

1
2
3
4
5
6
7 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

8
9 In the Matter of the Petition of

Cause No. UT-991991

10 MCI WORLDCOM, INC. and SPRINT
11 CORPORATION,

12
13
14 In the Matter of the Petitions of

Cause No. U-86-79

15 US SPRINT COMMUNICATIONS COMPANY,
16 and

Cause No. U-86-101

17
18 MCI TELECOMMUNICATIONS
19 CORPORATION.

INTERVENOR SBC's RESPONSE TO
PETITIONERS' MOTION TO COMPEL THE
DEPOSITION OF DR. JERRY A. HAUSMAN

20
21
22 I. RELIEF REQUESTED

23
24 SBC Communications Inc. ("SBC") respectfully requests the Washington Utilities and
25 Transportation Commission ("Commission") deny petitioners' motion to compel the deposition of
Dr. Jerry A. Hausman ("Dr. Hausman") because they present no reason why this deposition is necessary.
Dr. Hausman submitted pre-filed testimony and SBC has responded to extensive data requests. The
deposition would be cumulative and is unnecessary and would be unduly burdensome to SBC and Dr.
Hausman.

II. GROUNDS

A. Depositions are not Routine Commission Practice.

The submission of pre-filed expert testimony is the routine, required practice in Commission
adjudicative proceedings. While depositions may be allowed by Commission rule, WAC 480-09-480
they are not common in Commission proceedings, contrary to the Joint Petitioners' claims (Motion to

INTERVENOR SBC's RESPONSE TO
PETITIONERS' MOTION TO COMPEL THE

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100
Mail Address: P.O. Box 21926

1 Compel, p. 3).¹ That is because the purpose of requiring pre-filed testimony obviates the need for
2 depositions in most circumstances. A leading authority on administrative law, Cottine & Edmondson,
3 BNA Administration Practice Manual § 111, p. 5103 (1992), notes:
4

5 Written direct testimony has several advantages over oral testimony and frequently makes
6 the attorney's job easier. Written direct testimony often accomplishes the following:
7

8 eliminates surprise and narrows the issues;
9 avoids the artificial device of question-and-answer format for lengthy technical
10 testimony;
11 eliminates the concern that a witness will forget some of the essential facts;
12 allows more background information into the record in order to make the essential facts
13 more understandable;
14 saves time at the hearing; and
15 promotes more effective cross-examination.
16

17 Thus, a deposition, which is a civil litigation discovery tool, would duplicate the purpose of pre-
18 filed testimony and greatly increase the expense and burdens of administrative proceedings. Absent
19 unusual or extraordinary circumstances, depositions should not be encouraged or allowed in
20 administrative practice before the Commission where the party producing the witness does not consent.
21 Such circumstances would include the inability of the witness to be physically present for cross-
22 examination² or where some compelling evidentiary reason arises which would require a deposition to
23 avoid unfair surprise to opposing parties.
24
25

None of these circumstances is present here. Dr. Hausman will be physically present for his
cross-examination in Olympia at the scheduled hearings. All of the areas of inquiry listed by the Joint
Petitioners in their Motion to Compel (p. 3, ¶ 5) are thoroughly discussed in the 22 pages of

¹ The Order relied upon by Joint Petitioners, In Re the Petition of US West Communications, Inc., Docket No. UT-980948, Eight Supplemental Order, March 29, 1999, is barely one month old and hardly supports the proposition that the taking of depositions is routine. That Order dealt with the issue of whether depositions of non-witnesses could be taken. That Order really supports SBC's position that the Commission has the authority to deny a deposition under WAC 480-09-480. SBC asks the Commission to do so here because the circumstances do not warrant a deposition.

² Depositions are not appropriate when the opportunity exists to cross examine a witness who pre-filed testimony. In Re Utility Line Clearing Practices, 1993 La. PUC Lexis 90, *2 (June 3, 1993). "A deposition . . . is useful when it is unlikely that a witness will be available to testify at the hearing Cottine & Edmondson, BNA Administrative Practice Manual, § 111, p. 3201 (1992).

1 Dr. Hausman’s pre-filed testimony. SBC has responded to 9 data requests from MCI WorldCom Sprint
2 regarding Dr. Hausman’s testimony and is in the process of responding to 6 detailed data requests in the
3 MCI WorldCom Sprint second set of data requests. SBC has provided the Joint Petitioners with the
4 requested background information for Dr. Hausman’s testimony.
5
6

7 B. The Joint Petitioners Make No Case for Why They Need the Deposition.

8
9 The Joint Petitioners make no showing as to why they cannot prepare for effective and efficient
10 cross-examination within the bounds of normal, customary Commission practice. Instead, they present a
11 cursory two-sentence justification that somehow a deposition will promote “efficiency.” SBC submits
12 the deposition of Dr. Hausman would not promote efficiency, but would be merely cumulative and
13 would not save hearing time before the Commissioners, who would have to hear the same cross-
14 examination of Dr. Hausman, irrespective of his deposition.
15
16
17

18
19 In contrast, SBC and its witness would be unduly burdened. Dr. Hausman is a professor at the
20 Massachusetts Institute of Technology. He is in the throes of concluding his semester of teaching and
21 will be traveling outside the country, which will only allow time for Dr. Hausman to travel to Olympia
22 for his live testimony. Preparing Dr. Hausman for his deposition and the conduct of the deposition is
23 very time consuming and, in fact, cannot be accomplished without great hardship to the witness. On top
24 of this is the expense which SBC will have to bear to have counsel travel to Boston for the deposition.
25

On balance, given the extensive pre-filed testimony, the data requests and SBC responses and the opportunity for full cross-examination in person at the hearings SBC reasonably asks this Commission to refuse to order Dr. Hausman’s deposition in this case.

C. WAC 480-09-480 Gives the Commission Ample Authority to Deny the Deposition.

The deposition rule does not automatically entitle the Joint Petitioners to take Dr. Hausman’s deposition. This rule, WAC 480-09-480(6)(b), is permissive only and states that depositions “may be available during one or more conferences scheduled in the prehearing order.”

Further, it is clear from the language and history of the rule that depositions are not the norm but

1 are to be conducted, if at all, under tightly controlled circumstances – pursuant to “conferences”
2 scheduled in the prehearing order in Olympia, so that the Commission can attend or preside. For
3 instance, the second sentence of WAC 480-09-480(6)(b) states that a party intending to depose a witness
4 will give at least five days notice to the Commission prior to the scheduled conference.
5

6
7 The rule’s history is that “WAC 480-09-480 requires that depositions be taken at Olympia
8 [Washington].” In the Matter of Amending WAC 480-09-480, Docket No. A-910835, General Order
9 No. R-351, p. 4, October 29, 1991.
10

11
12 The fact that the rule has so many conditions is persuasive evidence that depositions in
13 Commission practice are not just like depositions under Civil Rule 30, which has no similar restrictions
14 and which allows depositions as a matter of right.
15

16
17 Finally, this Commission retains the ultimate discretion to limit or preclude the deposition of
18 Dr. Hausman under WAC 480-09-480(6)(a)(vi) on the basis that this deposition would be unreasonably
19 cumulative, duplicative or overly burdensome. SBC urges the Commission to do so.
20

21
22 The precedential consequence of ordering Dr. Hausman’s deposition could be great. SBC is an
23 intervenor, with valuable information of public interest to present to the Commission. Burdensome,
24 expensive, unnecessary depositions penalize parties who intervene in Commission proceedings –
25 whether they are a large corporation like SBC or a grass roots public interest group. Unless there is
some compelling reason to order depositions – which Joint Petitioners cannot provide – the Commission
has no reason to set a precedent which would chill public intervention. To do so will also greatly
increase the costs of all parties who regularly appear before the Commission. Depositions should remain
the exception – not the norm – if the Commission wishes to promote streamlined, efficient practice.

III. CONCLUSION

For the foregoing reasons, intervenor SBC requests the Commission deny Petitioner’s Motion To
Compel Testimony of Dr. Hausman because it is unnecessary, duplicative, unduly burdensome, not
within allowed procedures, and because sufficient discovery has occurred.

1 RESPECTFULLY SUBMITTED this ____ day of April, 2000.

2 WILLIAMS, KASTNER & GIBBS PLLC

3
4
5 By

6 Judith A. Endejan
7 WSBA #11016
8 Christopher L. Dahl
9 WSBA #29320

10 Attorneys for Intervenor SBC Communications,
11 Inc.
12
13
14
15
16
17
18
19
20
21
22
23
24
25