

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of)	<u>DOCKET NO. 98-049-24</u>
US WEST COMMUNICATIONS, INC.,)	
for Exemption of IntraLATA Long)	
Distance Services from Regulation)	<u>REPORT AND ORDER</u>

ISSUED: January 12, 1999

BY THE COMMISSION:

On August 14, 1998, US WEST Communications, Inc. ("U S WEST"), commenced this docket by filing its Application for Exemption for IntraLATA Long Distance Services from Regulation ("Application"). The Application sought exemption from regulation applicable to all providers of the following services in the state of Utah: Message Telecommunication Service ("MTS"), Calling Connection Plans, Operator Handled Surcharges ("Operator Services"), Account Code Billing, 800 Service, 800 ServiceLine, and Ancillary Wide Area Telecommunications Services ("WATS"). The foregoing services will be referred to hereinafter as the "Subject Services." US WEST also filed direct testimony of Ted D. Smith and David L. Teitzel in support of the Application and a Motion for Protective Order on August 14, 1998.

On September 3, 1998, the Commission issued a Notice of Further Agency Action and Notice of Scheduling Conference setting a prehearing scheduling conference for September 16, 1998. The Commission also issued a Protective Order. US WEST, the Division of Public Utilities ("Division"), AT&T Communications of the Mountain States, Inc. ("AT&T"), NEXTLINK Utah, Inc. ("Nextlink"), Tel America of Salt Lake City, Inc. ("Tel America"), and the Utah Rural Telecom Association ("URTA") appeared at the prehearing scheduling conference on September 16, 1998. On recommendation of the Division and URTA, it was agreed that US WEST's Application would not apply to areas of the state of Utah currently served by incumbent telephone corporations other than U S WEST. In addition, a schedule governing further proceedings was set.

Petitions to intervene were filed by AT&T, MCImetro Access Transmission Services, LLC ("MCIW"), Sprint Communications Company L.P. ("Sprint"), Electric Lightwave, Inc. ("ELI"), Nextlink, Tel America, and URTA. Although URTA is an intervenor in the case, it did not take an active role in the case following the agreement to exclude areas of the state currently served by incumbent telephone corporations other than US WEST. Accordingly, the term "Intervenors" will refer hereinafter to AT&T, MCIW, Sprint, ELI, Nextlink, and Tel America.

The parties proceeded with discovery and the filing of additional testimony. The Division filed direct testimony of George R. Compton and Larry F. Fuller, AT&T filed the direct testimony of Arleen M. Starr, Sprint filed direct testimony of David E. Stahly, and Nextlink filed rebuttal testimony of Rex Knowles. Thereafter, US WEST filed rebuttal testimony of Ted D. Smith and David L. Teitzel and the Division filed rebuttal testimony of George R. Compton.

On November 18, 1998, US WEST filed a Motion To Compel requesting that the Commission enter an order compelling each of the Intervenors to provide answers, more complete answers, or at least partial answers to specified data requests. At a hearing on the motion on November 25, 1998, the Commission directed US WEST and the Intervenors to attempt to resolve their discovery disputes and recessed the hearing to provide them an opportunity to do so. Following the recess, US WEST, the Division, and the Intervenors advised the Commission that they were working on a settlement of the entire case and requested that the hearing on the motion be continued to December 1, 1998 to allow the parties to continue their discussions. In addition, because the evidentiary hearing in the case was scheduled for December 1 and 2, 1998, the parties requested that the Commission continue the evidentiary hearing until December 8,

1998. The Commission issued its Order Continuing Hearings on November 30, 1998 in accordance with this request.

On December 1, 1998, the parties advised the Commission that they had not reached complete agreement, but that they believed it worthwhile to continue discussions. Therefore, the hearing on US WEST's motion to compel was continued until December 2, 1998. On December 2, 1998, the parties presented their Stipulation to the Commission. In addition to the written Stipulation and subject to Commission approval of the Stipulation, the parties stipulated that the testimony filed by the parties should be admitted into evidence and that the parties would waive cross examination of the testimony. Accordingly, the Commission has admitted the testimony and exhibits of Ted D. Smith as Exhibits USWC 1, 1.1 and 1R; the testimony and exhibits of David L. Teitzel as Exhibits USWC 2, 2.1 through 2.8, 2R and 2R.1 through 2R.4; the testimony of George R. Compton as Exhibits DPU 1 and 1R; the testimony and exhibits of Larry F. Fuller as Exhibits DPU 2, 2.1 through 2.9 and 2.6 Revised; the testimony and exhibits of Arleen M. Starr as Exhibits ATT 1 and 1.1; the testimony and exhibits of David E. Stahly as Exhibits Sprint 1 and 1.1 through 1.3; and the testimony of Rex Knowles as Exhibit NLU 1R without cross examination.

DISCUSSION, FINDINGS, AND CONCLUSIONS

The Application sought exemption from regulation of the Subject Services for all providers. As part of the Application, US WEST took the position that it should not be required to impute the price of switched access in the price for the Subject Services because there are alternatives to switched access from US WEST in providing the Subject Services. The Division and the Intervenors opposed the Application in part on the ground that US WEST was seeking exemption from the price floor test in Utah Code Ann. § 54-8b-3.3(3) and the cross subsidy test in Utah Code Ann. § 54-8b-6. These parties emphasized US WEST's dominance in provision of local exchange service or wholesale switched access as the basis for their concern. In addition, the Division and the Intervenors objected to US WEST's request that all providers be relieved of the obligation of filing price lists in advance of offering Subject Services to the public generally and of filing competitive contacts pursuant to which the Subject Services are provided. However, the Division and Nextlink acknowledged that it was appropriate for US WEST to receive some regulatory freedom in providing the Subject Services and that US WEST ought to be regulated more like its facility-based competitors so long as it was subject to the price floor and cross subsidy tests. In addition, the Division believed the Subject Services ought to remain subject to a price ceiling. AT&T and Sprint did not take a position on the issue of regulatory freedom in their testimony.

US WEST clarified in its rebuttal testimony that it was not seeking exemption from the price floor and cross subsidy tests for the Subject Services. The Stipulation provides that US WEST will continue to be subject to these statutes and to Utah Admin. Code Rule R746-349-6 in providing the Subject Services. In addition, the Stipulation provides that US WEST will be exempt from tariff requirements for the Subject Services, but that the Subject Services will be offered subject to the pricing flexibility provisions of Utah Code Ann. § 54-8b-2.3, except the procedures and conditions of Subsection (2)(b). Subsection (2)(b) requires an incumbent telephone corporation to petition the Commission for pricing flexibility and provides that the pricing flexibility will become effective when certain conditions are satisfied. The parties explained that US WEST would not be required to petition for pricing flexibility for the Subject Services and that pricing flexibility for the Subject Services would become effective on issuance of the Commission's order approving the Stipulation regardless of satisfaction of the conditions in Subsection (2)(b)(iii). The parties explained that US WEST would still be subject to the other provisions of Section 54-8b-2.3 with respect to the Subject Services. The Stipulation also states that its intent is to provide US WEST with the same pricing flexibility granted to all other Utah certificated facility-based providers of the Subject Services. By specifying that the Subject Services are subject to certain provisions of the Utah Code or Utah Administrative Code, the parties have not agreed that they are exempt from other provisions of the Utah Code or Utah Administrative Code except as otherwise provided in the Stipulation.

The Stipulation notes that the parties are not taking any position as to whether switched access is an essential facility or how the price floor test will be met. In testimony filed, US WEST took the position that it is not appropriate to impute the price of switched access in determining compliance with the price floor test in cases where alternatives to switched access are available. USWC 2 at 21; USWC 2R at 8-12. The Division, AT&T, Sprint, and Nextlink testified that switched access prices should be imputed in determining if US WEST's prices for the Subject Services meet the price floor test. DPU 1 at 16; ATT 1 at 19; Sprint 1 at 3-4; NLU 1R at 2-3. The Division testified, however, that imputation of switched access prices was not always required. DPU 1 at 21. The parties explained that their disagreement on these issues did not prevent them from reaching the Stipulation because all parties agree that the proper test is the price floor

test in Section 54-8b-3.3(3). Disputes about how that test is satisfied may be resolved if and when they arise in the future.

The Stipulation further provides that during the period US WEST's rates for the Subject Services would have otherwise been subject to maximum prices under Utah Code Ann. § 54-8b-2.4(4)(a), US WEST shall not charge an amount for a Subject Service in excess of the average rate per minute of tariffed rates in effect for that service on December 2, 1998. The parties explained that this provision was inserted in the Stipulation at the request of the Division to ensure that US WEST would not use its pricing flexibility to increase the rates for the Subject Services above those set by the Commission in its December 4, 1997 Report and Order in Docket No. 97-049-08, US WEST's last general rate case, during the period those rates would have otherwise been capped at those levels. US WEST and the Division also explained that it was necessary to use the term "average rate per minute" because some intraLATA long distance service plans involve both recurring flat monthly charges and usage charges and because US WEST measures the revenues for such plans on an average rate per minute basis.

The Stipulation also provides that the Stipulation and our resulting findings of fact, conclusions of law, and order would not serve as precedent beyond this docket.

Finally, the Stipulation provides that US WEST may file a plan for deregulation of Operator Services. The Application included Operator Services in the Subject Services for which exemption from regulation was sought. No party opposed the Application with respect to Operator Services. The Division testified that deregulation of Operator Services was justified, and recommended that US WEST prepare a plan for deregulating Operator Services.

Consideration of the Stipulation

US WEST originally sought exemption from regulation for the Subject Services under U.C.A. §54-8b-3. After negotiation, the principal relief US WEST was seeking was authorization to price the Subject Services flexibly. The law favoring settling disputes over litigating them is as applicable to regulatory proceedings as it is to civil litigation. *Utah Dept. of Admin. Services v. Public Service Comm'n*, 658 P.2d 601, 613 (Utah 1983). Statutorily, "[i]nformal resolution, by agreement of the parties, of matters before the [C]ommission is encouraged. The Commission may approve any agreement after considering the interests of the public and other affected persons." U.C.A. §54-7-1. We believe that section of the code enables the Commission to approve the agreement without making the finding of effective competition required by U.C.A. §54-8b-3. Pricing flexibility, the relief US WEST now seeks for the Subject Services, does not require a finding of effective competition. As a result, we will address the Stipulation pursuant to U.C.A. §54-7-1.

In considering the interests of the public, we recognize the Utah Legislature's declarations of state policy, found in U.C.A. §54-8b-1.1, to:

- (2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;
- (3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;
- (4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops; . . .
- (8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry; . . . and
- (10) endeavor to protect customers who do not have competitive choice.

We find that the Stipulation terms foster the public policies enumerated above. The Subject Services are available from multiple telecommunications providers in the State of Utah. Based upon information obtained from the Universal Service Fund submissions, in December 1997, almost 150 companies provide the Subject Services to Utah customers.

Of these, over 100 were competing with US WEST in the Utah market. Pursuant to Commission rule, US WEST implemented intraLATA 1+equal access on July 30, 1998. Customers have the capability to receive service from 33 competitors in exactly the same way they are able to receive service from US WEST. Competitors offer a wide variety of services, plans, and options that are functionally equivalent to US WEST's intraLATA long distance services at comparable prices, terms quality and conditions. USWC 2 at 8-10. The Stipulation's terms will permit US WEST to have the same pricing flexibility as do competing providers, all of which are subject to the statutory provisions governing pricing flexibility found in U.C.A. §54-8b-2.3. We find approval and implementation of the pricing flexibility terms to be an appropriate means to further the public policy goals numbered (4) and (8) in Section 54-8b-1.1.

Where appropriate, the public interest is served by allowing competition among competitors on more equal terms in the provision of the Subject Services. We find that the advent of pricing flexibility for US WEST, relative to the Subject Services, likely will increase competition in the provision of these services. There is evidence that new packages or innovative service offerings have occurred in circumstances where US WEST has been granted pricing flexibility similar to those contemplated in the stipulation. USWC 2 at 15-20. There is also evidence which would give rise to concerns associated with abuse of pricing flexibility. Sprint 1 at 12-13. However, we conclude that as US WEST's pricing flexibility would be subject to the provisions of Sections 54-8b-2.3, 54-8b-3.3, 54-8b-6, and Commission Rule R746-349-6, we will be able to adequately deal with possible problems if US WEST misuses pricing flexibility. We find that customers should benefit from a wider array of services at better prices if competition between competitors goes forward with competitors having equal pricing capabilities for the Subject Services. This furthers the policy goals numbered (2), (3) and (8) in Section 54-8b-1.1.

While the evidence presented indicates that customers can obtain the Subject Services from multiple providers, there may be situations where a specific US WEST customer may not have access to these alternative providers. With regard to the potential effect on US West captive customers, we find that the stipulation provision that US WEST will not increase its average rate per minute for a Subject Service over the average rate per minute of tariffed rates currently in effect for the specified time period provides sufficient protection to customers that pricing flexibility will not be used to increase their rates. This provides customers who do not have competitive choice with exactly the same protection provided to them as in the existing statutory provisions enacted by the Legislature. We find that this is consistent with the policy goal numbered (10) in Section 54-8b-1.1.

Based upon the foregoing, we find and conclude that the public interest will be served by granting the relief contemplated by the Stipulation.

Operator Services

US WEST's request for deregulation of Operator Services is not opposed by any party in this proceeding. The Division supports the request subject to US WEST filing a plan for deregulation addressing questions such as how investments and expenses will be segregated and how network services used in providing Operator Services will be charged to the deregulated services in a future docket. DPU 2 at 22. Accordingly, the Stipulation provides that "US WEST may file a plan for deregulation of Operator Services." We find that deregulation of Operator Services is appropriate subject to approval of a plan to be filed by US WEST. We will review the plan and approve or modify it in a separate docket.

Effect of Order

The Stipulation provides that the Stipulation and the resulting order shall not serve as precedent beyond this docket. It further provides that the Stipulation is a compromise of disputed claims and that by entering into the stipulation, no party waives any claim that it may have with regard to the subject matter of this stipulation except with respect to this docket and the resulting order.

Settlement of issues is encouraged if parties are free to compromise claims and positions, but remain free to reassert their claims or positions in subsequent proceedings. In addition, parties are more likely to compromise if they are assured that the decision based upon their compromise will not set precedent. In AT&T's exemption case, a similar stipulation allowing parties to reassert claims in future proceedings was made and approved by the Commission. *In the Matter of the Request for Agency Action of AT&T Communications of the Mountain States, Inc. for Exemption from Certain Requirements of Title 54, Public Utilities Statutes, of the Utah Code*, Docket No. 92-087-01, Order (Utah P.S.C.

March 15, 1993) at 12; Stipulation and Joint Motion (January 18, 1993) at 6.

Based upon the foregoing, we find and conclude that it is in the public interest to accept the Stipulation under the understanding that it does not bind the parties to future positions and that it will not be regarded as precedent by the Commission in future dockets.

Based upon the the Stipulation, U.C.A. §54-7-1, and the foregoing discussion, findings, and conclusions, the Commission makes the following order.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. US WEST may price the Subject Services by means of a price list or competitive contract pursuant to Utah Code Ann. § 54-8b-2.3, but shall be exempt from the procedures and conditions of Subsection § 54-8b-2.3(2)(b) with respect to obtaining pricing flexibility for the Subject Services. This paragraph is intended to provide the same pricing flexibility to US WEST that is granted to all other Utah certificated facility-based providers of the Subject Services.
2. US WEST shall remain subject to the price floor test in Utah Code Ann. § 54-8b-3.3(3) and the cross subsidy test in Utah Code Ann. § 54-8b-6 with respect to the Subject Services. US WEST shall also comply with Utah Administrative Code R746-349-6.
3. During the period of time for which the Subject Services would have otherwise been subject to maximum prices under Utah Code Ann. § 54-8b-2.4(4)(a), US WEST shall not charge an amount for a Subject Service or plan in excess of the average rate per minute of tariffed rates in effect for that service or plan on the date of this Order.
4. US WEST shall file price lists for the Subject Services with the Commission and the Division. These price lists shall be handled and treated by the Commission in the same manner as price lists filed by other facility-based providers of the Subject Services. Once the price lists for the Subject Services have become effective, US WEST may withdraw its tariffs for the Subject Services.
5. The Stipulation and this Order shall not serve as precedent beyond this docket.
6. US WEST's Operator Services may be deregulated after review and approval by the Commission of a plan for deregulation of Operator Services. US WEST may file a plan in a separate docket for this review and approval.
7. Within 20 days of issuance of this Order, an aggrieved party may file a written request for review by the Commission. If such request is denied in writing within 20 days, or is deemed denied as a result of the Commission taking no action on it within 20 days, the aggrieved party has 30 days following such denial within which to petition the Supreme Court for review.

DATED at Salt Lake City, Utah, this 12th day of January, 1999.

/s/ Stephen F. Mecham, Chairman

(SEAL) /s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary