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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RON McDOUGALL, assignee, and PAYTEL	)	
NORTHWEST, INC.,	)	
	)	No. UT-970112
Complainant,	)	
	)	U S WEST'S ANSWER TO MOTION
v.	)	FOR SUMMARY DETERMINATION
	)	ON LIABILITY
U S WEST COMMUNICATIONS, INC.,	)	
	)	
Respondent.	)	
	)	

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I. RELIEF REQUESTED

Complainant's Motion for Summary Determination should be denied because U S WEST Communications, Inc. (U S WEST) did not violate an order of the Washington Utilities and Transportation Commission (Commission). U S WEST seeks a dismissal of the complaint by Ron McDougall and Paytel Northwest, Inc. (McDougall) as there are no factual disputes here and U S WEST is entitled to judgment as a matter of law.

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McDougall claims that U S WEST should have filed a revised tariff for Public Access Line (PAL) service after the Commission issued its Fourth Supplemental Order, instead of filing its tariff after the Commission's Fifth Supplemental Order. McDougall seeks to recover the difference in price of the PAL service between the two dates of April 6 and September 1, 1995. What McDougall ignores, however, is that U S WEST petitioned for reconsideration of the Fourth Supplemental Order, the Commission accepted U S WEST's Petition for Reconsideration, the Commission issued a Fifth Supplemental Order with a new tariff filing date, and the Commission accepted U S WEST's filing with an effective date for the new rate of September 1, 1995. Complainant is trying to reopen an issue that has already been decided by the Commission. U S WEST did not disobey a Commission order. McDougall's motion should be denied and his complaint dismissed.

II. STATEMENT OF FACTS

A. THE COMMISSION'S PAYPHONE ORDER.

Since the inception of the first PAL rate in 1986, the Commission has established and adjusted the PAL rate in accordance with a comprehensive regulatory scheme. This dispute involves the reduction of the PAL rate in 1995. On March 17, 1995, the Commission issued its Fourth Supplemental Order in Docket No. UT-920174 ordering a reduction in the rate for PAL service. The Fourth Supplemental Order did not specify any date for when the new PAL rate would take effect. Thus, U S WEST had the right to choose an effective date for implementing the reduced PAL rate.

On March 27, U S WEST requested that the Commission reconsider the Fourth

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Copies of the Fourth and Fifth Supplemental Orders are attached to the Declaration of Brooks Harlow.

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3 Supplemental Order. On April 7, Complainants' counsel wrote a letter to counsel for U S WEST  
4 pointing out that U S WEST was in technical violation of the Fourth Supplemental Order because  
5 it had not filed a revised tariff reflecting the new PAL rate. That same day, U S WEST filed an  
6 emergency motion with the Commission stating that, because the Fourth Supplemental Order did  
7 not set an effective date for the new PAL rate, U S WEST "should not be forced to the expense of  
8 performing a meaningless act pending decision on its [petition for reconsideration]." U S WEST  
9 also requested that the Commission decide the emergency motion "expeditiously" in light of the  
10 technical violation of the Fourth Supplemental Order. Responding on April 11, 1995 to the  
11 emergency motion, complainants' counsel argued that U S WEST should be required to file the  
12 revised tariff immediately and that the new PAL rate should take effect not more than 30 days  
13 from the date of filing.

14 The Commission did not rule on U S WEST's emergency motion until June 29, 1995.  
15 Apparently recognizing the futility of forcing U S WEST to file a revised tariff during the  
16 pendency of U S WEST's Petition for Reconsideration, the Commission ruled on the emergency  
17 motion and the Petition for Reconsideration at the same time. Relying upon the Commission's  
18 decision to delay ruling on the emergency motion, U S WEST did not file the revised tariff until  
19 the Commission issued its rulings. The Commission denied both motions, and it also denied  
20 Complainants' request that U S WEST be required to file the revised tariff immediately with an  
21 effective date of not more than thirty days later. The Commission did not state that U S WEST  
22 had done anything wrong by not filing the revised tariff earlier. Instead, on June 29, 1995, the  
23 Commission issued its Fifth Supplemental Order requiring U S WEST to file tariff revisions

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25 Copies of U S WEST's Emergency Motion for Stay of Final Order and Answer to U S WEST's Emergency Motion  
for Stay are attached to the declaration of Lisa Anderl as Exhibits A and B.

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2 within twenty days, or by July 19. As with the Fourth Supplemental Order, the Commission did  
3 not specify any effective date for the new PAL rate.  
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5 U S WEST filed the revised tariff for the new PAL rate on July 11, well before the  
6 specified date. The tariff specified that the new PAL rate would start on September 1. On  
7 July 14, the Commission issued an order approving the tariff and the effective date of September 1  
8 for the reduced PAL rate. To maintain overall revenue neutrality, and after negotiations between  
9 U S WEST and Commission staff personnel, the Commission also approved increases in the rates  
10 for non-PAL services that offset the revenue U S WEST lost through the reduced PAL rate. The  
11 Commission approved September 1 as the effective date for both the increased rates and the  
12 decreased rates.

13 B. PROCEDURAL HISTORY BEFORE SUPERIOR COURT.

14 On April 5, 1996, complainant brought the identical claim as in this action in King County  
15 Superior Court and moved for summary judgment, alleging the same facts as in this motion.  
16 U S WEST filed a cross motion, arguing that the Commission had exclusive and primary  
17 jurisdiction over the claim. U S WEST also presented additional arguments in the event the court  
18 disagreed with jurisdiction by the Commission. However, the court agreed with U S WEST's  
19 position and on November 6, 1996, dismissed Complainants' claim without prejudice. The Order  
20 stated, "Plaintiff may file any cognizable claim with the Commission. If the Commission rules that  
21 it lacks jurisdiction on plaintiff's claim or authority to award damages, the plaintiff may refile his  
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23 It is not unusual for U S WEST to file a tariff with an effective date for the new rates of more than six weeks later. In  
24 this case, the new PAL rate involved an entirely new rate structure that eliminated per message charges, which  
25 required a major conversion of the billing system. Six weeks was required to make the necessary changes to the  
26 billing system and to notify customers of the increased rates that offset the reductions in PAL revenue. See  
Declaration of Theresa Jensen, at ¶ 4.

See Declaration of Theresa Jensen at ¶¶ 2-6.

U S WEST, Inc.  
1600 7th Ave., Suite 3206  
Seattle, WA 98191  
Telephone: (206) 343-4000  
Facsimile: (206) 343-4040

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3 complaint in this court without bar by any statutes of limitations.”

4 III. STATEMENT OF ISSUES

5 1. When U S WEST petitioned for reconsideration of the Commission Order of  
6 March 17, 1995, complainant argued before the Commission that U S WEST should be ordered to  
7 file a revised tariff immediately and that the new PAL rate should take effect thirty days later.  
8 The Commission rejected Complainants’ argument, approving September 1 as the date when the  
9 new PAL rate would take effect. Is U S WEST entitled to summary determination because the  
10 Commission has already decided that September 1 is the proper effective date?

11 2. The Commission ruled on U S WEST’s emergency motion on June 29, 1995. The  
12 Commission never said that U S WEST did anything wrong by not filing the revised tariff within  
13 twenty days of the Fourth Supplemental Order. The Commission denied Complainants’ April 11  
14 request that U S WEST be ordered to file the revised tariff immediately with an effective date of  
15 thirty days later. Is U S WEST entitled to summary determination because it was justified in not  
16 filing the revised tariff until after the Commission had ruled on U S WEST’s emergency motion?

17 3. The Commission issued a Fifth Supplemental Order that set a new date of July 19  
18 for filing the revised tariff. Is U S WEST entitled to summary determination because it filed its  
19 revised tariff before July 19?

20 4. Is U S WEST entitled to summary determination that it did not “willfully” violate  
21 any Commission order?

22 IV. EVIDENCE RELIED UPON

23 Declarations of Theresa Jensen and Lisa Anderl.

24 V. AUTHORITY

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A. U S WEST DID NOT VIOLATE A COMMISSION ORDER.

Complainant bases its allegations against U S WEST on three statutes: RCW 80.04.220, .230 and .440. RCW 80.04.220 allows the Commission to order reparations where a public service company has charged “an excessive or exorbitant amount for such service.” RCW 80.04.230 allows the Commission to order a refund where the public service company has charged an amount “in excess of the lawful rate in force.” RCW 80.04.440 is a more general statute which provides that a public service company is liable to any affected party if it has failed to follow any order or rule of the Commission.

Here, complainant alleges that U S WEST is liable because it filed its revised PAL tariffs on July 11, with an effective date of September 1, instead of filing tariffs April 6, 1995. McDougall completely ignores the fact that the Commission accepted U S WEST’s Petition for Reconsideration and accepted as the effective date of revised PAL tariff September 1. McDougall’s motion only tells half of the story. U S WEST did not charge an exorbitant amount for PAL service, did not charge more than the lawful rate in force at the time, and did not disobey a Commission order.

B. THE COMMISSION HAS ALREADY DECIDED THAT SEPTEMBER 1, 1995 IS THE EFFECTIVE DATE FOR THE REDUCED PAL RATE.

When U S WEST filed its Petition for Reconsideration, complainant argued on April 11, 1995 that U S WEST’s emergency motion should be denied and that U S WEST should be ordered to file a revised tariff immediately with an effective date for the reduced PAL rate of not more than thirty days later. The Commission rejected complainant’s argument and issued an order on July 14 approving September 1 as the effective date for the reduced PAL rate. Commission staff

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personnel negotiated the September 1 effective date with U S WEST so that the PAL revenue decreases and the offsetting revenue increases would go into effect at the same time. See Jensen Declaration, ¶ 3.

Further, McDougall assumes, without any basis, that tariffs filed on April 6, 1995 would have been effective that same day. This is a totally unwarranted assumption. Had tariffs been filed on April 6, 1995, U S WEST would still have selected an effective date of September 1 or later, in order to allow sufficient time to institute the changes to the billing program. See Jensen Declaration, ¶¶ 2-4.

Complainant's current argument that the new PAL rate should have taken effect on April 6 flies in the face of the Commission's July 14 order establishing September 1 as the effective date. McDougall's claim is without merit and should be dismissed as a matter of law.

C. U S WEST ACTED REASONABLY AND WAS FULLY JUSTIFIED IN ITS ACTIONS.

The question of whether U S WEST acted reasonably and was justified in its actions is normally a question of fact. Schaaf v. Highfield, 127 Wn.2d 17, 25, 896 P.2d 665 (1995). In this case, however, the only conclusion a reasonable person could reach is that U S WEST acted reasonably in the circumstances. See, Lewis v. Bours, 119 Wn.2d 667, 669, 835 P.2d 221 (1992) (summary judgment appropriate where "reasonable persons could reach but one conclusion"). U S WEST therefore submits that it is entitled to summary determination that it was justified in not filing the revised tariff until after the Commission had ruled on U S WEST's emergency

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The Commission now has a specific rule regarding compliance filings, WAC 480-09-340, effective February 3, 1996. That rule now states explicitly what appears to have been the rule all along - that if a Commission order does not specify the required number of business days between the date of the filing and its stated effective date, the 30 day statutory period is the minimum which must be provided. There has never been any requirement that the stated effective date cannot be longer than 30 days. Thus, had U S WEST filed tariffs on April 6, 1995, the effective date would not have been April 6, and in fact would have been much later.

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motion. Moreover, the Commission’s actions and ruling confirm the reasonableness of U S WEST’s actions.

Instead of promptly denying U S WEST’s emergency motion and ordering U S WEST to file the revised tariff immediately, as requested by McDougall, the Commission took almost three months to decide U S WEST’s emergency motion. Further, the Commission rejected complainant’s argument that U S WEST should be ordered to file the revised tariff immediately on April 11. Instead, the Commission set a date of July 19 for U S WEST to file the revised tariff while the Commission was considering U S WEST’s emergency motion.

In addition, it is “hornbook law that the law does not require a useless act.” Franklin County Sheriff’s Office v. Sellers, 97 Wn.2d 317, 334, 646 P.2d 113 (1981). The Commission’s Fourth Supplemental Order did not specify any effective date for the new PAL rate. When U S WEST filed its emergency motion on April 7, 1995, its Petition for Reconsideration was pending, and the Commission had set May 31 as the date for entry of an order on U S WEST’s Petition for Reconsideration. Anderl Declaration, Exhibit B at 2. If U S WEST had been forced to file a revised tariff before May 31, it would have selected an effective date after May 31. Id.

Apparently recognizing that such an exercise would have been pointless, the Commission decided to rule on U S WEST’s emergency motion and its Petition for Reconsideration at the same time. In so doing, the Commission effectively stayed the effect of its Fourth Supplemental Order pending its rulings on U S WEST’s motions. As a matter of law, U S WEST was justified in not filing the revised tariff during the pendency of its emergency motion.

D. U S WEST DID NOT “WILLFULLY” VIOLATE ANY COMMISSION ORDER.



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Complainant argues that, for purposes of RCW 80.04.440, U S WEST “willfully” violated Commission orders. For the reasons set forth above, U S WEST submits that complainant’s claim does not even implicate RCW 80.04.440. Even if RCW 80.04.440 did apply to this case, U S WEST is entitled to summary judgment that it did not violate any Commission order and that its conduct was not “willful” within the meaning of RCW 80.04.440.

Questions of willfulness, like issues of reasonable conduct, are normally left to the finder of fact. Myles v. Northern Assurance Co., 113 Wash. 158, 164, 193 P. 703 (1920); Sherrell v. Selfors, 73 Wn.App. 596, 604, 871 P.2d 168 (1994). Here, however, U S WEST is entitled to judgment as a matter of law because the undisputed facts are such that no reasonable person could find that U S WEST willfully violated any of the Commission’s orders.

In response to the Fourth Supplemental Order, U S WEST filed a Petition for Reconsideration and an emergency motion to stay its effect. U S WEST did not ignore the Fourth Supplemental Order nor flout its terms. Moreover, the Commission effectively acknowledged that the Fourth Supplemental Order was stayed while the Commission was considering U S WEST’s motions.

In response to the Fifth Supplemental Order, U S WEST filed the revised tariff well before the specified date. The Commission’s July 14 order approved September 1 as the effective date for the reduced PAL rate. Complainant concedes that U S WEST implemented the reduced PAL rate on September 1. Complainant’s Motion at 3. Thus, U S WEST is entitled to summary determination that it did not willfully violate any of the Commission’s orders.

DATED this \_\_\_\_\_ day of February, 1997.

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U S WEST Communications, Inc.

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Lisa A. Anderl, WSBA No. 13236