

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

UNITED & INFORMED CITIZEN	)	DOCKET NO. UT-960659
ADVOCATES NETWORK, a non-profit)	
Washington Corporation,)	
)	
Complainant,	)	SECOND SUPPLEMENTAL
	)	ORDER DENYING UNITED &
v.	)	INFORMED CITIZEN
	)	ADVOCATES MOTION FOR
	)	SUMMARY DETERMINATION;
PACIFIC NORTHWEST BELL TELEPHONE	)	GRANTING U S WEST
COMPANY, d/b/a U S WEST	)	COMMUNICATIONS, INC.,
COMMUNICATIONS, INC.,	)	MOTION FOR SUMMARY
	)	DETERMINATION
Respondent.)	
.....)	

SUMMARY

HEARINGS: A prehearing conference was held in this matter in Olympia, Washington on January 21, 1997. A hearing on dispositive motions was held in Olympia, Washington on March 25, 1997. The hearings were held before administrative law judge Marjorie R. Schaer of the Washington Utilities and Transportation Commission.

APPEARANCES: The complainant, United and Informed Citizen Advocates Network ("U&I CAN"), was represented by J. Byron Holcomb, attorney, Bainbridge Island. The respondent, U S WEST Communications, Inc. ("U S WEST"), was represented by Lisa A. Anderl, attorney, Seattle. The Washington Utilities and Transportation Commission ("Commission Staff"), was represented by Shannon E. Smith, Assistant Attorney General, Olympia.

DECISION: The motion for summary disposition of U & I CAN is denied. U & I CAN does not have standing to bring the complaint. The services sought from U S WEST by U & I CAN require the payment of access charges to obtain. It is illegal in Washington to provide Extended Area Service (EAS) area bridging without payment of access charges. It was proper for U S WEST to disconnect the call transfer features that were being used to provide EAS bridging without giving advance notice, and the shut-offs did not violate U S WEST tariffs or Commission Rules.

The motion for summary disposition of U S WEST is granted. U S WEST did not violate any statute, regulation, or tariff in disabling the call transfer features on lines which are used to circumvent the payment of access and/or toll charges on U S WEST's network.

MEMORANDUM

I. SCOPE OF PROCEEDING

This is a formal complaint proceeding brought by U&I CAN, a Washington non-profit corporation, against U S WEST. The complaint alleges that U S WEST improperly discontinued a service provided to U & I CAN when U S WEST disabled the call transfer feature of the calling package it sold to three U S WEST customers whose phone numbers are included in the complaint. It seeks renewal of the disabled service, damages, penalties, and attorneys fees.

U S WEST admits that it disabled the call transfer capability of the three phone lines, and claims that its action was lawful because the call transfer capability was being used in a manner which violates state law. U S WEST seeks a summary determination that it was lawful and proper to disable the call transfer features of complainant's subscribers' Centrex systems, and that damages are not authorized. U S WEST seeks summary determination of the issues raised in its counterclaim whether complainant is acting as a telecommunications company and should be required to register as such, and further, whether complainant's use of U S WEST's exchange services is in violation of law.

The Commission Staff supports U S WEST.

This order deals with cross-motions for summary disposition filed by U & I CAN and U S WEST pursuant to WAC 480-09-426. The order is based on agreed facts provided in the complaint; in the deposition of Joseph Thayer, with attachments; the affidavit of Joseph Thayer, with attachments; the declaration of Lisa Anderl, with attachments; responses of Commission Staff to data requests of U & I CAN; and the sworn testimony of Bill Loveless, general manager of U & I CAN. The motions are described in more detail below.

U S WEST also seeks, in a counter-claim, payment of access charges by U & I CAN for inter-exchange toll services U S WEST has provided to U & I CAN's members using the call transfer capabilities. This claim was not a part of the motion for summary disposition. The counter-claim of U S WEST for access charges is not ruled on in this order. U S WEST will have ten days after this order is entered to inform the parties and the Commission whether it will pursue its claim for access charges.

This order also does not seek to determine whether U & I CAN should be classified as a telecommunications company subject to Commission jurisdiction. That issue is framed by the counterclaim of U S WEST, but its determination is beyond the scope of this order. Because the evidence on the issue is incomplete and conflicting it is not subject to summary determination. Nor is determination of whether U & I CAN is

a telecommunications company necessary to resolution of the questions presented by the complaint. If U S WEST or the Commission Staff wish to pursue classification of U & I CAN, they may do so in a separate classification proceeding.

II. BACKGROUND

On May 17, 1996, U & I CAN filed a complaint with the Washington Utilities and Transportation Commission (Commission) against U S WEST for declaratory relief and for money damages for breach of contract. In essence, U & I CAN seeks relief against U S WEST because U S WEST "disabled" Centrex services to three telephone numbers assigned to U & I CAN members.

U S WEST filed an answer to U & I CAN's complaint on June 7, 1996. U S WEST denied that it wrongfully disabled the Centrex service to the telephone numbers and counterclaimed that U & I CAN provided toll services in the state of Washington for a fee without purchasing access services from U S WEST. U S WEST also counterclaimed that U & I CAN is operating as a telecommunications company in the state of Washington without first registering with the Commission as required by state law.

U & I CAN is a non-profit corporation. U & I CAN claims to have no customers or investors, only members, whose identity is claimed to be confidential. U & I CAN members currently pay a one-time initiation fee of \$8.00 and then pay monthly membership dues of \$8.00. U & I CAN had gross receipts in 1996 of more than \$80,000. U & I CAN claims that it operates a private telecommunications system.

One benefit of membership in U & I CAN is use of a telephone system that will allow the member to bypass toll charges for long distance. It provides a computer and "dedicated" lines to its members to enable them to interconnect access lines provided by U S WEST and other local exchange companies. U & I CAN limits its members' access to its telecommunications system to 30 calls per month.

U & I CAN members subscribe to telecommunications services from U S WEST, and request features which enable subscribers to transfer calls. U & I CAN purchases and maintains computer equipment which enables calls to be transferred as described in the affidavit of Joseph Thayer. Such call features, as used by the individual subscribers to U & I CAN's services, with the instructions and facilities provided by U & I CAN, enable the callers to complete calls within the state of Washington. These are toll calls, but because of the use of overlapping EAS areas, and the call transfer function, these calls are completed without payment of either toll charges or access charges by U & I CAN.

Joseph Thayer, an employee of U S WEST, investigated the telecommunications activities of U & I CAN. He enrolled in U & I CAN in October 1995, and described the calling benefit as follows:

From my home in Shoreline, telephone number 543-9589, I dialed 529-8799, a residence in Federal Way. I received the message "We're sorry. You must first dial a "1" or "0" and the area code when calling this number. Please hang up and try your call again."

From my home in Shoreline, I then called 441-5200. When I received a series of three tones, I entered my access number; I received another tone and then dialed the same number above, 529-8799. I received a final series of tones, then the called party answered. The call was completed.

Affidavit of Joseph Thayer, p. 2.

Following this investigation, Mr. Thayer concluded that U & I CAN was unlawfully bridging EAS. U S WEST then disabled the transfer features on the lines used by U & I CAN members to bridge EAS. Apparently then, at the request of the U & I CAN members, U S WEST restored the transfer features to the lines for a period of time.

On March 11, 1996, Mr. Thayer called Bill Loveless, General Manager of U & I CAN to inform him that U S WEST would again disable the transfer feature on the indicated lines. Id., p. 4. Mr. Thayer informed Mr. Loveless that U & I CAN must subscribe to the appropriate underlying services from U S WEST's access tariff before U & I CAN could provide the services it was providing. Id. U S WEST again disabled the transfer feature on those lines. U S WEST only disabled the transfer feature. All other services, including dial tone, remained.

III.- THE U & I CAN MOTION

The U & I CAN motion seeks the following:

- 1) An order as to certain listed telephone numbers "and for any such other number as and to which the U&I CAN may now subscribe or may establish in accordance with the practice and procedure established as to the four¹ numbers above in the future" regarding U S WEST services which include call-transfer capability:
 - a) declaring that disablement of the call transfer capability is unlawful or not authorized;
 - b) immediately restoring the customized call management [call transfer] features;
 - c) awarding damages of \$1,000 per day;
 - d) awarding penalties of \$1,000 per day; and
 - e) awarding attorney fees.

DISCUSSION AND DECISION

1. U & I CAN Does Not Have Standing to Bring the Complaint

The complaint in this matter is brought in the name of U & I CAN, but the lines which had their call transfer features disabled are listed in the names of individual residential customers of U S WEST. It appears that the lines are kept in individuals' names in order to hide the fact that it is really U & I CAN who is using the lines to provide telecommunications services between exchanges without paying toll charges or access charges. U & I CAN argues that it is the real party in interest, and that its members would want it to pursue this matter on their behalf. U & I CAN is not the customer of U S WEST, and U S WEST does not owe it a duty in connection with these lines. To hold otherwise would be to reward a subterfuge that attempts to avoid payment of a fair share of costs as required by the legislature.

¹ The U & I CAN complaint lists three telephone numbers whose call transfer feature was disabled. These are the focus of the complaint. The motion for summary determination lists six telephone numbers (the three in the complaint and an additional three). The text of the motion, as quoted, refers to four numbers, without explanation.

As further discussed in the prior section and below, U & I CAN cannot provide the services it seeks to provide without paying the proper amount, including access charges, for those services. In order to provide a complete discussion, the remainder of the complaint will be discussed as if U & I CAN did have standing.

2. U S WEST Did Not Wrongfully Disable the Transfer Feature

There is no doubt that U & I CAN used the hook flash feature of the computer it hooked up to the telephone lines which are the subject of this complaint to provide telecommunications services between exchanges without paying toll charges for the calls. Thus, neither U & I CAN nor its members contribute to the access charge system. The access charge system is mandated by RCW 80.36.160. As the Commission explained in In the Matter of Determining the Proper Classification of U. S. Metrolink Corp., Docket No. U-88-2370-J, Second Supplemental Order (May 1989):

The access charge system which the Commission has adopted is mandated by RCW 80.36.160 as explained in the Eighteenth Supplemental Order in our Cause No. U-85-23. Even were the Commission inclined to find the operations of Metrolink to be exempt from direct regulation, it would be necessary to extend our jurisdiction to Metrolink at least insofar as necessary to satisfy our obligations under RCW 80.36.160. The authority of the Commission to so extend its jurisdiction is specifically set forth in the second paragraph of this statute. Therefore, Metrolink has no hope of escaping its obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network.

Id., Page 4.

Because U & I CAN's operations unlawfully bypass the access charge system, U S WEST did not wrongfully discontinue the telephone features that make the unlawful activity possible. U S WEST should not be ordered to immediately restore the customized call management features.

3. U & I CAN Is Not Entitled to Penalties, an Award of Damages, or Attorney's Fees

U & I CAN is not the prevailing party in any portion of its complaint. No penalties should be awarded. Nor does the Commission have the authority to award damages or attorney's fees. No damages or attorney's fees should be awarded.

IV. THE U S WEST MOTION

The U S WEST motion seeks the following:

- 1) A determination that damages are not authorized by RCW 80.04.380 and RCW 80.04.405;
- 2) A determination that a non-profit corporation which, for a fee, provides facilities which allow its members to place toll calls on U S WEST's network by bridging EAS areas, without payment of toll or access charges, does not operate a "private telecommunications system" under RCW 80.36.370(2);
- 3) A determination that such a corporation is a telecommunications company and should be required to register as such with the Commission; and
- 4) A determination that U S WEST did not violate any statute, regulation, or tariff in disabling the call transfer features on lines which are used to circumvent the payment of access and/or toll charges on U S WEST's network.

DISCUSSION AND DECISION:**1. Private Damages Are Not Authorized by RCW 80.04.380 and RCW 80.04.405**

The complainant requests an award of private damages under RCW 80.04.380 and .405. Both statutes provide for penalties for violation of any statute, or Commission rule or order. RCW 80.04.400 provides that all penalties recovered under Title 80 shall be paid into the state treasury and credited to the general fund. RCW 80.04.405 contains a similar provision. No authority is provided to award private damages. The complainant's claim should be dismissed as a matter of law.

2. U & I CAN Does Not Operate a Private Telecommunications System

U & I CAN claims that it operates a private telecommunications system. With this claim, U & I CAN apparently intends to invoke the provision of RCW 80.36.370(2) which states that the Commission shall not regulate a private telecommunications system.

Several definitions are relevant to this issue, all of them are found in RCW 80.04.010. "Telecommunications" is defined as the transmission of information by wire, radio, optical cable, electromagnetic, or other means. A "telecommunications company" includes every person or entity owning or operating facilities used to provide telecommunications for hire, or resale to the general public.

A "private telecommunications system" is a telecommunications system "controlled by a person or entity for the sole and exclusive use of such person, entity, or affiliate thereof, including the provision of private shared telecommunications services by such person or entity." "Private shared telecommunications services" include the provision of telecommunications 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. U & I CAN members are not located in such discrete private premises.

To meet the statutory definition of a private telecommunications system, the system must be controlled by a person or entity for the sole and exclusive use of such person or entity or affiliate thereof. RCW 80.04.010. U & I CAN is a non-profit corporation. By its own admission, it controls the telecommunication system not for its own use as a non-profit corporation, but for the use of its members. A non-profit corporation is a separate and distinct legal entity from its members. Members of a voluntary nonprofit organization have no individual exclusive ownership of any particular part of the organization's property. Apostolic Faith Mission v. Christian Evangelical Church, 55 Wn.2d 364, 367 (1958). Thus, the telecommunications system provided by U & I CAN is not exempt under RCW 80.36.370(2).

3. Determination of Whether U & I CAN is a Telecommunications Company That Must Register With the Commission is Beyond the Scope of This Motion

As discussed in Section III.2 above, the access charge system is mandated by RCW 80.36.160. Even were the Commission inclined to find the operations of U & I CAN to be exempt from direct regulation, it would be necessary to extend our jurisdiction to U & I CAN at least insofar as necessary to satisfy our obligations under RCW 80.36.160. The authority of the Commission to so extend its jurisdiction is specifically set forth in the second paragraph of this statute. Therefore, U & I CAN has no hope of escaping its obligation of making an appropriate contribution toward the fixed and variable costs associated with accessing the public switched telecommunications network.

The proper forum for determining whether U & I CAN is subject to direct regulation is a classification proceeding. In fact, in Metrolink, the Commission required a classification proceeding to determine whether that company was subject to direct regulation (the Commission found that it was). U S WEST and the Commission Staff urge a determination that U & I CAN's services are for hire, based on the organization's emphasis on its telecommunications system, and its detailed instructions to members on how to use its facilities to avoid toll charges between exchanges. U & I CAN insists

that its purposes are served by its telecommunications network, and that its memberships are not "for hire". No party has briefed the case law on the meaning of "for hire" in this and other Commission statutes.

It is clear on the record in this proceeding that U & I CAN must purchase services off of the U S WEST access tariff if it wishes to provide service between exchanges to its members. This is equally true whether U & I CAN is subject to direct regulation, or whether its form of telecommunications system is subject to a lesser form of regulation. This order is based on the kind of customer U & I CAN is for U S WEST services, and on the kind of services it is purchasing.

4. U S WEST Did Not Violate Any Statute, Regulation, or Tariff

U S WEST did not violate any statute, regulation, or tariff in disabling the call transfer features on lines which are used to circumvent the payment of access and/or toll charges on U S WEST's network. Because U & I CAN's operations unlawfully bypass the access charge system, U S WEST did not wrongfully discontinue the telephone features that make the unlawful activity possible.

FINDINGS OF FACT

1. On May 17, 1996, United & Informed Citizen Advocates Network (U & I CAN) filed a complaint with the Washington Utilities and Transportation Commission (Commission) against U S WEST Communications, Inc. (U S WEST) for declaratory relief and for money damages for breach of contract.

2. The complaint alleged that the following statutes and regulations are relevant to this matter:

- RCW 80.04.110: Complaint-Hearing;
- RCW 80.04.120: Hearing-Order-Record;
- RCW 80.04.130: Suspension of tariff charge, etc.;
- RCW 80.04.220: Reparations;
- RCW 80.04.240: Action in Court on Reparations, etc.;
- RCW 80.04.380: Penalties-Violations by Pub. Serv. Cos.;
- RCW 80.04.405: Additional Penalties-officers, employees;
- WAC 480-120-021: Glossary;
- WAC 480-120-057: Deposit or security -- Interexchange;
- WAC 480-120-011: Application of Rules;
- WAC 480-120-024: Waiver of Regulatory Requirements;
- WAC 480-120-061: Refusal of service;
- WAC 480-120-081: Discontinuance of service;
- WAC 480-120-101: Complaints and disputes;

3. The complaint sought money damages pursuant to RCW 80.04.380 and .405., reasonable attorney's fees and costs.

4. On June 6, 1996, U S WEST filed an answer, counterclaim, and affirmative defenses to the complaint.

5. On July 12, 1996, U & I CAN filed its reply to the counterclaim and affirmative defenses of U S WEST.

6. On February 12, 1997, U S WEST filed a motion for leave to amend its counterclaim, seeking to add a claim for unpaid access charges.

7. On March 10, 1997, U & I CAN and U S WEST filed cross-motions for summary determination pursuant to WAC 480-09-426. The motions were heard on March 25, 1997.

8. U & I CAN is a Washington non-profit corporation. U & I CAN claims to have no customers or investors, only members, whose identity is claimed to be confidential.

9. U & I CAN members currently pay a one-time initiation fee of \$8.00 and then pay monthly membership dues of \$8.00. U & I CAN had gross receipts in 1996 of more than \$80,000.

10. U & I CAN claims that it operates a private telecommunications system. The telecommunications system operated by U & I CAN is not a "private telecommunications system" as that term is used in RCW 80.36.370(2).

11. One benefit of membership in U & I CAN is use of a telephone system that will allow the member to bypass toll charges for long distance. U & I CAN provides a computer and "dedicated" lines to its members to enable them to interconnect access lines provided by U S WEST and other local exchange companies. U & I CAN limits its members' access to its telecommunications system to 30 calls per month. U & I CAN provides detailed instructions of this use of its telecommunications system in its member newsletter. A copy of the newsletter is attached to the affidavit of Joseph Thayer.

12. U & I CAN members subscribe to telecommunications services from U S WEST, and order features which enable subscribers to transfer calls. Gary Shelton, telephone number (206)453-2070, Bob Rolan, telephone number (206)891-0368 and Al Hooper, telephone number (206)926-9233, each subscribed to a Centrex call package from U S WEST which included a call transfer feature. Each then dedicated his telephone line to U & I CAN, which purchased and maintained computer equipment which was attached to those lines, and which enabled calls to be transferred

as described in the affidavit of Joseph Thayer. Such call features, as used by the individual subscribers to U & I CAN's services, with the instructions and facilities provided by U & I CAN, enable the callers to complete calls within the state of Washington. These are toll calls, but because of the use of overlapping EAS areas, and the call transfer function, these calls are completed without payment of either toll charges or access charges by U & I CAN. The call transfer function of these Centrex packages was disabled by U S WEST.

13. Joseph Thayer, an employee of U S WEST, investigated the telecommunications activities of U & I CAN. He enrolled in U & I CAN in October 1995, and described the calling benefit as follows:

From my home in Shoreline, telephone number 543-9589, I dialed 529-8799, a residence in Federal Way. I received the message "We're sorry. You must first dial a "1" or "0" and the area code when calling this number. Please hang up and try your call again."

From my home in Shoreline, I then called 441-5200. When I received a series of three tones, I entered my access number; I received another tone and then dialed the same number above, 529-8799. I received a final series of tones, then the called party answered. The call was completed.

Affidavit of Joseph Thayer, p. 2.

This line test demonstrates that the U & I CAN telecommunications system was being used to provide toll service without payment of access charges.

14. Following his investigation, Mr. Thayer concluded that U & I CAN was unlawfully bridging EAS. U S WEST then disabled the transfer features on the lines used by U & I CAN members to bridge EAS. Apparently then, at the request of its customers, U S WEST restored the transfer features to the lines for a period of time. On March 11, 1996, Mr. Thayer called Bill Loveless, General Manager of U & I CAN to inform him that U S WEST would again disable the transfer feature on the indicated lines. Id., p. 4. Mr. Thayer informed Mr. Loveless that U & I CAN must subscribe to the appropriate underlying services from U S WEST's access tariff before it could provide the services it was providing. Id. U S WEST again disabled the transfer feature on those lines; it did not completely disable the dial tone at the indicated numbers. Id.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington and has jurisdiction over the parties and subject matter of the complaint.

2. U & I CAN does not have standing to bring the complaint. The complaint in this matter is brought in the name of U & I CAN, but the lines which had their call transfer features disabled are listed in the names of individual residential customers of U S WEST. It appears that the lines are kept in individual's names in order to hide the fact that it is really U & I CAN who is using the lines to provide telecommunications services between exchanges without paying toll charges or access charges. U & I CAN is not the customer of U S WEST, and U S WEST does not owe it a duty in connection with these lines.

3. Neither U & I CAN nor its members contribute to the access charge system. The access charge system is mandated by RCW 80.36.160. In the Matter of Determining the Proper Classification of U. S. Metrolink Corp., Docket No. U-88-2370-J, Second Supplemental Order, (May 1989). Because U & I CAN's operations unlawfully bypass the access charge system, U S WEST did not wrongfully discontinue the telephone features that make the unlawful activity possible.

4. RCW 80.04.380 and .405. provide for penalties for violation of any statute, or Commission rule or order. RCW 80.04.400 provides that all penalties recovered under Title 80 shall be paid into the state treasury and credited to the general fund. RCW 80.04.405 contains a similar provision. The Commission does not have the authority to award private damages.

5. A private telecommunications system must be controlled by a person or entity for the sole and exclusive use of such person or entity or affiliate thereof. RCW 80.04.010. U & I CAN is a non-profit corporation. By its own admission, it controls the telecommunication system not for its own use as a non-profit corporation, but for the use of its members. A non-profit corporation is a separate and distinct legal entity from its members. Members of a voluntary nonprofit organization have no individual exclusive ownership of any particular part of the organization's property. Apostolic Faith Mission v. Christian Evangelical Church, 55 Wn.2d 364, 367 (1958). Thus, the telecommunications system provided by U & I CAN is not exempt under RCW 80.36.370(2).

6. U & I CAN must purchase services off of the U S WEST access tariff if it wishes to provide service between exchanges to its members. This is equally true whether U & I CAN is subject to direct regulation, or whether its form of telecommunications system is subject to a lesser form of regulation. This conclusion is based on the kind of services U & I CAN is purchasing from U S WEST.

7. U S WEST did not violate any statute, regulation, or tariff in disabling the call transfer features on lines which are used by U & I CAN to circumvent the payment of access and/or toll charges on U S WEST's network. Because U & I CAN's operations unlawfully bypass the access charge system, U S WEST did not wrongfully disconnect the telephone features that make the unlawful activity possible.

ORDER

IT IS ORDERED That:

1. U & I CAN's Complaint and Petition for Declaratory Relief, and Money Damages for Breach of Contract to Provide Telecommunications Services is dismissed.
2. Complainant's Motion for Summary Determination is denied.
3. Respondent's Motion for Summary Determination is granted.
4. Respondent shall inform the parties and the Commission within ten days after the entry of its order whether it wishes to pursue its counterclaim for access charges.

DATED at Olympia, Washington, and effective this 17th day of September 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



MARJORIE R. SCHAER
Administrative Law Judge