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February 19, 1999

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Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, S.W.
Olympia, Washington 98504

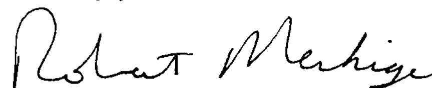
WorldCom, Inc. v. GTE Northwest Incorporated (Docket No. UT-980338)

Dear Ms. Washburn:

Enclosed for filing on behalf of GTE Northwest Incorporated please find an original and three copies of GTE's Reply to Opposing Parties Briefs. If you have any questions, please call me.

Thank you for your assistance.

Sincerely yours,



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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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WorldCom, Inc., f/k/a MFS Intelenet of Washington, Inc.,)	
)	
Complainant,)	
)	
v.)	
)	**DOCKET NO. UT-980338**
GTE Northwest, Inc.,)	
)	
Respondent.)	

GTE NORTHWEST'S REPLY TO OPPOSING PARTIES' BRIEFS

Introduction

In their opening Briefs, WorldCom, Inc. ("WorldCom") and the WUTC Staff ("Staff") assert inconsistent positions that serve only to illustrate the error of their respective arguments. For instance, WorldCom initially claims the Commission "must give full effect to the words" of the interim interconnection agreement between GTE and WorldCom (the "Interim Agreement"). Yet WorldCom later violates its own admonition – virtually ignoring the fact that the parties *had an interim* agreement and asserting instead that the Interim Agreement must continue in perpetuity. Similarly, WorldCom and Staff claim that the decision in the MFS/US West arbitration is somehow binding on GTE, notwithstanding this Commission's statement in that arbitration and elsewhere that arbitration decisions are binding only upon the parties to the arbitration.

The Commission, however, need not concern itself with the inconsistent positions taking by WorldCom and Staff.[1] Rather, a simple review of these parties' admissions conclusively establishes that: (1) the Interim Agreement expired by its own terms on July 15, 1998; and (2) the decision in the MFS/US West arbitration is neither binding on GTE nor a proper basis for imposing penalties on GTE as requested by Staff. Moreover, for the reasons previously explained by GTE, the Commission should reconsider its previous non-binding statements regarding the jurisdictional nature of calls to Internet service providers ("ISPs").

Argument

I. WorldCom Concedes that the Interim Interconnection Agreement has Expired

GTE's Counterclaim in this case is based on a simple premise – reciprocal compensation cannot be paid *under the terms* of the Interconnection Agreement for any period after July 15, 1998 because the Interim Agreement expired on this date. WorldCom agrees with this basic premise, stating:

> WorldCom does not dispute that the specific agreement expired by its terms on July 15, 1998; *indeed, that is what the contract says* . . . WorldCom Brief at 28 (emphasis added).

The parties disagree, however, on the effect of this termination on the terms and conditions in the Interim Agreement. WorldCom argues that the expiration of the Interim Agreement is a non-event, and that the parties must operate under the terms and conditions of this expired agreement indefinitely. To put it simply, WorldCom views the Interim Agreement as a "Perpetual" Agreement. This strained interpretation of the clear language of the Interim Agreement violates the very contract maxims WorldCom cites in its Brief.

[1] GTE does not object to WorldCom's request that this matter be decided by the Commission, rather than an administrative law judge, provided the Commission allows oral argument.

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1 For instance, GTE agrees that the Commission should give effect to all of the words in
2 the Interim Agreement. This is clearly the law in Washington. *See e.g., Newsom v. Miller*, 42
3 Wash.2d 727, 731, 258 P.2d 812, 814 (1953)(contract should be given an interpretation that does
4 not render any of its provision ineffective); *Bremer v. Mount Vernon School Dist. No. 320*, 34
5 Wash.2d 192, 199, 660 P.2d 274, 278 (1983). Yet WorldCom would have the Commission
6 ignore the most prominent term in the Interim Agreement – the title. The contract at issue here is
7 entitled "Interim Interconnection Agreement." "Interim" has but one ordinary meaning:
8 temporary. Black's Law Dictionary (5th Ed. 1979).[2]

9 In its effort to ignore the title (*and stated purpose*) of the Interim Agreement, WorldCom
10 focuses almost exclusively on Article VIII of the Interim Agreement. This provision provides in
11 pertinent part, that:

12 In the event that the Agreement expires after two years, the *interconnection*
13 *arrangements* in this Agreement shall remain in place until the parties are able to
14 negotiate and implement a new interconnection agreement. Interim Agreement at
15 Article 8, page 19 (emphasis added).
16

17 WorldCom's entire argument that the Interim Agreement is essentially perpetual
18 is based on the assumption that the phrase "interconnection arrangements" is
19 synonymous with the Interim Agreement itself. This assumption is erroneous. The plain
20 language of Article VIII demonstrates that there is a distinction between the Interim
21 Agreement (which expired on July 15, 1998) and the interconnection arrangements,
22 which were meant to survive. If the parties really meant for the Interim Agreement to
23 extend beyond July 15, 1998, they would have so stated. That the parties choose to use

---

[2] Counts in Washington routinely use dictionaries to determine the meaning of undefined terms. *See e.g. Kitsop County v. Allstate Ins. Co.* 136 Wash.2d 567, 576, 964 P.2d 1173, 1178 (1998)(citation omitted).

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1 the phrase "interconnection arrangements", as opposed to "agreement" in Article VIII
2 dooms WorldCom's argument. The language used by the parties is controlling here, and
3 it must be given its ordinary meaning. *Harris v. Ski Park Farms, Inc.*, 60 Wash.App.
4 604, __, 805 P.2d 819, 821 (1991). Here, the phrase "interconnection arrangements"
5 means only one thing – the physical connections between the GTE and WorldCom
6 networks. This can be seen by reference to a source as obvious as a dictionary. *See e.g.*,
7 Webster's Collegiate Dictionary (10th Ed. 1997)(defining interconnected as "having
8 internal connections between the parts or elements" and defining arrangements as
9 "something made by arranging parts or things together").

10 Indeed, WorldCom seems to acknowledge as much in its Brief, stating that the
11 provision it clings to was added by the parties to "prevent a disruption to each other's
12 customers . . ." WorldCom Brief at 30. Preventing disruption to customers by
13 maintaining interconnection arrangements is a far cry from the proposition that the
14 payment terms will remain unchanged indefinitely. If that were the case, the Interim
15 Agreement would have been called a Permanent Agreement, or would have had an
16 automatic renewal clause, something it clearly lacks. Similarly, the Interim Agreement
17 would not expressly require the parties to negotiate new terms and conditions if these
18 terms and conditions were to continue beyond the agreement's two year life. The *only*
19 way WorldCom's interpretation of the Interim Agreement makes any sense is if the
20 Commission: (1) ignores the title and stated purpose of the Interim Agreement; (2)
21 ignores Article VIII of the Interim Agreement limiting its existence to two years; (3)
22 ignores the plain distinction in Article VIII between the Interim Agreement (which
23 expired) and the "interconnection arrangements" (which survived); and (4) ignores the

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1 provisions requiring the parties to negotiate new terms and conditions. But ignoring the
2 language of the Interim Agreement is something the Commission should not, and cannot
3 do. *See e.g., Public Utility Dist. V. Washington Public Power Supply System,* 104
4 Wash.2d 353, 373, 705 P.2d 1195, 1209 (1985).

5 WorldCom also tries to divert attention from the plain language in the Interim
6 Agreement by misstating GTE's position on compensation and also by claiming that GTE
7 has waived its right to challenge WorldCom's lopsided view that the Interim Agreement
8 has not expired. These diversions fail for two reasons.

9 First, GTE has not, and does not, contend that no compensation is due to
10 WorldCom for terminating local traffic. *See* Pitterle Test. at 8-9. Instead, the issue is
11 whether that compensation is due: (1) under the terms and conditions of the expired
12 Interim Agreement; or (2) under new terms and conditions the parties agreed to negotiate
13 or arbitrate in accordance with the provisions of the Telecommunications Act. As is
14 explained above, that compensation must first be negotiated by the parties, and until these
15 negotiations are complete, will be deferred. While it appears unlikely that the parties will
16 agree on whether compensation will be due for Internet traffic to ISPs, the fact remains
17 that the parties agreed to negotiate (and if necessary arbitrate under the
18 Telecommunications Act) all terms after expiration of the Interim Agreement. That
19 WorldCom choose not to promptly resolve this issue (as well as the compensation to be
20 paid for truly local traffic) is simply a function of WorldCom's lackadaisical approach to
21 negotiations.

22 WorldCom tries to excuse its failure to negotiate, citing "extensive reorganization
23 activities ongoing at WorldCom." WorldCom Brief at 12. That WorldCom was too busy

C00652

1 to take care of its business does not excuse its failure to negotiate, either under the terms
2 of the Interim Agreement, or under the provisions of the Telecommunications Act. The
3 Interim Agreement obligated WorldCom to initiate negotiations at least 45 days before
4 expiration of that contract. WorldCom admittedly missed this deadline despite a
5 reminder from GTE. *See* Exhibit B to GTE's Post-Hearing Brief. WorldCom also
6 missed the deadline for filing an arbitration petition with this Commission, even though
7 WorldCom acknowledged that the statutory clock had begun to run as of November 4,
8 1997. *See* Exhibit A to GTE's Post-Hearing Brief.
9 Perhaps recognizing that it is too late to comply with the Interim Agreement and
10 the Telecommunications Act, WorldCom now asks this Commission to simply arbitrate a
11 new permanent agreement for the parties – an agreement that is objectionable to GTE for
12 all of the reasons previously stated in GTE's Post-Hearing Brief. Unfortunately for
13 WorldCom, the Commission cannot simply relieve WorldCom of its contractual
14 obligations any more than the Commission can impose a permanent agreement on GTE in
15 this proceeding or resolve the issue of what compensation is due after July 15, 1998.[3]
16 Stated differently, the Commission can no more ignore the language in the Interim
17 Agreement than it can ignore the jurisdictional deadlines for negotiation and arbitration

[3] Staff's contention that the Commission has jurisdiction to resolve this issue is based on the erroneous premise that the Commission has the authority, under 47 U.S.C. § 252(e)(1), to impose unarbitrated terms upon GTE. This is a misreading of the Act. Section 252(e)(1) authorizes the Commission to approve or reject negotiated agreements. It does not give the Commission the authority to impose terms on an unwilling party. The Commission can only do so when it conducts an arbitration under Section 252(b) of the Act. Here, it is clear that this matter is not before the Commission pursuant to an arbitration. Consequently, the Commission has no authority to unilaterally impose a new agreement on GTE or to order that compensation be paid after July 15, 1998.

under the Act – deadlines that WorldCom undeniably missed. Having missed these deadlines, WorldCom cannot be granted the relief it now seeks from the Commission.

Lastly, WorldCom's argument that GTE waived its right to contend that the Interim Agreement expired is disingenuous. As was explained previously, WorldCom will receive some compensation from GTE for terminating truly local traffic. This compensation will be paid, however, under the terms of the new interconnection agreement the parties agreed to negotiate. That GTE has not yet paid that compensation (whatever it may be) is again a result of WorldCom's approach to negotiations. More importantly, GTE's deferral of compensation is entirely consistent with GTE's position that the Interim Agreement expired on July 15, 1998. Any compensation to be paid to WorldCom after July 15, 1998 must, as the parties agreed, be paid under the terms of a new agreement. Unless and until this new agreement is made by the parties – either through negotiation or a proper and full arbitration under the Act – no compensation is due.

II. GTE Cannot be Fined by the Commission Because the Decision in the MFS/US West Arbitration is not Binding on GTE.

A central premise behind WorldCom and Staff's arguments on the issue of the proper treatment of calls to ISPs is that the arbitration decision in the MFS/US West Arbitration resolved this issue conclusively as to GTE. Moreover, the purportedly binding nature of that arbitration decision is what Staff contends warrants the imposition of penalties on GTE. It could not be any clearer, however, that the MSF/US West arbitration is not binding on GTE.

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First, the Commission stated in the course of the MFS/US West arbitration that its decision was binding only on the parties to that arbitration. *See In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US West Communications, Inc. Pursuant to 47 U.S.C. Section 252,* Docket No. UT-960323, Arbitrator's Second Procedural Order on Petition to Intervene (July 16, 1996). That the Commission would make this statement is not surprising as it conforms with the Commission's stated policies on arbitrations. *See In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996,* Docket No. UT-960269, Interpretative and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 ("Policy Statement"), at 4 (June 27, 1996)("Arbitration decisions are binding only upon the parties to the arbitration").

Second, the doctrine of *stare decisis,* relied upon so heavily by WorldCom, is simply inapplicable in this situation. As an initial matter, the doctrine is only marginally relevant in the context of administrative agencies. *See R.G. Vergeyle v. Employment Security Department*, 28 Wash.App. 399, 404, 623 P.2d 736, 739 (1981)("stare decisis plays only a limited role in the administrative agency context"), *overruled on other grounds, Davis v. Employment Security Department*, 108 Wash.2d 272, 276, 737 P.2d 1262, 1265 (1987). *See also, Stein, Vol. 5 Administrative Law*, § 40.02 (1996)("Administrative agencies are, in general, not bound by this doctrine. An agency is free to change prior rulings and decisions so long as such action is not done capriciously or arbitrarily. The courts recognize that agencies must be free to change prior policies and actions; otherwise, effective enforcement of statutes will be frustrated").

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1 Moreover, to the extent the doctrine even applies to agency action, it is limited to
2 adjudicative proceedings that "generally provide a guide to action the agency may be
3 expected to take in future cases." *National Labor Relations Board, v. Wyman-Gordon*
4 *Co.*, 394 U.S. 759, 766, 89 S.Ct. 1426, 1429. Here, however, it is clear that the MFS/US
5 West arbitration was not an adjudicative proceeding. *See* Policy Statement at 4
6 ("Arbitrations under the 1996 Act will not be deemed adjudicative proceedings under the
7 Washington Administrate Procedure Act"). Thus, the doctrine of *stare decisis* has no
8 application whatsoever to the Commission's non-adjudicative decision in the MFS/US
9 West arbitration.

10 That the MFS/US West decision is not binding on GTE also eviscerates Staff's
11 request for penalties. An adjudication in an arbitration that is binding on only the parties
12 thereto is hardly the sort of rule that must be obeyed by all. *See, Wyman-Gordon Co.*, 394
13 U.S. at 766, 89 S.Ct. at 1429-30 (decisions in adjudications are not rules that must,
14 without more, "by obeyed by the affected public"). Indeed, Staff can point to no order,
15 rule, direction or requirement by the Commission supporting its contention that
16 incumbent carriers must treat all calls to ISPs as local or face the threat of penalties to be
17 imposed by the Commission. This is not a case where GTE has violated any rule or order
18 by the Commission concerning how GTE must treat calls to ISPs – *no such rule or order*
19 *exists.* Rather, this is a case where Staff wants GTE penalized simply because GTE
20 disagrees with Staff's position. This is clearly too thin a reed to support Staff's request
21 for penalties.

22 Lastly, the penalties sought by Staff should not be imposed under RCWA
23 80.36.170. The contention that GTE's objection to paying reciprocal compensation for

ISP traffic is somehow anti-competitive is simply wrong. The investment community has already recognized that CLECs like WorldCom are reaping windfall profits as a result of reciprocal compensation provisions for ISP traffic. *See* Exhibit H to GTE Post-Hearing Memorandum. The FCC has also recognized that the impact of such a position on consumers is negligible because the issue "has nothing to do with consumer Internet charges." Pitterle Reply at p. 11. GTE has done nothing more than to try to put an end to this arbitrage opportunity. This is hardly the type of conduct that warrants the imposition of a penalty by this Commission.

Conclusion

For all of the forgoing reasons, GTE is entitled to prevail on both its Counterclaim and WorldCom's Complaint.

Submitted this 19th day of February, 1999.

GTE NORTHWEST INCORPORATED

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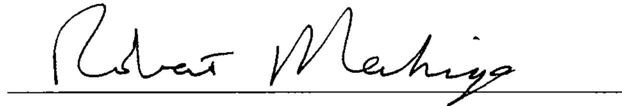
CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon Richard M. Rindler, Esq., Michael L. Shor, Esq., SWIDLER & BERLIN, CHARTERED, 3000 K Street, N.W., Suite 300, Washington D.C. 20007, counsel for WorldCom, Inc., f/k/a MFS Intelenet of Washington, Inc. and Gregory J. Trautman, Assistant Attorney General, 1400 S. Evergreen Park Drive SW, P.O. Box 40128, Olympia, Washington 98504-0128, counsel for the Staff of the Washington Utilities and Transportation Commission, via telecopy and by depositing a copy in the United States mail, first-class, postage pre-paid on February 19, 1999.



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