a threatened disconnection of service. USWC answered and counterclaimed, alleging that STS violated USWC's tariff by providing service across Extended Area Service ("EAS") boundaries without paying USWC's access tariff fees.

INITIAL ORDER: An initial order would deny STS' complaint, finding that STS failed to sustain its burden of proving that USWC violated any statute, regulation or tariff requirement. It would grant USWC's counterclaim. The initial order found that STS provided an EAS bridging service and that it should be required to pay access charges from the time it started those operations.

ADMINISTRATIVE REVIEW: STS petitions for administrative review, contending that STS is merely providing shared telecommunications services, which are lawful, and that the Commission should order USWC to provide it service under shared tenant service tariffs. USWC answers, supporting the initial order and alleging that the petition fails to meet the minimum requirements for petitions for administrative review established in WAC 480-09-780.

COMMISSION: The Commission denies the petition for administrative review and affirms the initial order.

APPEARANCES: STS appeared through its president, Robert Leppaluoto, Vancouver, Washington; Molly Hastings, Attorney at Law, Seattle, represented US West Communications; and

Robert E. Simpson, Assistant Attorney General, Olympia, represented the Commission Staff.

MEMORANDUM

STS is a provider of telecommunications services. It purchased local exchange service from USWC under USWC's shared tenant service provider tariff, and resold that service to the public.

In August, 1992, USWC became aware that STS was using telephone lines supplied by USWC to provide toll-free interexchange service. USWC notified STS that STS would have to convert to switched access service or USWC would disconnect it. To avoid disconnection, STS filed this complaint with the Commission alleging, among other things, that USWC's threatened disconnection violated statutes and regulations. USWC counterclaimed that STS was providing EAS bridging services and should be required to pay USWC's access tariff fee.

USWC moved for waiver of WAC 480-120-081(4)(g), which restricts disconnection of service pending the resolution of a complaint. The motion was argued on January 7, 1993, and the administrative law judge entered an interlocutory order granting the motion on January 8, 1993.<sup>1</sup>

The initial order would deny STS' complaint for failure to sustain its burden of proving that USWC violated any statute, regulation or tariff requirement. It would grant USWC's counterclaim. The initial order found that STS provided an EAS bridging service and concluded that it should be required to pay access charges from the time it started the bridging operations.

STS petitions for administrative review, contending that STS is merely providing shared telecommunications services and that the Commission should order USWC to provide service to it under shared tenant service tariffs. USWC answers, supporting the initial order and alleging that the petition fails to meet the minimum requirements for petitions for administrative review set forth in WAC 480-09-780.

The Commission denies the petition for administrative review and affirms the initial order.

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<sup>1</sup>The Commission will consider respondent's arguments on the interlocutory review in this order.

MOTION FOR LATE FILING OF ANSWER

STS filed its Petition for Administrative Review on March 22, 1993; USWC's reply was due April 1, 1992. USWC did not file its Answer until April 2, 1993. Because STS misaddressed USWC's copy of its petition, USWC did not receive it until March 30, 1993, eleven days after its postmark and two days before the deadline for answer. Under these circumstances, the one day delay in filing of USWC's Answer is excusable. USWC's Motion for Late Filing its Answer is granted.

PETITION FOR ADMINISTRATIVE REVIEW

STS' Petition for Administrative Review raises four issues.<sup>2</sup>

STS alleges (a) that USWC, STS and the initial order all agree that STS is a shared tenant provider, (b) that, given that (a) is true, USWC violated the laws and rules of the State of Washington, (c) that lack of a rule waiver in a prior proceeding (wherein none was sought) is relevant to whether the waiver sought by USWC in this proceeding could be granted and (d) that the interlocutory order granting waiver of the rule should be reversed.

Our review of the first issue is dispositive. USWC and the initial order do not agree with STS that it qualifies as a shared tenant provider. USWC communicated this belief to STS in August 1992 and repeated it in its answer to the petition. The findings of fact in the initial order also directly contradict this contention. The Commission has reviewed the entire record and finds ample evidence to support the initial order's conclusion that STS' service was not that of a shared tenant provider as defined in RCW 80.04.010. Because STS was not a shared tenant provider, USWC's actions did not violate the laws and rules of the State.

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<sup>2</sup>The petition states the issues as follows:

Is Washington STS, Ltd. a shared telecommunications service under the law, RCW 80.04.010. Is US West Communications subject to the laws and regulations of the State of Washington and the WUTC? Did the administrative judge err in refusing to allow judicial notice to STS? Is STS entitled to review of administrative judge's order granting waiver of WAC 480-120-081(4) (g).

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STS challenges the interlocutory order authorizing waiver of WAC 480-120-081(4)(g) to permit USWC's disconnection of STS' service pending resolution of the complaint. It asks that we take judicial notice of testimony about the effect of the rule, presented in a prior case. It contends that the interlocutory order erred in failing to take such notice.

It is improper to take official notice of testimony in a prior case when offered for the truth of the testimony. In the prior case, Docket no. UT-910286, NCI v. US West Communications, Inc., witnesses took the position that WAC 480-120-081(4)(g) forbids disconnection pending resolution of a formal complaint. All parties apparently agree in this proceeding that the language of the rule so requires. That is why USWC sought waiver of the rule. No party in the NCI proceeding sought waiver of the rule. The testimony and the result in that proceeding do not support the proposition for which petitioner cites them.

We affirm and adopt the result of the initial order and adopt its findings of fact and conclusions of law as our own, with modifications for style and clarity and to provide that the Commission will retain jurisdiction to effectuate the terms of the order. We affirm and adopt the interlocutory order authorizing disconnection.

#### FINDINGS OF FACT

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's tariffs. USWC installed 48 Seattle exchange trunks on July 14, 1992. Through an arrangement with its affiliate, SVV Sales, STS thereafter used the lines to provide interexchange service without paying USWC's tariffed, applicable access charges.
4. STS, through its arrangement with SVV, 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 provided telecommunications interexchange services beginning 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 this Docket alleging that USWC violated its tariffs and various statutes and regulations. STS also requested that the Commission enter a declaratory order holding USWC to be bound by the terms of an alleged contract between the parties and that USWC had violated various statutes and regulations. STS failed to prove that USWC violated its tariffs or applicable statutes and regulations. The Commission cannot properly enter STS' requested declaratory order.

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. USWC's tariff requires STS to purchase interexchange access service from USWC's access tariff. STS therefore owes access charges to USWC. The amount of back access charges STS owes to USWC cannot be determined on this record.

8. On December 14, 1992, USWC moved for waiver of the rule prohibiting disconnection pending resolution of a formal complaint, so that it could terminate STS' service. The issue was argued on January 7, 1993, and the administrative law judge entered an interlocutory order on January 8, 1993, authorizing waiver of the rule and termination of service. STS asks review of the interlocutory order.

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. USWC sustained its counterclaim.

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

5. Because 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. In the absence of agreement between the parties as to the amount due, USWC may request an evidentiary hearing under this docket number to determine the amount.

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. STS' complaint should be denied.

7. All motions made during this proceeding which are consistent with findings and conclusions of this order should be granted. Those which are inconsistent therewith should be denied.

8. The Commission should retain jurisdiction over the parties to and the subject matter of this complaint to effectuate the terms of this 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 That USWC's disconnection of STS' service pursuant to waiver of WAC 480-120-081(4)(g) is authorized; 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; and

IT IS ORDERED That the Commission retains jurisdiction over the parties to and the subject matter of this complaint to effectuate the terms of this order.

DATED at Olympia, Washington, and effective this 28<sup>th</sup> day of June 1993.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*Sharon L. Nelson*

SHARON L. NELSON, Chairman

*R. D. Casad*

RICHARD D. CASAD, Commissioner

*Richard Hemstad*

RICHARD HEMSTAD, 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).