BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Inc. Against U S WEST Communications, Inc. Regarding Provisioning of Access Services	Docket No. UT-991292 U S WEST'S PROPOSED REPLY

Pursuant to the provisions of WAC 480-09-425(3)(b) and WAC 480-09-420(9)(b) U S WEST Communications, Inc. (U S WEST) hereby files its proposed reply to AT&T's and Commission Staff's answers to U S WEST's motion to dismiss.

Reply to AT&T

AT&T essentially admits the substance of U S WEST's motion to dismiss, agreeing that the vast majority of the services it complains about are interstate services.[1] However, AT&T then goes on to raise legal and policy issues with regard to the Commission's ability to proceed to hear the complaint. These legal and policy arguments with regard to the Commission's

[1] In fact, AT&T's discovery responses to date indicate that AT&T filed this complaint in Washington on the basis of zero held orders for intrastate services.

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jurisdiction over and ability to regulate the provisioning of interstate services are completely contrary to well-settled law at the federal level and in Washington state. These issues are addressed in this reply.

A. The Commission Lacks Jurisdiction To Hear A Complaint Regarding Interstate Services.

There is no legal basis upon which the Washington Commission can exercise jurisdiction to hear a complaint concerning U S WEST's provisioning of access services pursuant to U S WEST's FCC tariffs. This principle is well settled, and it is disingenuous of AT&T to argue to the contrary, particularly in light of AT&T's arguments less than two years ago that a state commission could *not* assert jurisdiction over service provisions pursuant to FCC tariffs. AT&T's arguments that a state commission has no jurisdiction to hear a complaint regarding interstate services is discussed more fully below.

AT&T opens its argument in its answer by claiming that AT&T's complaint specifically alleges "unlawful service" with regard to both dedicated access facilities and switched access facilities. AT&T claims that switched access has a more substantial intrastate component than dedicated access does, but that the Commission has jurisdiction over both types of facilities. It is not clear whether "both types of facilities" refers to both switched and dedicated facilities or both interstate and intrastate facilities. In any event, while it is true that AT&T's complaint has generally alleged unlawful service with regard to switched access facilities, AT&T has not pled any general or specific fact to establish such violations. Nor has AT&T cited a single held order for switched facilities which are intrastate in nature.

AT&T is simply wrong when it claims that the Commission has jurisdiction over interstate dedicated access facilities. AT&T cites no legal authority to support its position. To the contrary, there is ample authority supporting the position that the FCC has jurisdiction over

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interstate services and that states are not permitted to regulate such services. U S WEST cited, in its motion to dismiss, provisions of the Telecommunications Act of 1934 which confer upon the FCC jurisdiction to regulate interstate services. Those sections include 47 U.S.C. 152(a), 47 U.S.C. 201, 202, 203, and various other sections in the Act. There is nothing in the Act to the contrary.

Furthermore, the provision of the Act cited by AT&T in support of state authority to enforce existing law or impose new requirements on telecommunications carriers for telephone exchange service or "exchange access" (*see* Answer at p. 6) is specifically limited by its own terms to confer authority on states to impose new requirements only for *intrastate* services. 47 U.S.C. 261(c). The only other provision of law cited by AT&T in support of its argument that the Commission has jurisdiction to regulate interstate services is § 253(b) of the Telecommunications Act. That section grants a state commission authority to impose, on a competitively neutral basis and consistent with § 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. There is absolutely nothing in that section or any other provision of the Telecommunications Act of either 1934 and 1996 which confers upon a state commission authority to regulate interstate telecommunications services.

AT&T emphasizes in its answer that facilities and services provisioned under U S WEST's FCC tariffs may carry intrastate traffic. This is certainly true, but it is irrelevant for interstate dedicated access services. Whether or not such services ordered under the FCC tariff carry both inter- and intrastate traffic has bearing on the jurisdictional nature of the facilities only to the extent that the services are designated as interstate if they carry more than 10% interstate

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traffic. Those services and facilities are designated as intrastate if they carry less than 10% interstate traffic. U S WEST's FCC tariffs, as well as its Washington intrastate dedicated access tariffs, impose the requirement on the customer ordering the access service to designate the nature of the traffic and the nature of the facility. However, the designation is far more than merely a pricing methodology as suggested by AT&T (Answer at p. 3). In fact, AT&T goes so far as to suggest that the tariffs merely reflect the FCC's regulation for apportioning access costs for facilities which carry both interstate and intrastate traffic. AT&T further suggests that the fact that price and ordering of an access service might be governed by an FCC tariff does not make all of the traffic "interstate traffic." This begs the question of whether the FCC and the state commission can exert concurrent jurisdiction over services ordered out of the FCC tariff. U S WEST suggests they cannot and that once services are ordered and/or provisioned out of the FCC tariff, those services are interstate.

The rule that facilities which carry inter- and intrastate traffic are subject to FCC jurisdiction is a well settled legal principle, which has been established since the FCC's ruling in 1989 regarding mixed – use facilities. The mixed – use facilities rule is set forth succinctly in a recent decision by the FCC concerning the FCC tariffing of GTE's DSL services.[2] In that order, the FCC discussed the mixed-use facilities rule at ¶ 23, stating that

> 23. GTE argues that its ADSL service is properly tariffed at the federal level on the ground that it [sic] similar to existing special access services that are subject to federal regulation under the mixed-use facilities rule because more than ten percent of the traffic is interstate.[3] The mixed-use facilities rule was introduced in a 1989 proceeding involving the re-examination of the separations treatment of "mixed-use" special access lines.[4] Specifically, in the *MTS/WATS Market*

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[2] GTE Tel. Operating Cos. GTOC Transmittal 1148, CC Docket No. 98-79 (Opin. and Order rel. October 30, 1998) (GTE DSL Order).

[3] *See, e.g.*, GTE Rebuttal at 15.

[4] MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989) (*MTS/WATS Market Structure Separations Order*).

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> *Structure Order*, the Commission adopted the Joint Board's recommendation that "mixed-use" special access lines (*i.e.*, lines carrying both intrastate and interstate traffic) are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction.[5] The Commission found that special access lines carrying more than *de minimis* amounts of interstate traffic to private line systems should be assigned to the interstate jurisdiction.[6] Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line.[7]

The FCC went on to note in ¶ 25 of the GTE DSL Order that they agreed that GTE's ADSL service warranted federal *regulation*, not just federal pricing, under the "ten percent" rule. The FCC further stated that the ADSL service also is similar to traditional private line services in that both services may carry interstate and intrastate traffic. Nothing in this discussion indicates that these services are not properly tariffed and regulated at the FCC level. AT&T's contention that FCC tariffs serve only to price the services is patently wrong and clearly contrary to well-established legal precedent in place since 1989.

1. <u>AT&T Has Recognized And Advocated That The FCC Has Exclusive Jurisdiction Over Services Provided Pursuant To FCC Tariffs</u>.

AT&T has recognized that the FCC has exclusive jurisdiction over services provided pursuant to FCC tariffs. AT&T was involved as the respondent in a complaint filed by Ameritech before the Illinois Commerce Commission in 1997. In that complaint, Ameritech argued that AT&T had violated various sections of the Illinois Public Utilities Act in the provisioning of various services to Ameritech. In that proceeding, AT&T argued that the services at issue were not telecommunication services and therefore not subject to the jurisdiction of the Illinois Commerce Commission. AT&T further argued that even if the services at issue

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[5] *Id.*

[6] *Id.* at 5660, 5661. A private line services is a service for communications between specified locations for a continuous period or for regularly recurring periods at stated hours. 47 C.F.R. Pt 36, App. For example, high volume voice telephone customers purchase private line services as a means of obtaining direct access to interexchange carrier (IXC) networks.

[7] *Id.* at 5660.

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were telecommunications services, the Illinois Commerce Commission's jurisdiction did not extend beyond the intrastate arena for access and interconnection for interstate services. AT&T stated its position succinctly in its brief filed on February 6, 1998 as follows:

> Put another way, the Commission does not have jurisdiction over interstate "telecommunications services." Instead, the Commission only has jurisdiction over telecommunications services that would otherwise be within its (intrastate) jurisdiction.
>
> As discussed below, the SCPA [Shared Customer Provided Access] arrangement is used almost exclusively in connection with terminating interstate circuits and is, therefore, subject to the interstate, not intrastate jurisdiction.

AT&T goes on to quote the 1989 jurisdictional order which is referenced above in the GTE DSL order noting that if the interexchange circuits are interstate, they are provided out of the interstate tariff and are subject to the jurisdiction of the FCC. AT&T's brief on this issue concludes as follows:

> To summarize, if the interstate traffic on the dedicated access circuit constitutes more than 10% of the total traffic, the service is classified as interstate and subject to the interstate jurisdiction of the FCC – *in its entirety and for all purposes*. (Emphasis in original).

AT&T's argument in the Illinois docket was not only correct, it convinced the hearings examiner and the Commission to rule in AT&T's favor on this issue.[8] The decision determined that the Illinois Commission lacked jurisdiction over the interstate facilities but did have jurisdiction over six intrastate circuits identified in the complaint. The Commission in Washington should reach the same conclusion. In order to do so, it must require AT&T to specifically identify whether there are any circuits at issue that are ordered pursuant to U S WEST's intrastate switched or dedicated access tariffs.

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[8] *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. AT&T Corp. and AT&T Communications of Illinois, Inc.*, 1998 Ill. PUC LEXIS 139 (February 27, 1998).

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2. <u>Jurisdictional Disputes Regarding Interstate Claims Should Be Resolved Now By Dismissal Of The Complaint And Should Not Be Resolved In The Proceeding</u>.

AT&T, at p. 4 of its Answer, suggests that the Commission should proceed to a full hearing without making the necessary and appropriate jurisdictional determinations at the outset. AT&T suggests that the Commission need not summarily undertake the legal and factual analysis necessary to determine the full scope of the Commission's authority. U S WEST does not understand why the Commission would want to engage in an unnecessary and potentially unlawful investigation into U S WEST's provisioning of access services pursuant to its FCC tariffs when the clear remedy to that problem is a dismissal of the complaint as it related to the circuits provisioned pursuant to U S WEST's FCC tariffs.

AT&T raises no legal or policy argument to support its contention that the parties should proceed to a full hearing on issues of held orders and provisioning disputes concerning circuits and services over which the Washington Commission has no jurisdiction. AT&T's suggestion that the Commission should proceed because Washington consumers are affected by U S WEST's access provision is also not well taken.

This argument, if carried to its logical conclusion, would confer upon the Commission jurisdiction to investigate all FCC-related complaints, contrary to the clear provisions of the Telecommunications Act. The simple fact of the matter is that all services affect consumers living in one state or another. The jurisdiction to investigate these complaints is determined by whether the services are interstate or intrastate, not by whether the customer lives within the boundaries of a particular state or not. AT&T's proposal would confer on the Commission authority to regulate interstate switched access charges on the basis that Washington consumers are affected by those charges. This result is absurd and should be summarily rejected.

Amazingly, in spite of its arguments to the Illinois Commission set forth above, AT&T

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states in this proceeding that "it is not settled as a factual and legal matter that all facilities used to provide services and the access services *priced* pursuant to U S WEST's interstate tariff are considered interstate and governed solely by FCC oversight." Compare this with the statement discussed earlier wherein AT&T suggested to the Illinois Commission that "if the interstate traffic on the dedicated access circuit constitutes more than 10% of the total traffic, the service is classified as interstate and subject to the interstate jurisdiction of the FCC – *in its entirety and for all purposes*." At that point, it certainly seemed at least to AT&T's counsel in Illinois, that it was well settled as a legal matter that the services provided pursuant to a carrier's interstate tariffs are considered interstate and governed solely by FCC oversight.

Finally, AT&T makes the argument that because the facilities that provide both interstate and intrastate access services are located in Washington and are used to provide services to Washington consumers, regulatory oversight and control should reflect that as well. This argument is absolutely contrary to the FCC's mixed-use facilities rule discussed above. It is also inconsistent with well established law that the location of the facility is irrelevant to a determination of the regulatory jurisdiction. Rather, case law involving facilities and services used for both interstate and intrastate communications indicate that the nature of the communications determines the regulatory jurisdiction and even a physically intrastate facility, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation. *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). Certainly, AT&T is aware of this decision and knows that its argument on this issue is not well founded.

B. <u>The Filed Rate Doctrine Is Applicable And Controlling</u>.

The filed rate doctrine, as AT&T correctly identifies in its complaint, states that tariffed services must be provided and priced consistent with the carrier's tariff and a purchaser cannot

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assert state law claims based on promises outside of the tariff. The filed tariff doctrine goes further, though, and does in fact bar both the claims of AT&T, and Commission regulation of the FCC services. Even if the filed rate doctrine did no more than AT&T suggests, AT&T's state law claim would be barred by that doctrine, as AT&T is a purchaser of tariffed services asserting state law claims based on requirements that are not consistent with U S WEST's filed and approved tariffs. AT&T has not made any claims against U S WEST's tariff provisions in this docket and in fact has not claimed that U S WEST's conduct is in any way violative of the terms or conditions of its filed tariffs. The filed rate doctrine has been applied by Washington courts to defeat state law claims of breach of contract, negligent misrepresentation, fraud and violation of the Consumer Protection Act. *Hardy v. Claircom*, 86 Wn. App. 488 (1997). In that case, Claircom, d/b/a AT&T Wireless, claimed that state law claims were pre-empted by federal law and barred by the filed tariff doctrine. The courts agreed.

AT&T has vigorously sought protection under the filed tariff doctrine in the past, and has prevailed. *AT&T v. Central Office Tel.*, ___ U.S. ___, 118 S. Ct. 1956, 141 L.Ed.2d 222 (1998). AT&T attempted to invoke the filed tariff doctrine again in *Tenore v. AT&T Wireless*, 136 Wn.2d 322 (1998). AT&T did not prevail in that case only because there were no filed tariffs actually in issue.

AT&T is essentially asking the Commission in this case to order U S WEST to pay damages under various provisions of state law. Of course, AT&T is not so foolish as to characterize the remedies it seeks as damages but that is essentially what they are. Would the Commission order U S WEST to provision all facilities requested and to never have held orders? This is directly contrary to U S WEST's tariffs which state that U S WEST's obligation to furnish service is conditioned upon the availability of facilities. If AT&T received service

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beyond that which is called for in the tariff, and at a higher level than U S WEST's rates contemplate, AT&T has essentially received an award of damages under state law, which is not permitted.

In fact, the truly interstate nature of AT&T's complaint in this matter is revealed at p. 9 of its motion where AT&T suggests that its complaint is consistent with § 203(c) of the Telecommunications Act because AT&T is asking the Commission to stop U S WEST from giving its affiliates and certain customers preferential treatment prohibited by § 203(a). Clearly, AT&T understands that it has brought an action for enforcement of provisions of the Telecommunications Act of 1934 to the Washington Commission. Such a proceeding is improper before a state commission. AT&T's complaint, if it has any merits at all, clearly belongs before the FCC.

Reply to Staff

U S WEST replies to Staff's suggestion that it is appropriate for the Commission to exercise jurisdiction because Washington consumers are or may be affected by allegations in the complaint. This is an argument similar to one made by AT&T and, when carried to its logical conclusion, produces an absurd result. If the Commission adopts such a rationale, the Commission will essentially have jurisdiction over every issue under the Telecommunications Act and will have stripped the FCC of any jurisdiction or authority to hear complaints regarding interstate services because the Washington Commission will have interceded and usurped the FCC authority, under the guise of protecting Washington consumers. As noted above, the claim that individual state residents are or may be affected simply cannot hold, because every service affects a resident of a state and that is not the critical determination for concluding where jurisdiction is appropriate.

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U S WEST is certainly aware that the Washington Commission and Commission Staff take a keen interest in safeguarding the rights of Washington consumers, and U S WEST believes that the Commission has ample tools in order to do so. In fact, U S WEST does not challenge the Commission's jurisdiction to hear this complaint to the extent that it legitimately relates to any intrastate services. U S WEST believes it does not and therefore requests again that the Commission dismiss this complaint in whole or in part.

Conclusion

As set forth herein and in U S WEST's motion to dismiss, AT&T's complaint should be dismissed. AT&T should be instructed that if it wishes to refile this complaint, it must do so only with regard to intrastate services.

DATED this 7sth day of October, 1999.

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