

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint and Request)
For Relief of TEL-SAVE, INC., against)
U.S. WEST COMMUNICATIONS, INC., for)
Violation of Sections 201(b) and 202 of the)
Communications Act of 1934, as amended,)
Violation of Utah Code Ann. §§ 54-3-1 and)
54-3-8)

DOCKET NO. 98-049-20

REPORT AND ORDER

ISSUED: December 16, 1998

SYNOPSIS

The Commission held that it had jurisdiction to regulate Respondent's policies and procedures regarding customers' setting and lifting of Primary Interexchange Carrier ("PIC") freezes and denied Respondent's motion to dismiss; on the merits, the Commission held that Respondent's procedures and policies regarding PIC freezes were mandated under a previous Commission Order, and since the Commission is not disposed to revisit the issue at this time, the Commission dismissed the complaint.

Appearances:

Marcy Greene
Swidler Berlin Shereff Friedman, LLP

For

Tel-Save, Inc.,

John M. Eriksson
Stoel Rives, LLP

"

U.S. West Communications, Inc.,

BY THE COMMISSION:

PROCEDURAL HISTORY

The above-named Complainant filed its complaint June 22, 1998. The above-named Respondent filed its response July 17, 1998 and a motion to dismiss September 30, 1998. Thereafter the parties filed memoranda supporting and opposing Respondent's motion to dismiss. The Administrative Law Judge, having been fully advised in the matter, now enters the following Report containing proposed findings of fact, conclusions of law, and the Order based thereon.

FINDINGS OF FACT

1. Complainant is a telecommunications provider offering inter-LATA (long distance toll) service nation wide, as well as intra-LATA (state wide long distance toll) service. Respondent is the incumbent local exchange carrier ("ILEC") throughout the state of Utah. Respondent is certificated by this Commission; Complainant is not.
2. Respondent acts as a gateway for inter-LATA and intra-LATA toll providers in that customers can designate their Primary Interexchange Carrier ("PIC") with Respondent. Respondent then programs its equipment so that a customer dialing "1" plus the long distance number (or "0" plus within Utah) will be routed through the customer's PIC.
3. A number of unscrupulous interexchange carriers have lodged fraudulent PIC changes with Respondent and other

ILEC's, a practice known as "slamming." The practice has led to a good deal of customer confusion and dissatisfaction. To obviate the problem, a customer can place a "PIC freeze" on her/his account -- meaning that Respondent will change a PIC (or lift the freeze) only upon verified contact from the customer. Under Respondent's current procedure, the customer must telephone Respondent's service personnel to initiate the change.

4. The gist of the complaint is that Respondent's policy is too restrictive in that Respondent will not accept E-Mail, either from a customer or an interexchange carrier on the customer's behalf, to initiate a PIC change on a frozen account. Complainant seeks relief in the form of a Commission Order mandating that Respondent implement changes initiated by E-Mail, either by the customer or by Complainant on the customer's behalf.

DISCUSSION

Respondent's motion to dismiss is bottomed on alleged Federal preemption of the subject matter. Respondent directs our attention to Section 258(a) of the Telecommunications Act of 1996, which provides:

No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. *Nothing in this section shall preclude any State Commission from enforcing such procedures with respect to intrastate services.* (Emphasis added.)

Respondent urges us to construe the second sentence as meaning the state can enforce the rules laid down by the Federal Communications Commission ("FCC"). Such a construction, in our view, renders the second sentence meaningless. Furthermore, it is inconsistent with the FCC's own construction of the statute.⁽¹⁾ Accordingly, we are disinclined to dismiss the complaint on the grounds of Federal preemption.

At this juncture, however, we do not believe further proceedings in this matter are warranted. We dealt with the issue of PIC freeze changes in a recent proceeding involving equal access to Respondent's network for intra-LATA toll purposes.⁽²⁾ In that proceeding we mandated the very procedures here at issue. We then determined that deterring the practice of slamming outweighed any customer inconvenience in lifting PIC freezes or making PIC changes for frozen accounts. *A fortiori*, it outweighs the convenience of interexchange carriers. Although the proceeding involved intra-LATA service, it would be anomalous to provide different procedures for inter- and intra-LATA service. We are not inclined to revisit the issue in the context of a complaint proceeding.⁽³⁾

CONCLUSIONS OF LAW

Respondent's motion to dismiss lacks sufficient legal basis and should be dismissed. On the merits of this matter, the Commission has recently considered the subject matter and perceives no reason to revisit it at this time. Accordingly, the complaint should be dismissed on the merits.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

Respondent's motion to dismiss is denied; the complaint is dismissed on the merits.

Any person aggrieved by this Order may petition the Commission for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 16th day of December, 1998.

/s/ A. Robert Thurman
Administrative Law Judge

Approved and Confirmed this 16th day of December, 1998, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary

ss#15295

1. Letter to Elliot Burg, 1 Communications Reg. (P&F) 733, 1995 WL 561599.
2. Docket No. 98-049-05 (PSC Utah 1998).
3. Although the matter is not *res judicata* in the legal sense, it is a matter governing the conduct of both Respondent and its customers. As such, we believe it is much better addressed under the Utah Rulemaking Act, which would allow comment and, if necessary, participation from all parties affected. If Complainant wishes to present a proposed rule, incorporating adequate safeguards against slamming, we are willing, of course, to consider it.