

SERVICE DATE  
DEC 19 1997

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION,	)	
	)	DOCKET NO. UT-961638
Complainant,	)	
	)	
v.	)	THIRD SUPPLEMENTAL
	)	ORDER DENYING JOINT
U S WEST COMMUNICATIONS, INC.,	)	MOTION TO STRIKE
	)	TESTIMONY
Respondent.	)	
.....	)	

**BACKGROUND**

On December 4, 1997, Public Counsel, Commission Staff, and TRACER filed with the Commission a joint motion to strike Exhibit TAJ-5, to the testimony of U S WEST witness Ms. Jensen. a report entitled *Local Exchange Competition Under the 1996 Telecom Act, Redlining the Local Residential Customer*, authored by Peter Huber (Report). The Commission on December 5, 1997, called for U S WEST and other interested parties to reply to the joint motion not later than December 11, 1997. Both U S WEST and GTE timely filed a reply to the joint motion.

The Commission asked the parties undertake discussions to resolve this evidentiary dispute prior to the date set for filing replies to the motion. Public Counsel notified the Commission by letter on December 10, 1997, that the joint parties had been unsuccessful in their efforts to resolve this dispute with U S WEST. Public Counsel indicated its willingness to strike two specific statements in the testimony of its witness Dr. Selwyn, upon which it claims U S WEST justifies the filing of Exhibit TAJ-5, if the exhibit is withdrawn. Failing this resolution of the joint motion, the moving parties reassert their objection to the entire exhibit and renew their request to file supplemental testimony.

**MEMORANDUM**

**I. Joint Motion**

The joint motion asks the Commission to strike Exhibit TAJ-5 in its entirety, or in the alternative, to strike the exhibit with the exception of pages ii (title page), 10, and 11, and that the moving parties be allowed to file responsive supplemental testimony; if the Commission authorizes the filing of supplemental testimony, the moving parties ask the Commission to modify the procedural schedule to allow additional time for filing final memoranda. The moving parties argue the exhibit should be stricken as beyond the proper scope of rebuttal testimony.

The moving parties urge that U S WEST is attempting to supplement the direct testimony of Ms. Jensen “by placing in the record lengthy and detailed industry-sponsored advocacy characterized as ‘information’ about a wide array of competitive issues not directly raised in this proceeding.” These parties assert that use of the exhibit is a misuse of rebuttal testimony because it attempts to add new material in a manner which disadvantages the other parties and broadens the scope of the proceeding. To the extent any of the included material is relevant, U S WEST had ample opportunity to address the matter of competition and competitive local exchange company activities in its direct case.

In the alternative, the moving parties ask that if the Commission does not strike the exhibit in its entirety, the exhibit be limited only to those pages cited in Ms. Jensen’s rebuttal testimony and the title page. They ask also for the opportunity to file supplemental testimony in response to these pages of the Report. To the extent that any portion of the Report remains in Exhibit TAJ-5, the moving parties ask leave to file supplemental response and an extension of the procedural schedule providing additional time for filing final memoranda.

## **II. Replies to Motion**

### **A. U S WEST**

U S WEST rebuts the joint movants characterization of the basis for its filing of Exhibit TAJ-5, quoting instead a lengthy list of references in testimony filed by witnesses for the moving parties about the current level of competition in local exchange service. U S WEST maintains that the Report “directly responds to the arguments offered by the Opposing Parties” witnesses and is, therefore, proper rebuttal. U S WEST argues that “[r]elevant articles and reports are routinely entered into the record as exhibits in Commission proceedings; any evidentiary objections would go to the weight of the evidence, not its admissibility.”

U S WEST counters the moving parties claim that it could have put evidence in the direct testimony of Ms. Jensen. Claiming it is the joint movants “who attempt to carve out a distinction under the [Telecommunications Act of 1996] based on their notions of the extent of local competition[,]” U S WEST’s instant tariff filing and direct testimony properly seek the same obligation to serve as the Commission permits its competitors to enjoy. U S WEST is not required to anticipate, nor to respond in advance through its direct testimony, to testimony of the moving parties’ witnesses which had not yet been filed. “U S WEST properly submitted the Huber Article in rebuttal to opposing witnesses’ testimony about the level of competition, since it is clearly within the scope of the opposing witnesses’ testimony.”

Finally, U S WEST contends the procedural schedule adopted in this matter does not contemplate supplemental testimony by the joint movants or any other party. USWC opposes the motion; it finds no justification for the filing of surrebuttal testimony or extending the procedural schedule.

#### **B. GTE**

GTE states that it opposes placing new issues in rebuttal testimony, and that the Commission as a matter of practice should reject attempts to do so. Here, however, GTE believes the testimony of witnesses for Public Counsel/TRACER and Commission Staff address, "almost exclusively, their arguments over appropriate public policy resting on their beliefs over the state of competition in the market for local telephone service." The contested exhibit therefore "is an appropriate rejoinder . . . and the Commission should be entitled to consider that document, and give it whatever weight may be proper."

GTE urges the Commission to deny the motion.

#### **COMMISSION DISCUSSION AND DECISION**

The Commission believes that a significant public policy issue is framed by the U S WEST filing of the instant tariff revisions. It regrets not only the vehicle which U S WEST has elected to posit this issue, but the limited time permitted the Commission to fully explore the arguments and the merits of the relative positions taken by the parties to this proceeding. As the Commission has so often noted, neither the Commission's open meeting nor the adjudicative process attending suspended tariff filings are forums conducive to the exploration of public policy issues of this magnitude, breadth, and impact.

Nonetheless, U S WEST has elected to raise this critical public policy issue through a tariff filing and the Commission must resolve this matter on the written testimony and exhibits of the parties and final memoranda. We choose to consider all information relevant to an ultimate determination on this issue. We are concerned that the instant record alone will afford us sufficient exposition of all facets of the debate attendant to such an important public policy determination. But, the instant record is all that is available to us, and on that basis U S WEST will have the decision it seeks.

After reviewing the motion and replies, in the context of the filed written testimony of the witnesses for the parties, the Commission believes the contested exhibit is appropriate for our consideration. Our decision is further influenced by the context of the time and information constraints we describe above, and our belief that

public policy determinations, especially those with the far-reaching implications as that before us here, should be informed by the broadest exploration permitted us. As the replies of U S WEST and GTE note, it is for the Commission to determine the weight to be given the evidence properly placed before us. We will deny the motion to strike Exhibit TAJ-5. U S WEST has indicated its unwillingness to extend the procedural schedule in this matter. With that operative constraint, the Commission will deny the motion to strike the exhibit, to file supplemental testimony, and to extend the briefing schedule.

**ORDER**

THE COMMISSION ORDERS That the Joint Motion of Public Counsel, Commission Staff, and TRACER to Strike Exhibit TAJ-5 is denied in its entirety.

DATED at Olympia, Washington, and effective this 19 day of December 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ANNE LEVINSON, Chair



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner