



0000008518

RECEIVED
AZ CORP COMMISSION



AT&T

Richard S. Wolters
Attorney

FEB 16 12 13 PM '99

Room 1575
1875 Lawrence Street
Denver, CO 80202
303 298-6741

DOCUMENT CONTROL

VIA HAND DELIVERY

February 16, 1999

Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

RE: Docket No. T-00000b-97-0238

To The Commission:

Attached please find an original and ten copies of the Motion by Joint Movants to Reject U S WEST's Notice of Intent to File With FCC and Response to U S WEST's Motion for Immediate Implementation of Procedural Order in the above referenced matter.

Sincerely,

Richard S. Wolters

Attachment

cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of the Motion By Joint Movants To Reject U S WEST's Notice Of Intent To File With FCC And Response To U S WEST's Motion For Immediate Implementation Of Procedural Order regarding Docket No. T-00000B-97-0238, were sent via overnight delivery this 16th day of February, 1999, to:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007



and that a copy of the foregoing was Hand Delivered this 16th day of February, 1999 to the following:

Christopher Kempley
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007

Ray Williamson, Acting Director
Arizona Corporation Commission
Utilities Division
1200 West Washington
Phoenix, AZ 85007

and that a copy of the foregoing was sent via Overnight Delivery this 16th day of February, 1999 to the following:

Thomas M. Dethlefs, Esq.
U S WEST Communications, Inc.
1801 California Street, #5100
Denver, CO 80202

Timothy Berg
Fennemore Craig, P.C.
3003 North Central Ave., #2600
Phoenix, AZ 85012

and that a copy of the foregoing was sent via United States Mail, postage prepaid, this 16th day of February, 1999 to the following:

Maureen Arnold
U S WEST Communications, Inc.
3033 North 3rd St., Room 1010
Phoenix, AZ 85012

Robert Munoz
WorldCom, Inc.
225 Bush Street, Suite 1900
San Francisco, CA 94014

Scott Wakefield
Deborah R. Scott, Esq.
Residential Utility Consumer Office
2828 North Central Ave., #1200
Phoenix, AZ 85004

Karen Johnson
Penny Bewick
Electric Lightwave, Inc.
4400 NE 77th Ave
Vancouver, WA 98662

Michael M. Grant, Esq.
Gallagher and Kennedy
2600 North Central Ave.
Phoenix, AZ 85004-3020

Thomas L. Mumaw, Esq.
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-0001

Mark Dioguardi, Esq.
Tiffany and Bosco, P.A.
500 Dial Tower
1850 North Central Ave.
Phoenix, AZ 85004

Donald A. Low
Sprint Communications Company L.P.
8140 Ward Parkway 5E
Kansas City, MO 64114

Lex J. Smith
Michael W. Patten
Brown & Bain, P.A.
P. O. Box 400
2901 North Central Ave.
Phoenix, AZ 85001-0400

Charles Kallenbach
American Communications Services, Inc.
131 National Business Parkway
Annapolis Junction, MD 20701

Joyce Hundley
United States Dept. of Justice
Antitrust Division
1401 H Street NW, Suite 8000
Washington, DC 20530

Thomas H. Campbell
Lewis and Roca
40 N. Central Ave.
Phoenix, AZ 85004

Barry Pineles
GST Telecom, Inc.
4001 Main Street
Vancouver, WA 98663

Rex Knowles
NEXTLINK
111 E. Broadway, Suite 1000
Salt Lake City, UT 84111

Douglas G. Bonner
Alexandre B. Bouton
Swidler & Berlin, Chartered
3000 K Street, N.W. – Suite 300
Washington, D.C. 20007

Joseph Faber
Teleport Communications Group, Inc.
1350 Treat Blvd., Suite 500
Walnut Creek, CA 94596

Bill Haas
Richard Lipman
McLeod USA
6400 C Street SW
Cedar Rapids, IA 54206-3177

Carrington Phillip
Fox Communications, Inc.
1400 Lake Hearn Drive, N.E.
Atlanta, GA 30319

Richard Smith
Director of Regulatory Affairs
Cox Communications
2200 Powell Street, Suite 795
Emeryville, CA 94608

Kath Thomas
Brooks Fiber Communications
1600 South Amphlett Blvd., #330
San Mateo, CA 94402

Thomas F. Dixon
MCI Telecommunications Corporation
707 – 17th Street, #3900
Denver, CO 80202



the Commission's existing procedural orders and confirm that a hearing will be held for the purpose of determining U S WEST's compliance with Section 271 of the Telecommunications Act of 1996 ("Act").

I. INTRODUCTION

Under the Act the FCC is required to consult with the Commission regarding U S WEST's compliance with the requirements of Section 271 of the Act. As the Commission acknowledged in its own orders, the Commission must provide its recommendation to the FCC within 20 days after U S WEST files an application with the FCC under Section 271. For this reason, the Commission properly adopted procedural orders establishing the orderly process through which U S WEST must provide information to the Commission to enable the Commission to make its recommendations to the FCC. These orders require that U S WEST provide the Commission, at the time of its initial filing, with the complete record it intends to present to the FCC to demonstrate its compliance with Section 271.

U S WEST has now filed a notice that it intends to file a Section 271 application with the FCC within 90 days. Contrary to the explicit terms of the Commission's orders, however, U S WEST provided no information with its filing to demonstrate the extent to which it complies with Section 271 of the Act and the FCC's implementation orders. Instead, U S WEST has filed its notice under the terms of its own proposed procedural order under which U S WEST will not file its testimony until March 31, 1999, almost two months after its initial filing.

U S WEST has violated the Commission's orders by failing to provide the Commission with the complete record U S WEST intends to present to the FCC. Moreover, U S WEST's proposed procedures would deprive the Commission and intervenors of any real opportunity to evaluate U S WEST's application. For these reasons, Joint Movants request that U S WEST's notice be rejected and that U S WEST

be ordered to file a notice of intent only when it is prepared to file with this Commission all of the information which it intends to file with the FCC. In addition, Joint Movants request that the Commission deny U S WEST's request for changes in the procedural schedule and maintain the procedural requirements established by the Commission's existing orders.

II. ARGUMENT

A. U S WEST's Filing Ignores This Commission's Procedural Orders.

Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. *See In the Matter of Application of Ameritech Michigan, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, interLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-137 (released August 19, 1997), ¶ 43 (“*Ameritech Michigan Order*”). For this reason, the FCC requires that a Section 271 application must include **all** of the factual evidence upon which an applicant intends to rely in showing that it has met the requirements of the Act on the date that it is filed. *Id.*, ¶ 49. The FCC has determined that this is “the only workable rule given the unique scheme of accelerated and consultative review that Congress crafted for Section 271.” *Id.*, ¶ 50.

This Commission has rightly determined that its own interests, along with the interests of the other parties in this proceeding, require a rule similar to the FCC's. For these reasons, the Commission's orders include detailed requirements to which U S WEST must respond in providing information to the Commission at least 90 days before filing with the FCC. *See In the Matter of U S WEST's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. U-97-238, Decision No. 60218 (Arizona Corp. Comm'n, docketed May 27, 1997) at Appendices A, B. Under the rules established by the Commission, U S WEST must file “all information responsive” to

certain questions, along with “the full and complete application which U S WEST intends to file with the FCC” at least 90 days prior to making its FCC filing. *See Id.*, Procedural Order (Docketed June 16, 1998) at 2.

Notwithstanding this clear direction from the Commission, U S WEST has made no effort to comply with the Commission’s orders. U S WEST filed no factual information with its Notice of Intent. Instead, U S WEST proposes that the Commission ignore its own prior determinations in favor of a new procedural schedule under which U S WEST will provide *no information* regarding its compliance with the Act until March 31, 1999. *See* U S WEST’s Motion for Immediate Implementation of Procedural Order at 5.

U S WEST’s attempt to circumvent the Commission’s review by failing to file the factual information supporting its application circumvents the Commission’s purposes in outlining and obtaining the information U S WEST is required to file. Without some knowledge of U S WEST’s evidence regarding its compliance with the Act, no intervenor can provide informed comments to the Commission for review in evaluating U S WEST’s contentions. Intervenors will have no choice but to conduct broad discovery of all U S WEST procedures, rather than discovery focused on the issues identified by U S WEST’s testimony. Moreover, the time frames U S WEST has proposed will not permit the Commission or any of the parties sufficient time to conduct any reasonable investigation of U S WEST’s assertions and evidence. For all of these reasons, U S WEST’s Notice of Intent and its proposed procedural schedule should be rejected.

B. There is No Basis for U S WEST’s Refusal to File Its Case As Required by the Commission.

U S WEST bases its failure to file a complete application upon a claim that it has suffered delay in other jurisdictions, making its original filings in those jurisdictions “outdated and irrelevant.” *Id.* at 3. Joint Movants agree that U S WEST, in fact, has

outdated and irrelevant information on file in a number of its Section 271 applications throughout the region. The problems experienced in those states, however, have everything to do with U S WEST's own actions, and nothing to do with any problem that will be cured by U S WEST's proposed procedures.

The problems experienced in Montana and other states cited by U S WEST were caused directly by U S WEST's failure to file a complete application in the first instance. In Montana, for example, intervenors pointed out significant flaws in U S WEST's initial filing in the Motion to Dismiss and Motion for Summary Judgment. U S WEST attempted to cure some of the incompleteness in its original filing by supplying hundreds of pages of new factual material to the Commission with its rebuttal testimony *only a few weeks before the scheduled hearing*. The rebuttal testimony, in fact, included testimony on a number of issues that were not even addressed in U S WEST's initial filing. U S WEST's actions gave the Commission no choice, but to postpone the hearing for five months to permit all parties an opportunity to review and comment upon U S WEST's additional filing. This is the reason that the proceeding in Montana has taken so long to complete.

To prevent this situation from occurring in Arizona, the Commission should require that U S WEST comply with the existing procedural orders and provide all of the evidence upon which it intends to rely with its initial filing, including the information required by Appendices A and B to the Commission's May 1997 Order. This rule will encourage U S WEST to make its filing only when it has, in fact, complied with Section 271. As the FCC has determined, U S WEST has the burden "in the first instance . . . [to] present a prima facie case in its application that all of the requirements of Section 271 have been satisfied." *Ameritech Michigan Order*, ¶ 44. If U S WEST cannot meet this burden, any filing by U S WEST would simply waste the time of this Commission and all of the other parties. There is no reason, therefore, for the

Commission to change its requirement that U S WEST file a full and complete application with its notice as the Commission's Orders require.

C. U S WEST's Proposed Procedural Schedule is Unworkable.

U S WEST's proposed procedural schedule contains a number of problems that clearly require this Commission to reject it. U S WEST proposes that the parties issue all initial discovery no later than Wednesday of this week (February 17, 1999), and before U S WEST files its testimony. U S WEST's proposal will do nothing more than substantially expand the amount of discovery that the parties must undertake. Without testimony from U S WEST demonstrating the manner in which U S WEST claims to have met Section 271 requirements, the parties will be forced to ferret out all of this information from U S WEST during the course of discovery. This may require hundreds or even thousands of additional data requests, many of which could be circumvented if U S WEST first provided the evidence required to prove its *prima facie* case. With testimony on file, the parties could conduct focused discovery. Without testimony, the intervenors would be in the dark as to what issues could be fruitful for discovery and will be required to conduct broad discovery into all aspects of U S WEST's compliance and performance.

U S WEST's proposed schedule also appears to contemplate significant discovery aimed at intervenors. Again, experience in other states should provide this Commission with significant cautions against permitting U S WEST to use discovery to discourage parties from voluntarily providing information to the Commission in this proceeding. As the FCC has noted, U S WEST must prove that it meets the requirements of Section 271 "even if no party opposes the BOC's application." *Id.*, ¶ 43. None of the intervenors have an obligation to participate in this proceeding. Nevertheless, many of the intervenors have direct experience with U S WEST and can supply the Commission with relevant information important to the Commission's recommendation to the FCC. In many other jurisdictions, including Montana, New Mexico, and Nebraska, U S WEST

has imposed burdensome and expensive discovery on intervenors. The Commissions in Montana and New Mexico wisely prohibited U S WEST's efforts. In Nebraska, however, the Commission permitted U S WEST to conduct unfettered discovery. This, in turn, led almost all of the intervenors to withdraw from the proceeding to avoid the burden and expense of responding to broad and competitively sensitive discovery, depriving the Commission of important information in evaluating U S WEST's application.

The procedural schedule U S WEST proposes seems to anticipate extensive discovery by U S WEST, including depositions and unlimited data requests as against the intervenors. It is not appropriate to impose such obligations upon voluntary participants in the proceeding. It is even less appropriate to impose these obligations on non-participants, which it appears U S WEST intends to do by proposing that the Commission approve the use of third-party subpoenas as part of its proposed procedural schedule. All of the information necessary to prove whether U S WEST complies with the requirements of Section 271 is within U S WEST's possession and control.

D. The Commission Should Confirm that a Hearing Will Be Held On U S WEST's Application.

Joint Movants believe that the Commission's procedural orders set forth a reasonable schedule that will permit the Commission to make a considered recommendation to the FCC. The Commission's requirement that U S WEST file its complete FCC case at the beginning of the proceeding will allow the Commission and all parties an opportunity to evaluate U S WEST's claims of compliance with the Act. However the Commission should confirm that hearings will be held before the commencement of a Section 271 proceeding.

The Commission's order of June 16, 1998, indicates that a hearing will be held to determine U S WEST's compliance once U S WEST has completed its full and complete application. Joint Movants agree that a hearing should be held at that time. U S WEST

appears to also agree with this position. Nevertheless, the order is ambiguous in that it also references the use of workshops rather than a hearing for the purpose of determining U S WEST's compliance. Joint Movants request confirmation that the issue of U S WEST compliance with Section 271 will be the subject of a formal hearing rather than workshop proceedings.

III. CONCLUSION

For all of these reasons, Joint Movants request this Commission reject U S WEST's motion for immediate implementation of procedural order and Joint Movants also request that the Commission confirm that a hearing will be held for the purpose of determining U S WEST's compliance with Section 271 of the Act. Finally, Joint Movants request that the Commission reject U S WEST's Notice of Intent to file with the FCC.

U S WEST should be directed to file a full and complete application at such time as it believes that it can present a *prima facie* case of compliance with Section 271.

Dated this 15th day of February, 1999.

AT&T COMMUNICATIONS OF
THE MOUNTAIN STATES, INC.

By:



Richard S. Wolters
Maria Arias-Chapleau
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6741

Joan Burke
Osborn Maledon, P.A.
2929 North Central Ave., 21st Floor
Phoenix, AZ 85012-2794
(602) 640-9356

GST TELECOM, INC.

By: Barry Pineles by Rsw
Barry Pineles
4001 Main Street
Vancouver, WA 98663
(360) 356-7104

SPRINT COMMUNICATIONS
COMPANY L.P.

By: Don A. Low by Rsw
Don A. Low
Sprint Communications Company, LP
8140 Ward Parkway SE
Kansas City, MO 64114
(913) 624-6865

ELECTRIC LIGHTWAVE, INC.

By: Mike Grant by Rsw
Mike Grant
Gallagher & Kennedy
2600 North Central
Phoenix, AZ 85004-3020
(602) 530-8291

MCI WORLDCOM, INC., on behalf of its
regulated subsidiaries

By: Thomas F. Dixon by Rsw
Thomas F. Dixon
MCI WorldCom, Inc.
707 17th Street, Suite 3900
Denver, CO 80202
(303) 390-6206

E.SPIRE COMMUNICATIONS, INC.

By: Mike W. Patten by Row
Mike W. Patten
Lex Smith
Brown & Bain, P.A.
2901 North Central
Phoenix, AZ 85012
(602) 531-8345