

ISSUE DATE: December 11, 1998

DOCKET NO. P-421/AR-97-1544

FINAL ORDER REGARDING USWC'S ALTERNATIVE REGULATION PLAN,
PURSUANT TO MINN. STAT. § 237.764, SUBD. 2.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayer
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Petition by US WEST
Communications, Inc. Requesting Approval of
an Alternative Regulation Plan

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PROCEDURAL HISTORY

On October 21, 1997, US WEST Communications, Inc. (USWC, U S WEST or the Company) filed a proposed alternative regulation plan pursuant to Minn. Stat. §§ 237.76 through 237.775. Minn. Stat. § 237.764 provides that the Commission must issue its decision within six months of the filing unless the Commission and the applicant agree to an extension.

On November 13, 1997, the Commission met to establish procedures for the consideration of USWC's proposed plan.

On November 25, 1997, the Commission issued a NOTICE OF FILING, AND ORDER ESTABLISHING PROCEDURES AND CONVENING SETTLEMENT CONFERENCE. This Order provided interested persons 20 days to challenge the adequacy or completeness of USWC's October 27 filing.

On December 15, 1997, the Minnesota Department of Public Service (the Department) and AT&T Communications of the Midwest (AT&T) filed comments on the completeness and adequacy of the filing.

On December 26, 1997, USWC filed a reply to these comments. USWC responded that its Plan filing more than substantially complied with the applicable statutory filing criteria and that consideration of the Plan should go forward. It argued that concerns raised by the Department and AT&T are matters that were being addressed in the ongoing settlement discussions and should be included in comments on the Plan.

From January 5 through 13, 1998, the Commission held public hearings in Minneapolis (January 5), St. Paul (January 5), Duluth (January 6), Sauk Rapids (January 7), Marshall (January 8), Rochester (January 9) and Moorhead (January 13). An Administrative Law Judge from the Office of Administrative Hearings conducted the meetings and reported his findings to the Commission on February 2.

On February 11, 1998, the Commission issued its ORDER EXTENDING DEADLINES AND

ACCEPTING FILING AS TO FORM. On February 19 and March 24, the Commission again issued orders granting the requests of the parties to extend the date for issuing its decision. On March 31, 1998, parties submitted lists of unresolved issues in this case.

On April 22-23, 1998, parties filed initial comments.

On May 22, 1998, parties filed reply comments.

On May 29-June 1, 1998, parties filed responsive comments.

On June 29, 1998, the Department filed an “amended plan” reflecting a settlement of differences with USWC. The filing of this settlement had the effect of triggering a 60-day period for Commission action, pursuant to Minnesota Statutes § 237.764, subdivision 1(f).

On July 1, 1998, the Commission met to consider the amended plan, and requested additional comments.

On July 21, 1998, parties filed additional comments.

On July 30-31, 1998, parties filed reply comments. In particular, the Department and USWC filed another amended plan,¹ which they said reflected a settlement of differences among AT&T, the Department, the Minnesota Business Utility Users Council (MBUUC), Sprint Communications (Sprint), the Suburban Rate Authority (SRA) and USWC. The filing of this settlement had the effect of re-starting the 60-day period for Commission action, pursuant to Minn. Stat. § 237.764, subd. 1(f).

On August 14, USWC filed a document which it said should amend the July 30 comments it filed with the Department, and to amend the AFOR Plan.

On August 19, 1998, parties filed additional comments. In particular, USWC filed a stipulation agreement documenting the settlement of differences among AT&T, the Department, MBUUC, Sprint, SRA and USWC as of July 30, 1998.

On August 21, SRA filed an August 19 letter addressed to USWC which purported to amend the July 30 AFOR Plan.

By letter dated September 3, 1998, MCI WorldCom (MCI) agreed to be bound by the access charge flow-through provisions of USWC’s July 30 agreement. MCI also agreed not to contest the agreement at the Commission’s September 8 meeting.

On September 8, 9 and 21, 1998, the matter again came before the Commission.

On September 28, 1998, the Commission issued its ORDER MODIFYING USWC’S ALTERNATIVE REGULATION PLAN (September 28 Order).

From October 27 - 30, 1998, parties filed comments on the AFOR Plan as modified.

¹Unless otherwise indicated, further references to USWC’s AFOR Plan refer to the amended plan filed on July 30, 1998.

The matter again came before the Commission on November 18, 1998.

FINDINGS AND CONCLUSIONS

I. Procedural Guidelines

Minn. Stat. § 237.764, subd. 2, provides as follows:

Upon receipt of a petition for an alternative regulation plan, the commission shall convene a conference including all interested parties to encourage settlement or stipulation of issues. Any settlement or stipulation must be submitted to the commission, which shall accept or reject the proposal in its entirety or modify it. If the commission modifies the proposal, all parties have 30 days to comment on the proposed modifications, after which the commission shall issue its final order. If the final order contains modifications to the proposal, each party to the settlement has ten days to reject the proposed modifications, in which case the matter must be decided under section 237.61. After appropriate notice and hearing for all parties, the commission may adopt a stipulation submitted by a substantial number of, but less than all, parties.

As noted above, the Department and USWC filed an AFOR plan reflecting a settlement of differences among AT&T, the Department, MBUUC, Sprint, SRA and USWC on July 30-31, 1998. In its September 28 Order, the Commission exercised its discretion to modify the plan. The American Association of Retired Persons (AARP), the Department, MCI, MBUUC, the Minnesota Senior Federation (MSF), OAG-RUD and USWC each commented within the 30-day limit. This is the Commission's FINAL ORDER pursuant to Minn. Stat. § 237.764, subd. 2; underscored or stricken text denotes additions or deletions from the language of the AFOR Plan as modified by the Commission's September 28 Order.

II. Commission Analysis

A. Section IV.A. "Initial Classification"

Minn. Stat. § 237.761 states that —

An alternative regulation plan must contain provisions that provide for classification of all telephone services as price regulated, flexibly priced or nonprice regulated....

In its September 28 Order, the Commission approved AFOR Plan Section IV.A "Initial Classification" and Appendix A. September 28 Order at 7-8. The Department expresses concern that the Commission, by adopting the initial classification of services set forth in the AFOR Plan, may create an undue presumption in favor of that classification. Department Comments at 1-2.

The Commission observes that the process for reclassifying services is set forth in the AFOR Plan at Section IV.B. It is, in relevant part, as follows:

1. USWC, or the Commission on its own motion, the Department, OAG[-RUD], or any other party retain the right during the term of this Plan to propose the reclassification of services listed in Appendix A....
2. As permitted pursuant to Minn. Stat. § 237.761, subd. 6, the

Commission on its own motion, USWC or any other party may file a petition for reclassification of a USWC service at any time during the term of the Plan by filing a petition and supporting documents addressing the relevant statutory criteria. Unless comments opposing the petition are filed within 30 days of the issuance of the Commission motion or the filing of a petition, the Commission shall issue an order approving the unopposed petition within 60 days of the issuance of a Commission motion or the filing of the petition. If a party files an objection to the petition within 30 days, the Commission shall conduct a contested case proceeding, or if requested by USWC, an expedited proceeding pursuant to Minn. Stat. § 237.61....

The presumption in favor of the current classifications is sufficiently slight that any supported request for reclassification will be approved unless someone takes initiative to oppose it. *Id.* Except as set forth in the discussion of Reclassification of Services, below, it is unclear to the Commission that anything in its Order alters the operation of this provision, or how the Commission might alter the AFOR Plan to better address the Department's concerns. Indeed, the Department does not ask the Commission to alter the terms of the AFOR Plan.²

However, the Commission will hereby clarify that, in approving the Initial Classification set forth in AFOR Plan Appendix A, the Commission does not intend to impede the reclassification of those services as provided in AFOR Plan Section IV.B.

Another party, MSF, objected that the AFOR Plan does not classify residential Caller ID as a Flexibly-Priced Category A service. That categorization would keep USWC from raising the rate for that service during the AFOR Plan's first three years. MSF notes the importance of Caller ID for screening unwanted sales calls, as well as harassing or threatening calls. MSF then argued that Caller ID is a monopoly service, in that it is line-activated by the telephone company. The importance of this service to protecting consumer privacy, combined with the lack of viable substitutes, suggest that heightened consumer protections may be warranted. MSF Comments at 1-2.

While the Commission acknowledges the desire to screen incoming calls, it is not persuaded that re-categorization of Caller ID is warranted. The Commission heard arguments minimizing Caller ID's utility for screening telemarketing calls, in that telemarketers routinely block their numbers from being displayed by Caller ID, or locate their operations in areas where the local telephone switch does not provide Caller ID information. In contrast, the Commission also heard that an inexpensive answering machine can perform a call screening function.

²The Department entered a Stipulation Agreement (filed August 19, 1998) whereby it agreed not to oppose the terms of the AFOR Plan. The Department stated its belief that the AFOR Plan "represents a reasonable, balanced approach to resolving the issues that have been raised and urge[d] the Commission to adopt this [AFOR Plan] as an appropriate way of resolving this proceeding." AFOR Plan (June 29, 1998).

Minn. Stat. § 237.764 directs the Commission to determine whether to adopt an AFOR plan based on a proceeding conducted pursuant to § 237.61. In a § 237.61 proceeding, the Commission must make a decision based on the record of the case. By implication, the Department believes that the AFOR Plan is supported by the record of the case.

Furthermore, call tracing services — which remain price regulated — are the primary deterrent and tool for dealing with cases involving threats or serious harassment.

Absent more compelling reason to the contrary, the Commission will decline to re-categorize Caller ID.

B. Section IV.B. “Reclassification of Services”

In its September 28 Order, the Commission modified the language of the AFOR Plan cited above to allow the Commission, on its own motion, to suspend a reclassification petition. September 28 Order at 8-9, 25. USWC stated that it would agree to include this modification in a final AFOR plan approved by the Commission. USWC Comments at 4-5. No party objected. The Commission will therefore retain this modification of the AFOR Plan.

C. Section IV.C. “Introduction of New Services”

In its September 28 Order, the Commission modified the language of AFOR Plan Section IV.C. “Introduction of New Services,” to allow the Commission to investigate the price, terms or conditions of a new service on its own motion. September 28 Order at 15, 25. USWC stated that it would agree to include the modification in a final AFOR plan approved by the Commission. USWC Comments at 4-5. No party objected. The Commission will therefore retain this modification of the AFOR Plan.

D. Section IV.D.4. “Switched Access Service Prices”

In its September 28 Order, the Commission modified the language of AFOR Plan Section IV.D.4. “Switched Access Service Prices” to omit the sentence, “USWC also agrees to withdraw its Complaint on access charge reduction flow through filed against AT&T in Docket No. P442/C-97-121.” September 28 Order at 6, 25. USWC stated that it would agree to include the modification in a final AFOR plan approved by the Commission. USWC Comments at 4-5. No party objected. The Commission will therefore retain this modification of the AFOR Plan.

E. Section IV.D.5. “Adjustments to Certain Other Initial Prices”

AARP, MSF and OAG-RUD each argued for further reductions in the rate for residential service, especially in rural areas.

AARP and OAG-RUD asked the Commission to modify the AFOR Plan to reduce the monthly rate for residential service by \$1.00 per month in urban areas, and \$.50 per month in rural areas. AARP Comments at 2 (August 19, 1998); OAG-RUD Comments at 1-3. According to OAG-RUD, many rural customers are paying more for telephone service as a result of extended-area service (EAS) surcharges, universal service-type surcharges, and misleading advertising. OAG-RUD also noted that residential customers make a large contribution to USWC’s profits by buying a number of the most profitable services from USWC. Finally, OAG-RUD attempted to add some perspective by noting a recent case in which residential rates in Washington fell to \$12.50; in contrast, the AFOR Plan, if implemented, would start residential rates at below \$15.00 in the Twin Cities and at \$13.96 in outstate areas.

MSF asked the Commission to modify the AFOR Plan to reduce the monthly rate for residential service in the outstate portions of USWC’s service area by \$.50 per month, from \$13.96 or

\$13.46. MSF asserted that people in outstate Minnesota tend to have lower incomes than people in urban areas, and that residential customers in outstate areas deserve a rate reduction just as urban Minnesotans do. MSF Comments at 2.

Rate design is always a matter of judgment. By its nature, it is a zero-sum game; to shift rates to favor one person, the Commission must unavoidably shift rates to disfavor someone else. During oral argument it was suggested that the Commission reduce residential rates at the expense of the AFOR Plan's access rate reductions. AT&T and MCI have committed to pass through those savings to Minnesota customers in the form of lower intrastate toll rates. These reductions will tend to benefit people in rural areas, where the local calling area tends to be smaller. The Commission also notes that these pass-through commitments are contingent upon the Commission approving the access charge reductions set forth in the AFOR Plan.

As parties noted during the November 18 hearing, evidence from USWC's cost study docket suggests that the cost of providing residential service in rural areas already exceeds the price of that service. Under these circumstances, in this docket, the Commission is reluctant to exacerbate this situation. OAG-RUD argues that the federal Telecommunications Act, 47 U.S.C. § 254, requires "reasonably comparable rates" rather than cost-based rates. See also AARP Comments (August 19, 1998) at 7. The Commission acknowledged this dynamic in its September 28 Order at 19. The Commission notes, however, that this requirement arises in the context of the Act's universal service provisions. Mindful of these requirements, the Commission has launched a rulemaking to devise the best system for promoting universal service, and the best way to share the costs of such a system.³ The AFOR Plan expressly provides for the implementation of future universal service rules. In the meantime, the Commission will decline to alter the rate design reflected in the AFOR Plan.

F. Section IV.E.4.(a), regarding tariff changes for price-regulated services

AARP expresses concern about the impact on local rates if the Commission reduces USWC's access charges after the third year of the Plan. AARP at 3.

AFOR Plan Section IV.E.4.(a) states:

If after the first three years of the Plan, the Commission further reduces access charges, USWC may petition the Commission to increase the price of other price-regulated services pursuant to Section G.1.b.

AFOR Plan Section IV.G.1.b., in turn, provides in relevant part:

USWC may file a petition for approval of rate increases with the Commission, Department, and notice to affected customers under sections IV.E.(2), (3), (4)(b) pursuant to the procedures of this provision. The Commission shall establish an appropriate procedural schedule and, after such proceedings as may be appropriate, shall make a determination on a petition for rate change within 120 days after the date of the filing of the petition. Filings by USWC shall include the following:

³In the Matter of the Planned Promulgation of Rules Governing the Competitive Provision of Local Telephone Service, Including Issues Related to Universal Service, Regulatory Treatment of Competitive Local Exchange Carriers (CLECs), Service Quality, and Emergency Service (911), Docket No. P-999/R-97-608.

- i. A proposed tariff page (or pages) reflecting the change (or changes);
- ii. Sworn documents that demonstrates that the change is authorized by Sections IV.E (2), (3) or (4)(b) above, that calculates the additional revenue for which USWC may seek recovery, that demonstrates the revenue impact of the proposed price changes, and that demonstrates how the additional proposed revenue has been allocated between the various categories of service, where applicable [*sic*].

According to these terms, access charges would not result in increased local rates unless 1) the Commission orders access charge reductions beyond the \$45 million in annual reductions implemented by the AFOR Plan's third year, 2) USWC were to elect to petition to recover the funds, 3) USWC could document and demonstrate that the amount it seeks to recover equals the amount lost due to the access charge reduction. The Commission believes that this process provides adequate safeguards for both ratepayers -- such as AARP -- and for USWC. The Commission declines to make any modifications further restricting USWC's ability to increase rates in response to a Commission-required access charge reduction after the third year of the plan.

Also, in its September 28 Order the Commission proposed the following modification to AFOR Plan Section IV.E.4(a):

If after the first three years of the Plan, the Commission further reduces access charges, USWC may petition the Commission to increase the price of other price-regulated services pursuant to Section G.I.(d). ~~G.I.b.~~

The Commission suggested that this language may reflect a typographical error, since Section G.I.(d) pertains to changes after three years related to access charge reductions; in contrast, Section G.I.(b) expressly does not apply to Section IV.E.4.(a). September 28 Order at 23. The Department supported this modification, and USWC stated that it would agree to include the modification in a final AFOR approved by the Commission. Department Comments at 3; USWC Comments at 5. No party objected. The Commission will therefore adopt this modification of the AFOR Plan.

G. Section IV.F. "Permitted Price Changes for Flexibly Priced and Non-Price-Regulated Services"

AARP objects to the provision of the AFOR Plan that permits USWC to increase rates for call waiting or local directory assistance after the first three years of the plan, even though the subsequent increases are capped at ten percent per year. AARP asserts that these rates should be capped throughout the AFOR's term. AARP Comments (August 19, 1998) at 5; AARP Comments at 3.

Part of the purpose of an AFOR is to give the regulated company a degree of flexibility. Admittedly, the Legislature identifies certain "price regulated" services that are sufficiently fundamental or necessary that a telephone company does not get discretion over their rates. However, neither of these services falls into that category. The Commission does not conclude that the AFOR Plan would grant USWC too much pricing discretion regarding call waiting or local directory assistance, and will decline to modify the AFOR Plan on this point.

H. Section IV.G.1.(b), regarding a universal service surcharge

In its September 28 Order, the Commission proposed the following modification to AFOR Plan Section IV.G.1.(b):

With regard to price changes authorized by Section IV.E.(2.) and (3.) and (4) above, any party may file a petition for approval of a rate decrease.

The Commission noted that Section IV.E.(4) merely lists circumstances under which USWC may seek to increase rates, not decrease them; in the context of a discussion of rate decreases, therefore, it may be appropriate to omit the reference to this section. September 28 Order at 23. The Department supported the modification, and USWC stated that it would agree to include the modification in a final AFOR plan approved by the Commission. Department Comments at 3; USWC Comments at 5. No party objected. The Commission will therefore adopt this modification of the AFOR Plan.

I. Section IV.G.1.(f), regarding a universal service surcharge

In its September 28 Order, the Commission proposed the following modification to AFOR Plan Section IV.G.1.(f):

f) Time Line for Other (Miscellaneous) Changes to Price-Regulated Services.

....
For purposes of this paragraph (f) d)....

The Commission suggested that this language may reflect a typographical error, in that the reference to “this paragraph d)” seems incongruous appearing in paragraph (f). September 28 Order at 23. The Department supported the modification, and USWC stated that it would agree to include the modification in a final AFOR plan approved by the Commission. Department Comments at 3; USWC Comments at 5. No party objected. The Commission will therefore adopt this modification of the AFOR Plan.

J. Section IV.K.3. “Local Taxes, Franchise Fees, Other Special Local Charges”

In its September 28 Order, the Commission proposed the following modification to AFOR Plan Section IV.K.3 “Local Taxes, Franchise Fees, Other Special Local Charges”:

3. *Local Taxes, Franchise Fees, Other Special ~~Surcharges-Local~~ Charges.*

a. a) Legislatively authorized local taxes, franchise fees or ~~other~~ special surcharges (collectively ~~referred to as a “Surcharge”~~) imposed by a local or regional governmental unit on the services provided by USWC under the Plan may be recovered through a separate line item on USWC’s bill and recovered only from customers living within the jurisdiction that imposed the Surcharge and who subscribe to the service upon which the surcharge is imposed. USWC shall maintain a list of all such ~~fees, taxes or other charges~~ Surcharges along with a designation of which customers are subject to their recovery. This paragraph does not give USWC authority to ~~recover~~ include recovery of “management costs” or “right-of-way management costs” as defined in Minnesota Statutes, Section 237.162, subd. 9 or other applicable provisions of Section 237.162 or .163, as such provisions may be amended from time to time, regarding the recovery of costs by local or regional governmental units, or the recovery of other police power fees imposed on USWC and allowed by law. Any recovery by USWC of Surcharges shall not include those charges that are currently imposed on USWC that are not currently recovered as a separate line item as of the effective date of the Plan. Subject to Section 3.(b), Surcharges may be recovered

by separate line item entries on a *customer's customers'* bill, from the effective date the Surcharge is imposed on USWC.

b. b) Prior to recovery of a Surcharge, USWC shall notify the imposing governmental unit in writing of USWC's intention to recover the Surcharge through a line item of the affected customers' bills. Absent mutual agreement between USWC and the imposing governmental unit, USWC shall file a tariff with the Commission for review and approval identifying the Surcharge amount and the format of the line item charge on the customer bill. The tariff will take effect 30 days after the tariff filing and notice to the local or regional governmental unit. Notwithstanding the tariff effective date, any party, including the imposing governmental unit, may object to the tariff before the Commission or in a court of competent competent jurisdiction.

The Commission observed that USWC submitted some of the above changes to the AFOR Plan by letter on August 14, 1998, and that SRA sent a letter on August 19 agreeing to most of those changes and suggesting others. However, neither USWC nor SRA had the authority to amend unilaterally a position taken by six parties as of July 30, 1998. The Commission therefore sought to provide the parties with an opportunity to object to the new language. September 28 Order at 24.

As noted above, SRA proposed these changes initially, and still supports them. SRA at 1. The Department supports the modifications, and USWC stated that it would agree to include the modifications in a final AFOR plan approved by the Commission. Department Comments at 3; USWC Comments at 5. No party objected. The Commission will therefore adopt these modifications of the AFOR Plan.

K. Section VIII. "Competitive Enforcement"

In its September 28 Order, the Commission added to the AFOR Plan a new section as follows:

Section VIII. Competitive Enforcement

A. Expedited Proceeding. USWC agrees to the use of an expedited proceeding under Minn. Stat. § 237.61 in lieu of a contested case to develop an evidentiary record in any proceeding covered by this section that involves contested issues of material fact.

B. Tariff Suspension. The Commission may, within 90 days after the effective date of a USWC tariff, suspend the tariff in a proceeding covered by this section if, based on the standards applied by Minnesota courts for granting temporary injunctions, the Commission finds a suspension appropriate.

C. Penalties. In lieu of referral by the Commission to the Attorney General to seek penalties under Minn. Stat. § 237.461, the Commission shall require USWC to pay penalties of between \$100 and \$5000 for each day of each knowing and intentional violation.

Various parties commented on this modification. For example, the Department, MBUUC, MCI, and OAG-RUD generally supported the new language. MBUUC Comments at 2; MCI Comments at 2. MCI and OAG-RUD both emphasized the growing importance of prompt resolution of disputes between incumbent telephone companies and their competitors to the development of competition.

USWC objected to the modification on legal grounds. First, USWC argued that the new provision exceeded the Commission's authority, in that —

[t]he Commission clearly does not have the statutory authority (1) to deprive U S WEST of its right to determine on a case by case basis whether to consent to expedited proceedings, (2) to suspend U S WEST's tariffs after the tariff effective date absent a Commission investigation or (3) to directly impose penalties.

USWC Comments at 22. The Commission believes that this misses the point. Throughout this AFOR process, USWC has proposed that the Commission grant USWC authority that USWC would otherwise lack, and the Commission has done likewise. Furthermore, USWC is not obliged to waive any of its statutory rights; the legislature has granted it the absolute discretion to reject the modified AFOR Plan and to retain the full panoply of statutory protections afforded by Minnesota Statutes, Chapter 237. Minn. Stat. § 237.764, subd. 1(e).

USWC also argues that equity requires that the Commission not insist on these terms in USWC's AFOR plan when the Commission did not insist on similar provision in Frontier's or Sprint's AFOR plans. USWC Comments at 22-23. The Commission is not persuaded.

First, USWC's argument implies that all AFOR plans should be identical to the Commission's first AFOR plan. This is clearly not anticipated by the statutes; nor by USWC, or else USWC would have proposed that the Commission apply all the terms of the earlier AFOR for USWC. Even in the absence of changed circumstances, the Commission has the discretion to adopt new policies over time.

Second and more fundamentally, by their nature AFOR plans are company-specific and time-specific. If the Legislature had intended for all AFOR plans to be alike, it would have specified their contents by statute or directed the Commission to specify their contents by rulemaking. Instead, the Legislature directed the Commission and the companies to negotiate plans appropriate to the situation of each company at the time the plan is approved.

The differences between the situations of Frontier and Sprint in mid-1996 and USWC in late 1998 are immense. In mid-1996, local competition had just been mandated by Congress and the Legislature; no one knew how it might best be accomplished. In late 1998 the Commission and all parties have had practical experience with the challenges of initiating competition, including the need for regulators to respond quickly and decisively to anti-competitive conduct.

Other differences are equally clear. USWC is a much larger company than either Sprint or Frontier. It is the incumbent provider in most of Minnesota's urban markets, where competition is most likely to begin. It has been the subject of several complaints by new

entrants alleging anti-competitive conduct.⁴ In short, USWC has and will continue to have a unique role in the transition from monopoly to competition. It is critical to the public interest that the flexibility USWC gains from the AFOR Plan be matched by Commission flexibility to monitor and respond to the competitive effects of USWC's actions.

For the forgoing reasons, the Commission is not persuaded that it is constrained from seeking to add Competitive Enforcement provisions in USWC's AFOR Plan simply because the Commission did not include such provisions in Sprint's or Frontier's AFOR plans.

However, the Commission is persuaded of the need to make some modifications to the Competitive Enforcement provisions. Parties noted that the language of the September 28 Order differed from the language that the Commission adopted at its September 21 meeting. Specifically, the September 28 Order omitted the following sentence, which had preceded paragraph A:

USWC agrees to be bound by the provision of this section in any pending or future proceeding under Minn. Stat. § 237.081 concerning allegations that USWC harmed the interest of a competitor by violating Minn. Stat. § 237.09 or § 237.121.

Department Comments at 3-4; MBUUC Comments at 1-2; USWC Comments at 19. USWC Comments at 21. The Commission acknowledges this oversight, and will restore the original language, except as modified below.

Parties argued that the scope of the Competitive Enforcement provision should be limited to cases initiated during the term of the AFOR Plan, not pending cases. MBUUC Comments at 3; USWC Comments at 20-21. In recognition of the forgoing concerns, the Commission will restore the first sentence of the Competitive Enforcement provision, but omit any reference to "pending or future proceedings," as follows:

VIII. Competitive Enforcement. USWC agrees to be bound by the provisions in this section in any proceeding initiated after the effective date of this plan under Minn. Stat. § 237.081 concerning allegations that USWC has harmed the interest of a competitor by violating Minn. Stat. § 237.07 or § 237.121.

In the September 28 Order, the Commission articulated the need for expedited proceedings. MCI and OAG-RUD share the Commission's concerns. As a result, the Commission will continue to seek the use of an expedited proceeding.

USWC objected that the proposed language is too vague, establishing a proceeding without due process guarantees. USWC Comments at 23-28. OAG-RUD echoed some of these arguments. OAG-RUD Comments at 3. The Commission appreciates many of these concerns, and believes that an accommodation can be reached. The Commission will alter the provision to clarify and guarantee traditional due process rights including cross-examination and discovery rights, and to permit the Commission, as the presiding body, to grant other procedures or standards as necessary. Additionally, the provision will now specify the intention that a quorum of

⁴See, for example, In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S West Communications, Inc. for Anticompetitive Conduct, P-421/C-97-1348 ORDER FINDING BREACHES OF STATE LAW AND INTERCONNECTION AGREEMENT AND REQUIRING COMPLIANCE, NEGOTIATIONS AND FILINGS (July 29, 1998).

Commissioners would preside at such expedited proceeding, with the acknowledgment that a quorum may not always be practicable. The resulting language is as follows:

A. Expedited Proceeding. USWC agrees to the use of an expedited proceeding under Minn. Stat. § 237.61 in lieu of a contested case under chapter 14 to develop an evidentiary record in any proceeding covered by this section that involves contested issues of material fact. An expedited proceeding under this section shall be governed by the following:

1. Discovery. Parties shall have the discovery rights provided in Minn. Rules, parts 1400.6700, 1400.6800, 1400.6900, and 1400.7000.

2. Cross-Examination. The parties shall have the right to cross-examine witnesses as provided in Minn. Stat. § 14.60, subd. 3.

3. Admissibility of Evidence, Decision Record. The admissibility of evidence and development of the record for decision shall be governed by Minn. Stat. § 14.60 and Minn. Rules, part 1400.7300.

4. Other Matters. The Commission may apply other procedures or standards, including rules of the Office of Administrative Hearings, as necessary to ensure the fair, expeditious resolution of disputes under this section.

5. To the extent possible, a quorum of the Commission shall preside over the expedited proceeding.

USWC noted that the “Tariff Suspension” provisions, relying on a court’s standard for temporary injunctions, created “numerous customer-service related problems and issues associated with the Commission suspending a tariff that has already taken effect....” USWC Comments at 32; see generally 28-32. Other parties argued that the temporary injunction standard is technical, and potentially too restrictive. MBUUC Comments at 3; OAG-RUD at 3-4.

In response to concerns raised regarding the draft “Tariff Suspension” language, the Commission will delete that entire section of the Competitive Enforcement language. In its place, the Commission will adopt the following:

B. Temporary Relief. After providing opportunity for notice and comment, the Commission may order USWC to temporarily cease allegedly anti-competitive conduct pending completion of any necessary evidentiary hearings under Minn. Stat. ch. 14 or § 237.61 and issuance of a final Commission decision, if the complaint shows that the temporary order is necessary to protect the public’s interest in fair and reasonable competition.

This language would permit the Commission to temporarily proscribe specific conduct. In this fashion, the Commission avoids the rubric of “suspending tariffs.” The Commission also substitutes a standard of “necessary to protect the public interest in fair and reasonable competition” for the more technical “temporary injunction” standard. While this is arguably a broader standard, it will apply to a narrower set of circumstances: cases alleging anti-competitive conduct requiring evidentiary hearings under Minn. Stat. ch. 14 or § 237.61. The language is designed to protect the public interest from harm pending the outcome of lengthy proceedings. If a case does not involve an evidentiary hearing, the Commission expects to be able to resolve it quickly without the need for emergency relief.

USWC also objected to the penalty language of the Competitive Enforcement provisions. First, USWC noted that the September 28 Order stated “the Commission *shall* require USWC to pay penalties...” but the language adopted at the September 21 meeting was “the Commission *may* require USWC to pay penalties....” The Commission acknowledges this error, and will make the appropriate correction.

More importantly, USWC argued that the penalties language of the Competitive Enforcement provisions lacked the “procedural and due process rights that the Minnesota Legislature has afforded defendants in other administrative hearings.” USWC Comments at 36. In response, the Commission proposes a revised version of these provisions, modeled generally on the statutory penalty provisions applied to the Minnesota Pollution Control Agency pursuant to Minn. Stat. § 116.072. This revision has the effect of ensuring fair and reasonable enforcement procedures by 1) establishing specific criteria for the imposition of penalties, 2) causing the party seeking penalties to bear the burden of proof, 3) requiring the Commission to identify the basis for the penalties in the Order, and 4) staying the imposition of penalties until USWC has had the opportunity for appellate review of the Commission’s penalty decision. The language is as follows:

C. Penalties. In lieu of referral by the Commission to the Attorney General to seek penalties under Minn. Stat. § 237.461, the Commission may shall require USWC to pay penalties of between \$100 and \$5000 for each day of each knowing and intentional violation. The Commission can impose penalties under this section only as follows:

1. Factors. The Commission shall apply the following factors in determining whether and in what amount to assess penalties for violations found under this section.

a. The willfulness of the violation;
b. The gravity of the violations, including the harm to customers or competitors;
c. The number of violations;
d. The economic benefit to USWC resulting from the violation;
e. The history of past violations, including the gravity of past violations and the time elapsed since the last violation;
f. Any corrective action taken or planned by USWC; and
g. Other factors as justice may require if the Commission specifically identifies the additional factors in the Commission’s Order assessing penalties.

2. Burden of Proof. The Commission cannot assess a penalty unless the record establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in this section.

3. Penalty Order. An Order assessing penalties must include:
a. a concise statement of the facts underlying the violation;
b. a reference to the statute, rule, order or stipulation agreement that has been violated; and
c. the amount of the penalty to be imposed and the factors on which the penalty is based.

4. Penalty Stayed. The penalty shall not be payable sooner than 31 days after the Commission issues its final Order assessing the penalty. If USWC files an appeal, the penalty shall not be payable until the reviewing court issues a decision sustaining the Commission’s penalty decision.

The Commission will adopt the modified Competitive Enforcement provisions, as set forth above.

L. Appendix B, Section II.B. “Repair Customer Remedies”

In its September 28 Order, the Commission proposed the following addition to AFOR Plan Appendix B.II.B. “Repair Customer Remedies” at 12:

When the Company fails to repair an out-of-service condition for DS1 or DS3 service within twenty-four hours of notification, a pro rata credit on the cost of the circuit and trunks will be credited to the customer’s account.

The Commission noted that USWC proposed this change to the AFOR Plan by its letter of August 14, 1998. However, USWC lacked the authority to amend unilaterally a position taken by six parties as of July 30, 1998. The Commission therefore sought to provide the parties with an opportunity to object to the new language. September 28 Order at 24-25. USWC proposed this addition initially, and the Department generally supported the addition. Department Comments at 3. No party objected to it. The Commission will therefore adopt this addition to the AFOR Plan.

M. Appendix B, Section V. “Substantial Compliance”

In its September 28 Order, the Commission proposed the following addition to AFOR Plan Appendix B, Section V. “Substantial Compliance” at 17:

Notwithstanding other provisions of this Plan and its appendices, after the first 270 days of this Plan USWC may not provide any price-regulated service for less than its Initial Price unless 1) USWC has demonstrated substantial compliance with the quality of service standards set forth in the Plan or 2) with the Commission’s assent.

The Commission adopted this language as a means to induce USWC to live up to the service quality standards set forth in AFOR Plan, Appendix B. September 28 Order at 17, 25-26.

No commentor supported this mechanism for inducing USWC compliance with service quality standards. The Department did not oppose the modification, but felt that it required clarification so as not to undo rate reductions already implemented, or initiated by others, even if USWC’s service quality were subsequently found inadequate. Department Comments at 2-3. OAG-RUD supported the policy advanced by this proposal, but argued that restricting price reductions punished ratepayers, not USWC. OAG-RUD Comments at 5-6. MBUUC expressed concern that parties competing with USWC, knowing of USWC’s inability to reduce rates, would have less incentive to reduce rates themselves. MBUUC Comments at 2.

USWC echoed many of these objections, noted that the service quality standards are quite stringent, and argued that the other AFOR terms provided USWC with ample incentive to meet the service quality standards. In addition, USWC found fault with the Commission’s rationale for adopting the provision. USWC Comments at 6-18.

In contrast, many parties expressed support for an alternative proposal that arose during the November 18 hearing. It was observed that the Commission might achieve much of its purpose by amending language regarding Substantial Compliance appearing in AFOR Plan Appendix B, Section V, as follows:

Failure to substantially comply with the service quality standards for two three

consecutive years will result in a Commission investigation to determine if additional customer remedies and/or penalties are warranted.

This modification would accelerate by one year the day that the Commission could order an investigation of inadequate service. Unlike the Commission's prior modification, this proposal permits a flexible response; the Commission will have the discretion to assess and fashion the appropriate response to USWC's service quality in two years, when more facts are known, rather than attempting to fashion that remedy today.

Given the overwhelming opposition to the Commission's original Substantial Compliance proposal, and the viability of the proposed alternative, the Commission will acquiesce to the parties' requests. The Commission will omit its original Substantial Compliance modification, and adopt the alternative discussed above.⁵

N. Appendix B, Section VII. "Force Majeure"

In its September 28 Order, the Commission proposed the following addition to AFOR Plan Appendix B, Section VII. "Force Majeure" at 22:

In the event of a strike by U S WEST employees, including the continuation of the strike commenced by the Communications Workers of America on August 15, 1998, U S WEST will continue to provide the customer remedies included in Appendix B, Service Quality Settlement, Sections I.B "Installation Customer Remedies", and Section II.B "Repair Customer Remedies." In the event of a strike by U S WEST employees, including the continuation of the strike commenced by the Communications Workers of America on August 15, 1998, U S WEST will not be subject to the following Service Quality Settlement penalty provisions: Section I.C "Installation Standards"; Section II.C "Repair Standards", Section III "Service Center Answer Times"; and Section IV "Penalties" until 10 days after the conclusion of the strike.

The Department, OAG-RUD and USWC proposed this language. September 28 Order at 16, 26. USWC stated that it would agree to include this language as part of the final AFOR Plan approved by the Commission. USWC Comments at 5. No party objected to the language. The Commission will therefore retain this modification of the AFOR Plan.

III. Commission Action

The Commission has reviewed USWC's AFOR Plan, and the Commission's modifications thereto contained in its September 28 Order, in light of the entire record including clarifications obtained at the hearing. The Commission finds that the Company's Plan as modified herein meets the statutory requirements found in Minn. Stat. §§ 237.76 to 237.775. Accordingly, the Commission will modify the AFOR Plan consistent with this Order.

⁵Regarding service quality, the Commission's September 28 Order contains a Service Quality Attachment, summarizing the terms of Appendix B.VI. "Service Quality Reporting." At five locations, the Attachment stated that USWC agrees to report various kinds of data "desegregated into the following sub-categories...." This reflects a clerical error; the Commission intended to note that USWC has agreed to report the various types of data *dis-aggregated* into sub-categories, rather than *desegregated*.

ORDER

1. Pursuant to Minn. Stat. § 237.764, subd. 2, the Commission modifies the AFOR Plan as provided in the Commission’s September 28 Order, and as set forth in numbered paragraphs 2 through 9 below.
2. AFOR Plan Section IV.E.4(a) is modified as follows:

If after the first three years of the Plan, the Commission further reduces access charges, USWC may petition the Commission to increase the price of other price-regulated services pursuant to Section ~~G.1.(d).~~ ~~G.1.b.~~
3. AFOR Plan Section IV.G.1.(b) is modified as follows:

With regard to price changes authorized by Section IV.E.~~(2.) and; (3.) and (4)~~ above, any party may file a petition for approval of a rate decrease.
4. AFOR Plan Section IV.G.1.(f) is modified as follows:
 - f) Time Line for Other (Miscellaneous) Changes to Price-Regulated Services.

....
For purposes of this paragraph ~~(f) (4)~~....
5. AFOR Plan Section IV.K.3 “Local Taxes, Franchise Fees, Other Special Local Charges” is modified as follows:
 3. Local Taxes, Franchise Fees, Other Special ~~Local Charges~~ Surcharges.
 - ~~a:~~ a) Legislatively authorized local taxes, franchise fees or ~~other~~ special surcharges (collectively referred to as a “Surcharge”) imposed by a local or regional governmental unit on the services provided by USWC under the Plan may be recovered through a separate line item on USWC’s bill and recovered only from customers living within the jurisdiction that imposed the Surcharge and who subscribe to the service upon which the surcharge is imposed. USWC shall maintain a list of all such ~~fees, taxes or other charges~~ Surcharges along with a designation of which customers are subject to their recovery. This paragraph does not give USWC authority to ~~recover include recovery of~~ “management costs” or “right-of-way management costs” as defined in Minnesota Statutes, Section 237.162, subd. 9 or other applicable provisions of Section 237.162 or .163, as such provisions may be amended from time to time, regarding the recovery of costs by local or regional governmental al units, or the recovery of other police power fees imposed on USWC and allowed by law. Any recovery by USWC of Surcharges shall not include those charges that are currently imposed on USWC that are not currently recovered as a separate line item as of the effective date of the Plan. Subject to Section 3.(b), Surcharges may be recovered by separate line item entries on a customer’s ~~customers’~~ bill, from the effective date the Surcharge is imposed on USWC.
 - ~~b:~~ b) Prior to recovery of a Surcharge, USWC shall notify the imposing governmental unit in writing of USWC’s intension to recover the Surcharge though a line item of the affected customers’ bills. Absent mutual agreement between USWC and the imposing governmental unit, USWC shall file a tariff

with the Commission for review and approval identifying the Surcharge amount and the format of the line item charge on the customer bill. The tariff will take effect 30 days after the tariff filing and notice to the local or regional government~~al~~ unit. Notwithstanding the tariff effective date, any party, including the imposing government~~al~~ unit, may object to the tariff before the Commission or in a court of ~~competent~~ ~~competant~~ jurisdiction.

6. AFOR Plan Section VIII. “Competitive Enforcement” is modified as follows:

VIII. Competitive Enforcement. ~~USWC agrees to be bound by the provisions in this section in any proceeding initiated after the effective date of this plan under Minn. Stat. § 237.081 concerning allegations that USWC has harmed the interest of a competitor by violating Minn. Stat. § 237.07 or § 237.121.~~

A. Expedited Proceeding. ~~USWC agrees to the use of an expedited proceeding under Minn. Stat. § 237.61 in lieu of a contested case under chapter 14 to develop an evidentiary record in any proceeding covered by this section that involves contested issues of material fact. An expedited proceeding under this section shall be governed by the following:~~

~~1. Discovery. Parties shall have the discovery rights provided in Minn. Rules, parts 1400.6700, 1400.6800, 1400.6900, and 1400.7000.~~

~~2. Cross-Examination. The parties shall have the right to cross-examine witnesses as provided in Minn. Stat. § 14.60, subd. 3.~~

~~3. Admissibility of Evidence, Decision Record. The admissibility of evidence and development of the record for decision shall be governed by Minn. Stat. § 14.60 and Minn. Rules, part 1400.7300.~~

~~4. Other Matters. The Commission may apply other procedures or standards, including rules of the Office of Administrative Hearings, as necessary to ensure the fair, expeditious resolution of disputes under this section.~~

~~5. To the extent possible, a quorum of the Commission shall preside over the expedited proceeding.~~

~~B. Temporary Relief. After providing opportunity for notice and comment, the Commission may order USWC to temporarily cease allegedly anti-competitive conduct pending completion of any necessary evidentiary hearings under Minn. Stat. ch. 14 or § 237.61 and issuance of a final Commission decision, if the complaint shows that the temporary order is necessary to protect the public’s interest in fair and reasonable competition. Tariff Suspension. The Commission may, within 90 days after the effective date of a USWC tariff, suspend the tariff in a proceeding covered by this section if, based on the standards applied by Minnesota courts for granting temporary injunctions, the Commission finds a suspension appropriate.~~

~~C. Penalties. In lieu of referral by the Commission to the Attorney General to seek penalties under Minn. Stat. § 237.461, the Commission may require USWC to pay penalties of between \$100 and \$5000 for each day of each knowing and intentional violation. The Commission can impose penalties under this section only as follows:~~

~~1. Factors. The Commission shall apply the following factors in determining whether and in what amount to assess penalties for violations found under this section.~~

~~a. The willfulness of the violation;~~

~~b. The gravity of the violations, including the harm to customers or competitors;~~

~~c. The number of violations;~~

d. The economic benefit to USWC resulting from the violation;
e. The history of past violations, including the gravity of past violations and the time elapsed since the last violation;

f. Any corrective action taken or planned by USWC; and
g. Other factors as justice may require if the Commission specifically identifies the additional factors in the Commission's Order assessing penalties.

2. Burden of Proof. The Commission cannot assess a penalty unless the record establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in this section.

3. Penalty Order. An Order assessing penalties must include:
a. a concise statement of the facts underlying the violation;
b. a reference to the statute, rule, order or stipulation agreement that has been violated; and
c. the amount of the penalty to be imposed and the factors on which the penalty is based.

4. Penalty Stayed. The penalty shall not be payable sooner than 31 days after the Commission issues its final Order assessing the penalty. If USWC files an appeal, the penalty shall not be payable until the reviewing court issues a decision sustaining the Commission's penalty decision.

7. AFOR Plan Appendix B, Section II.B. "Repair Customer Remedies" at 12 is modified to add the following language:

When the Company fails to repair an out-of-service condition for DS1 or DS3 service within twenty-four hours of notification, a pro rata credit on the cost of the circuit and trunks will be credited to the customer's account.

8. AFOR Plan Appendix B, Section V. "Substantial Compliance" at 17 is modified to omit the following language:

~~Notwithstanding other provisions of this Plan and its appendices, after the first 270 days of this Plan USWC may not provide any price-regulated service for less than its Initial Price unless 1) USWC has demonstrated substantial compliance with the quality of service standards set forth in the Plan or 2) with the Commission's assent.~~

9. AFOR Plan Appendix B, Section V. "Substantial Compliance" at 18 is modified as follows:

Failure to substantially comply with the service quality standards for two three consecutive years will result in a Commission investigation to determine if additional customer remedies and/or penalties are warranted.

10. Parties to the AFOR Plan have 10 days from the date of this Order to reject these proposed modifications, pursuant to Minn. Stat. § 237.764, subd. 2.

11. If no party to the AFOR Plan objects to the modifications within 10 days from the date of this Order, then
 - A. this AFOR Plan, as modified herein, shall take effect on January 1, 1999, and
 - B. USWC shall file with the Commission —
 - revised tariff and price list pages reflecting rate changes consistent with this Order, on or before January 1, 1999,
 - other revised tariff pages required by this Order within 30 days of the date of this Order, as provided in AFOR Plan Section D.1, and
 - a revised copy of the AFOR Plan incorporating all final modifications consistent with this Order, within 30 days of the date of this Order.
12. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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