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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 UNITED AND INFORMED CITIZEN )  
4 ADVOCATES NETWORK, a non-profit )  
5 Washington Corporation, )

6 Complainant, )

7 vs. ) DOCKET NO. UT-960659

8 PACIFIC NORTHWEST BELL TELEPHONE )  
9 COMPANY, d/b/a U S WEST )  
10 COMMUNICATIONS, INC. )

11 Respondent. )

12 -----  
13 GTE NORTHWEST, INCORPORATED, )

14 Complainant, )

15 vs. ) DOCKET NO. UT-970257

16 UNITED AND INFORMED CITIZEN ) VOLUME IV  
17 ADVOCATES NETWORK, a non-profit ) Pages 151 - 166  
18 Washington Corporation, )

19 Respondent. )  
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21 A prehearing conference in the above matter  
22 was held on November 9, 1999, at 10:35 a.m. at  
23 900 Fourth Avenue, Suite 2000, Seattle, Washington,  
24 before Administrative Law Judge MARJORIE SCHAER.

25 The parties were present as follows:

26 THE WASHINGTON UTILITIES AND TRANSPORTATION  
27 COMMISSION, by SHANNON E. SMITH, Assistant Attorney  
28 General, 1400 South Evergreen Park Drive Southwest,  
29 Post Office Box 40128, Olympia, Washington 98504-0128.

30 Kathryn T. Wilson, CCR  
31 Court Reporter

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1 P R O C E E D I N G S

2 JUDGE SCHAER: The hearing will come to  
3 order. This is a hearing in Docket No. 960659, which  
4 is a complaint brought by United and Informed Citizen  
5 Advocates Network against U S West. Also consolidated  
6 with this case is Docket No. UT-970257, which is a  
7 complaint by General Telephone, Incorporated, against  
8 U and ICAN, claiming that U and ICAN has improperly  
9 avoided paying access charges while using long-distance  
10 service on a GTE network.

11 This morning, we are here for a subpoena  
12 duces tecum issued jointly by the Commission staff and  
13 U S West, and U S West for discovery of certain  
14 materials held by U and ICAN. Commission has already  
15 ruled through its administrative law judge those  
16 materials should be provided and has already granted an  
17 order compelling production of those items.

18 We are here today on November 9th, 1999, in  
19 Suite 2000, Bank of California building, in a  
20 conference room of the attorney general's office. My  
21 name is Marjorie Schaer, and I'm the Administrative Law  
22 Judge this morning. I'd like to start by taking  
23 appearances, please.

24 MS. SMITH: Shannon Smith, assistant attorney  
25 general representing Commission staff.

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1 JUDGE SCHAER: I'd like the record to show  
2 that it is now 10:35, and we have waited 35 minutes  
3 beyond the ten o'clock commencement of this hearing  
4 waiting for counsel for U and ICAN and for Mr. Bill  
5 Loveless, its general manager, and that neither  
6 Mr. Loveless nor his counsel has appeared before the  
7 Commission this morning, so Ms. Smith, would you like  
8 to describe why we're here and what it is you're  
9 seeking this morning?

10 MS. SMITH: Yes, thank you. This matter has  
11 been an ongoing matter, and U S West Communications,  
12 Inc., served data requests on United and Informed  
13 Citizen Advocates Network on May 20th of 1999.  
14 Pursuant to the Commission's discovery rules, answers  
15 or responses to those data requests were to be served  
16 on U S West on June 7th, 1999. U S West did not  
17 receive responses to those data requests, and on June  
18 14th of 1999, U S West filed a motion to compel U and  
19 ICAN to answer those discovery requests.

20 The Administrative Law Judge, Marjorie  
21 Schaer, in this matter, on July 9th, 1999, issued an  
22 order compelling U and ICAN to respond to the data  
23 requests. U and ICAN has not responded to those data  
24 requests. Needing to obtain that information from  
25 U and ICAN in order to proceed in this

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1 matter, U S West, GTE, and the Commission staff on  
2 September 7th of 1999, filed a joint motion asking that  
3 the Commission issue a subpoena to U and ICAN to  
4 produce documents in Seattle at the Bank of California  
5 building or provide a witness to testify at the Bank of  
6 California on October 15th of 1999.

7 The Commission staff, GTE and U S West asked  
8 U and ICAN to provide data that was contained in  
9 U S West's Data Requests 1 through 13 and provide any  
10 other usage documents that U and ICAN might have with  
11 respect to its usage of U S West's network. The  
12 Commission did not issue that subpoena because counsel  
13 for U and ICAN would be absent from the state October  
14 9th through October 16th of 1999, which would include  
15 the date of the Subpoena.

16 On October 26th of 1999, GTE, U S West, and  
17 the Commission staff filed another motion asking the  
18 Commission to change the date of the production of  
19 documents from October 15th until October 9th of 1999.  
20 That motion was dated October 25th, 1999. On November  
21 1st, 1999, the Commission issued the Subpoena in this  
22 case to U and ICAN and its general manager, William  
23 Loveless, both at the same address.

24 The Subpoena was served on November 1st,  
25 1999. It was sent to William Loveless, the general

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1 manager of U and ICAN, and the Commission did receive  
2 the green card back on that certified mail. It's  
3 apparent that U and ICAN was, in fact, served with the  
4 Subpoena. On November 8th, 1999, at 4:42 p.m., counsel  
5 for U and ICAN, Michael Johnson, faxed to the  
6 Commission, I believe, and certainly to counsel, his  
7 notice of objection to the issuance of the Subpoena.

8 It's now about quarter to 11:00 on November  
9 9th, 1999, at the place where U and ICAN was to appear  
10 and bring the documents and to answer questions with  
11 respect to the information sought by the Subpoena. U  
12 and ICAN has not appeared. That's it.

13 JUDGE SCHAER: The record should show that  
14 the Commission did receive on November 8th at 4:05 in  
15 the afternoon a facsimile of a notice of objection to  
16 the Subpoena Duces Tecum issued by the Commission on  
17 November 1st, 1999. In this notice of objection, U and  
18 ICAN first notes it filed a petition for review in  
19 another docket before the Commission -- that would be  
20 Docket No. UT-971515 -- and argues that that should be  
21 a reason why the Subpoena should not issue. They also  
22 have noted that they have asked for review of orders  
23 issued in this Docket 960659 in a separate court  
24 proceeding filed on February 9th, 1999, and that case  
25 continues in King County Superior Court. Do you have

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1 any comments on either of those arguments, Ms. Smith?

2 MS. SMITH: Yes. The fact that U and ICAN  
3 has petitioned for review of the Commission's final  
4 order in Docket No. UT-971515 is irrelevant to this  
5 proceeding. That's an entirely separate docket. U and  
6 ICAN also has filed a petition for judicial review  
7 within the same petition for judicial review of orders  
8 issued by the Commission in this docket.

9 U and ICAN had previously filed a petition  
10 for judicial review of those orders in King County  
11 Superior Court. U and ICAN's petition for judicial  
12 review was dismissed because U and ICAN failed to  
13 properly serve the agency with a petition for judicial  
14 review. U and ICAN filed prematurely its petition for  
15 judicial review because it was not a final order of the  
16 Commission and because the Doctrine of Primary  
17 Jurisdiction lended itself to having the Commission  
18 resolve all of the issues prior to U and ICAN filing a  
19 petition for judicial review in Superior Court.

20 It is the Commission staff's position, based  
21 on the court of appeals' decision that was issued  
22 subsequent to that, that, in fact, the orders issued in  
23 UT-960659 that U and ICAN is appealing are not final  
24 orders of the Commission and that the Superior Court  
25 does not have jurisdiction over those orders, so

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1 regardless of the fact that U and ICAN petitioned for  
2 judicial review of those orders, they are not final  
3 orders, and the Superior Court does not have  
4 jurisdiction, so any filings pending by U and ICAN at  
5 the Superior Court have no bearing on this proceeding  
6 whatsoever.

7 JUDGE SCHAER: I am going to determine that  
8 you are correct in your argument and that U and ICAN is  
9 still in the midst of the proceeding in Docket No.  
10 UT-960659. There was a cross motion for summary  
11 disposition in that proceeding, this proceeding that we  
12 are in today, that was entered into without any  
13 objection by both U and ICAN and U S West. The  
14 Administrative Law Judge ruled in favor of U S West and  
15 against U and ICAN in that proceeding and allowed  
16 U S West to go forward with its counter claim for  
17 access charges. That ruling was allowed to be appealed  
18 to the Commission on an interlocutory review, and all  
19 of those rulings have been confirmed by the Commission  
20 in the Third Supplemental Order in Docket No.  
21 UT-960659, which was served on February 5th, 1998.

22 We are continuing to proceed in this matter  
23 as discussed on Page 5 of that order where the  
24 Commission notes that the order on summary disposition  
25 was a resolution of cross motions for summary

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1 disposition and that it made an initial determination  
2 of many of the major legal issues in the proceeding.  
3 It noted that the first prehearing conference order in  
4 this proceeding had indicated that there would be a  
5 bifurcated schedule where we would look first at the  
6 cross motions for summary determination, and then after  
7 they were ruled, if additional evidentiary hearings  
8 were needed, we would have another prehearing  
9 conference and then go forward with those hearings.

10         The case has proceeded along this line. The  
11 summary motions have been resolved and have been  
12 resolved at the Commission level. We are now at the  
13 second phase of the proceeding wherein U S West is  
14 seeking access charge recovery from U and ICAN, and we  
15 are still in the middle of Docket UT-960659. There has  
16 not yet been a final order to appeal to court, and  
17 there will not be one until such time as we are able to  
18 obtain necessary evidence in order to resolve the  
19 second phase of this matter.

20         The second objection is that the subpoena  
21 duces tecum issued by the Commission was issued in  
22 Docket No. 960659, which has been consolidated with  
23 Docket No. UT-970257, and that U and ICAN claims it  
24 gave adequate reasons at an earlier time in this  
25 subpoena phase where a subpoena should not issue at



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1 this time. Is there any response by the Commission  
2 staff to that argument, Ms. Smith?

3 MS. SMITH: Yes, there is. The Commission is  
4 not obligated to rule on objections to a subpoena  
5 before that subpoena is issued. The fact that U and  
6 ICAN has objected to that subpoena on grounds that  
7 Commission staff does not find to be adequate grounds  
8 to not issue a subpoena is no reason that the  
9 Commission should -- strike that. There is no reason  
10 set forth in U and ICAN's objections to the Subpoena  
11 Duces Tecum, either filed after the first motion before  
12 the Subpoena was issued or filed yesterday for the  
13 Commission, not to issue the Subpoena.

14 JUDGE SCHAER: Again, Commission agrees with  
15 you that this is a discovery phase of this proceeding;  
16 that the evidence that is being sought is more likely  
17 than not to lead to useful information for carrying out  
18 the remainder of this proceeding; that U and ICAN has  
19 been allowed to participate in all phases of this  
20 proceeding, including the first and second prehearing  
21 conferences where discovery was discussed. The  
22 discovery rule, WAC 480-09-480 was triggered, and the  
23 data request and subpoena processes available were  
24 discussed, so I'm going to rule that there is nothing  
25 in this objection that should bar the Subpoena from

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1 continuing to be in effect and from being enforced.

2 MS. SMITH: I also would like to note that in  
3 an earlier objection to the Subpoena filed by  
4 U and ICAN on September 13th of 1999, U and ICAN states  
5 that the application for the Subpoena is directed to  
6 the Commission, and that application was the motion by  
7 the Parties and not to the presiding officer. U and  
8 ICAN stated that the Applicants have not stated any  
9 statutory authority for the Commission as opposed to a  
10 presiding officer to issue a subpoena in a discovery  
11 setting.

12 That argument is without merit. The  
13 presiding officer sits on the delegation of the  
14 Commissioners and acts for the Commissioners and on  
15 their behalf. While it is true that an administrative  
16 law judge can issue a subpoena duces tecum under the  
17 Administrative Procedure Act, it also follows that the  
18 Commission itself may issue such a subpoena.

19 JUDGE SCHAER: I agree with that also, and  
20 that is why the Subpoena that has been issued is issued  
21 by the Commission. There is specific provision  
22 allowing the Commission to appoint administrative law  
23 judges and to delegate to them their authority in  
24 procedural matters, and I have worked with the  
25 Commission on the issuance of the Subpoena, and it is

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1 issued by them on behalf of the entire Commission.

2       The third matter that's listed is a claim  
3 that the issuance of a subpoena duces tecum is not  
4 necessary at this time, and I have already ruled on  
5 that in my order compelling discovery that there is a  
6 need for this information; that a protective order has  
7 been put in place to protect the confidentiality or  
8 sensitivity of any information, and that without  
9 obtaining this information, it could severely damage  
10 U S West and GTE's opportunities to seek the access  
11 charges which they believe are owed to them by U and  
12 ICAN. In fact, the Commission has already ruled that  
13 access charges should be paid. In the order I  
14 previously made reference to has merely said that the  
15 amount and the rest of the information about what  
16 should be paid needs to be developed at a later  
17 evidentiary phase.

18       MS. SMITH: I would also like to note, if I  
19 may, that U and ICAN also states in its third reason  
20 for objecting to the Subpoena that no hearing was ever  
21 held on the issue whether or not U and ICAN is a  
22 private telecommunications system. That is incorrect.  
23 The Commission in Docket No. UT-971515 determined that  
24 U and ICAN is a telecommunications company and is  
25 subject to regulation by the Commission and ordered

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1 U and ICAN to cease and desist from operating as a  
2 telecommunications company until it is so registered.

3 That is tantamount to a finding that U and  
4 ICAN is not a private telecommunications system. A  
5 company cannot be subject to regulation and be a  
6 private telecommunications system at the same time, so  
7 there was, in fact, a hearing on that issue, and there,  
8 in fact, was a finding that U and ICAN is not a private  
9 telecommunications system.

10 JUDGE SCHAER: At the same time, I would also  
11 like to point out to you, counsel, that in this case,  
12 the order that I have been discussing with you, the  
13 Third Supplemental Order entered by the Commission  
14 itself on February 5th, the Commission has determined  
15 that the Commission does have access to award access  
16 charges.

17 It has determined that U and ICAN is not a  
18 private telecommunications system, and it has  
19 determined that it is illegal for U and ICAN to provide  
20 the kind of telephone service it is providing across  
21 extended area service boundaries without payment of  
22 access charges, and the Commission said that all three  
23 of those findings could be made even without  
24 determining the classification of this company, so  
25 despite the fact that the order in 971515 may be before

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1 the courts, that ruling is not necessary to the finding  
2 by the Commission that under the statutory plan of the  
3 legislature for establishing EAS boundaries if a  
4 requiring payment of access charges. What is being  
5 done by U and ICAN is illegal and is something that is  
6 not allowed to be done, and that this company is not a  
7 private shared telecommunications service as defined in  
8 RCW 80.04.010.

9         So all of those decisions have been made in  
10 this proceeding before the Commission, and the  
11 Commission said that even if this company was not found  
12 to be a telecommunications company, it would still have  
13 to extend its jurisdiction over these activities under  
14 the reading of the statute, which allows expansion of  
15 jurisdiction to cover this kind of problem in the  
16 access charge law, and I would also note that there was  
17 definitely a hearing on these matters. The hearing  
18 took the form of an argument on cross motions for  
19 summary disposition. It was agreed by counsel for  
20 U and ICAN that those cross motions should be brought.  
21 U and ICAN and other counsel brought to the Commission  
22 agreed facts, which they provided as the basis for this  
23 determination. It was their decision to go forward  
24 with a motion for summary determination rather than  
25 building a factual record in a hearing, and at the

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1 hearing on the cross motions, there actually was live  
2 testimony presented by Mr. William Loveless, the  
3 general manager of U and ICAN, in order to fill in some  
4 gaps in the records of the facts that had been  
5 presented to the Administrative Law Judge.

6           There was no request at that time by counsel  
7 for the Company to provide any other witnesses or any  
8 other factual information to guide the Commission, and  
9 U and ICAN should not be heard now to complain that  
10 they had no hearing when the procedure followed by the  
11 Commission of using agreed facts provided by U and ICAN  
12 was one that they initiated and one that they agreed to  
13 through the proceeding.

14           MS. SMITH: With respect to the fourth reason  
15 that U and ICAN believes the Subpoena should not issue  
16 is that U and ICAN believes the Subpoena is vague as to  
17 who it is directed. The Subpoena is very clear. It's  
18 directed to Bill Loveless, who is the general manager  
19 of U and ICAN, and it is directed to U and ICAN.

20           U and ICAN indicates that the Commission's  
21 order on February 9th, 1999, refers to unnamed  
22 principles. That is completely irrelevant to the  
23 issues of this subpoena. The Subpoena was directed to  
24 U and ICAN. The Subpoena was directed to its general  
25 manager, Mr. Loveless. It was properly issued, and

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1 with respect to the Reason No. 5, no proper service has  
2 been made on U and ICAN of the Subpoena, U and ICAN's  
3 general manager was served in the offices of U and  
4 ICAN. An agent for the Company signed for that  
5 subpoena and a green card for indicating service by  
6 certified mail has been returned to the Commission.  
7 U and ICAN was properly served with this subpoena duces  
8 tecum.

9 JUDGE SCHAER: And again, I would confirm  
10 that is Commission's view as well. This subpoena was  
11 served in accordance with Commission rules and the  
12 APA. U and ICAN is a party to these proceedings, and  
13 therefore, can be served in the manner indicated.  
14 Mr. Loveless has indicated under oath in the record of  
15 this proceeding that he is the general manager of U and  
16 ICAN. The address given to the Commission for U and  
17 ICAN is identical to the home address of Mr. Loveless;  
18 and therefore, service at that address by certified  
19 mail with return receipt received is adequate service,  
20 and there is no base for an argument that the Subpoena  
21 was not properly served.

22 MS. SMITH: I would like to note that as  
23 we're perhaps getting close to the conclusion of this  
24 proceeding, it is now eleven o'clock a.m. and U and  
25 ICAN has not yet appeared to comply with the Subpoena

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1 Duces Tecum.

2 JUDGE SCHAER: I'm going to rule at this time  
3 that the Subpoena Duces Tecum is in order. It should  
4 be served. It should have been obeyed and that I think  
5 it is proper for the Parties to seek further  
6 enforcement of that subpoena at this time. Is there  
7 anything else to come before the Commission?

8 MS. SMITH: There is nothing else.

9 JUDGE SCHAER: With that, we are off the  
10 record. Hearing is adjourned.

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12 (Hearing concluded at 11:00 a.m.)

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