

SERVICE DATE

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re the Complaint of)	DOCKET NO. UT-991292
)	
AT&T COMMUNICATIONS OF THE ,)	THIRD SUPPLEMENTAL ORDER
NORTHWEST, INC.,)	
)	
Complainant)	
)	
)	
U S WEST COMMUNICATIONS, INC.)	
)	
Respondent)	
)	ORDER DENYING MOTION
Regarding the Provision of Access)	TO DISMISS
Services)	
.....)	

BACKGROUND

This docket is a complaint by AT&T against U S WEST, alleging that USWC has failed to comply with its requirements to provision facilities essential to providing tariffed services to AT&T when needed and that it has discriminated to favor itself. Along with its answer, USWC filed a motion to dismiss. AT&T and Commission Staff answered the motion, and USWC has filed a reply along with a request that it be considered – accepting replies to answers to motions is discretionary with the Commission under WAC 480-09-425. Here, the reply does contribute to understanding the issues, and the Commission accepts and considers it.

I The Motion to Dismiss.

When it filed its answer to the complaint, USWC filed a motion to dismiss the complaint. The chief argument in support of dismissal is that most of the complaint relates to services supplied under an interstate tariff. It makes four contentions:

- AT&T failed to state a claim on which relief could be granted;
- A prehearing conference order directed parties to focus presentations on events proving violations within the state;

- To the extent the complaint purports to be brought for the benefit of its end-use customers, only they have standing to complain; and
- The Commission lacks jurisdiction because the problem relates to services that are provided under an interstate tariff.

A. Three contentions not argued.

Three of these contentions are not argued in the motion and can be dismissed with little discussion.

- The threshold for stating a claim on which relief could be granted is low, and pleadings must be read "liberally" (WAC 480-09-425(4)) to effectuate their purpose. This complaint states a claim on which relief might be granted.
- The prehearing conference order directs parties to "focus" on violations within the state but does not exclude other violations, and violations within the state may result from actions taken in other jurisdictions that relate to requirements of the State, in which case the violation would occur here. No basis is shown for dismissing the complaint.
- AT&T has standing to complain as a buyer of USWC services. It is USWC's customer of record and its use of USWC's services to provide service to retail customers does not diminish the mutual responsibilities of the two companies as buyer and seller.

B. The jurisdictional claim.

USWC's principal argument appears to be that when a tariff is billed under an interstate tariff, the terms of the tariff apply exclusively to the service provided and any complaint about the service must be addressed exclusively to the FCC and not to the state in which service is provided. USWC contends that the Commission lacks jurisdiction because the vast majority of the purported violations arise as to services provided under the federal tariff. It cites *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998) for the proposition that a federal tariff is the exclusive determinant of the services provided under the tariff, even those aspects that are not specifically mentioned in the tariff.

II The Answers.

- A. Commission Staff answers briefly, stating that USWC itself acknowledges AT&T's complaint as involving both interstate and intrastate services; that the actual services supplied under the tariff may be up to 90% intrastate; and that the Commission has an interest in seeing that intrastate services are lawfully provided.

B. AT&T answers at more length. It argues as follows:

- USWC itself acknowledges that AT&T's complaint involves both interstate and intrastate services; the fundamental issue is whether Washington customers are being deprived of service in violation of Washington law; and the record will provide further elaboration of the reasons for Commission jurisdiction.
- The facilities addressed in the complaint are jurisdictional because they carry intrastate traffic.
- It is not settled legally or factually that all facilities used to provide services priced pursuant to federal tariffs are governed exclusively by the FCC. The nature of the traffic as interstate or intrastate should be developed during the hearing.
- The "filed rate doctrine" speaks only to claims at common law, and does not restrict Commission authority. In the *Central Office Telephone* case, the purchaser sought damages for fraud and breach of contract – remedies that the tariff did not provide – and the court merely ruled that the common law claims were preempted by the existence of the tariff. The case did not limit state jurisdiction over intrastate services carried under a federal tariff.
- AT&T's complaint meets the standards set out at RCW 80.04.110 and WAC 480-09-420 and USWC's motion fails to meet the standards set out at WAC 480-09-426.

C. USWC's Reply

U S WEST submits a request for leave to reply along with the reply it would submit if allowed to do so, consistent with WAC 480-09-425(3)(b). The request contends that AT&T's references to legal and public policy arguments in its answer constitute "new matter" entitling it to respond. The Commission accepts the reply.

- USWC cites a 1998 FCC order relating to ADSL providing that the FCC has jurisdiction over mixed-use special-access lines when it is not possible to separate the lines by jurisdiction, and that the lines are subject to FCC jurisdiction unless the interstate traffic is *de minimus* – that is, ten per cent or less of the traffic.
- USWC responds to Staff by presenting an *ad absurdum* argument – that if effect on Washington consumers were the only test of jurisdiction, the Commission would have jurisdiction over everything

that happens within the state. That is not the case, USWC says, and the Commission should exercise its authority only where it does have jurisdiction.

III Conclusion and Decision.

The jurisdictional issue is one of concern to the Commission. The Commission must not overstep the clear bounds of its jurisdiction. At the same time, it must not slight matters within its responsibilities unless the law is clear that it must do so.

No party has cited a judicial decision, a statute, or a rule that is directly on point. In the absence of clearly controlling precedent, the Commission will accept AT&T's representation that it will expand on jurisdictional facts during the hearing. The Commission has the duty not to usurp federal jurisdiction, it also has a responsibility to Washington consumers to protect their interests when it does have jurisdiction.

We do not believe that the Supreme Court's *Central Office* decision as to the filed-rate doctrine speaks to or controls the decision we make. Among other considerations, the plaintiff there was a private citizen and a customer under the tariff, not another agency of government with regulatory responsibilities that are specifically preserved in federal law.¹ The matters litigated in that proceeding involved financial aspects of the service, and such matters are appropriate for inclusion in tariffs. The filed-rate doctrine addresses common-law remedies. The cited decision simply did not address the question we face.

The Commission in the past has examined a similar "10% rule" and billing by competitive access providers selling unswitched interstate and intrastate services exclusively pursuant to a federal tariff. The Commission found that telecommunications companies offering intrastate service were not exempt from registering with the Commission despite offering services exclusively under federal pricing regulation.

This is consistent with Section 2(b) of the Communications Act of 1934. With certain irrelevant exceptions, that section says that nothing in the Communications Act of 1934 shall be construed to give the FCC jurisdiction over charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service.²

The FCC has not in any way clearly provided that it preempts state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of

¹Section 2(b) of the Communications Act of 1934, Ch. 652, Title I, Sec. 2(b), 48 Stat 1064, codified as amended at 47 U.S.C. Sec. 152(b) (1994).

²The issue of preemption under Section 2(b) is discussed in a slightly different context in Trincherro, Mark P. and Smith, Holly Rachel, "Federal Preemption of State Universal Service Regulations under the Telecommunications Act of 1996," 51 *Federal Communications Law Journal* 303 (1999).

clear authority that a customer's election to take service under a federal tariff per the "ten per cent rule" preempts all state regulatory authority, we decline to so rule. We do expect that the evidence will demonstrate a sufficient volume of intrastate traffic to warrant our proceeding to a decision on the issues presented.

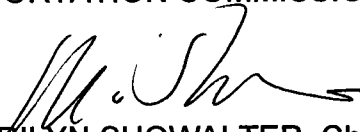
The Commission denies the motion to dismiss. The parties cite no clearly pertinent or binding statute, decision, or rule providing that the FCC has exclusive, preemptive jurisdiction over the subject of the complaint.

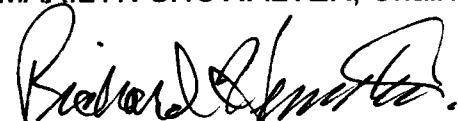
ORDER

The Commission denies U S WEST's motion to dismiss the complaint.

DATED at Olympia, Washington and effective this 12th day of November, 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


MARILYN SHOWALTER, Chairwoman


RICHARD HEMSTAD, Commissioner


WILLIAM R. GILLIS, Commissioner