



0000008612

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

MAY 03 1999

DOCKETED BY	
-------------	--

RECEIVED  
AZ CORP COMMISSION

MAY 3 3 51 PM '99

DOCUMENT CONTROL

**JAMES M. IRVIN**  
Chairman  
**TONY WEST**  
Commissioner  
**CARL J. KUNASEK**  
Commissioner

**IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S  
COMPLIANCE WITH § 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996**

**DOCKET NO. T-00000B-97-0238  
RESPONSE BY JOINT  
INTERVENORS TO U S WEST'S  
MOTION TO RECONSIDER  
PROCEDURAL ORDER**

AT&T Communications of the Mountain States, Inc., TCG Phoenix (collectively "AT&T"), Sprint Communications Company, L.P., NEXTLINK Arizona, Inc., MCI Worldcom, Inc., ACI Corp. and Electric Lightwave, Inc. (all collectively "Joint Intervenors") hereby respond to U S WEST Communications Inc.'s ("U S WEST") Motion to Reconsider.

**I. INTRODUCTION**

On April 7, 1999, the Hearing Division issued a Procedural Order setting forth the timeline for this Commission's review of U S WEST's notice of intent to file an application under Section 271 of the Telecommunications Act of 1996 (the "Act"). In setting a hearing date for August 1999, the Hearing Division recognized both the complexity of U S WEST's filing and the experience of other states. No other state has accomplished a review of a Section 271 application filed by U S WEST within 90 days. In fact, in at least one state, U S WEST's application remained pending for almost one year because of U S WEST's failure to provide information necessary to evaluate the application.

Now, several weeks after the Hearing Division's order, U S WEST seeks to substantially shorten the Hearing Division's established schedule. U S WEST proposes that the Commission Staff Report and intervenors' testimony be filed on May 25, 1999, 30 days in advance of the date

required in the Procedural Order. U S WEST's failure to file its motion within a reasonable time after issuance of the Procedural Order seems designed specifically to prejudice intervenors. There is no basis for granting U S WEST's motion. The Hearing Division's Procedural Order makes sense, and U S WEST's motion should be denied.

## II. ARGUMENT

### A. **The Hearing Division's Procedural Schedule Is Designed to Permit an Ordered Approach to Review of U S WEST's 271 Application.**

The Procedural Order adopted by the Hearing Division is designed to allow an orderly review of U S WEST's application. U S WEST's application is several thousand pages long. Any considered evaluation of this long and complex filing requires sufficient time for discovery and analysis, both of which are provided by the Hearing Division's Order.

U S WEST's motion sets forth no substantive reason for its request that the Commission reconsider the Hearing Division's schedule. Instead, U S WEST alleges only that the intent of the intervenors is to delay this proceeding and that this intent provides a reason to shorten the schedule. U S WEST conveniently ignores the fact that it was not the intervenors who proposed the procedural schedule. The Hearing Division adopted this schedule on its own motion without input from intervenors. Given the complexity of U S WEST's application and the experience of other states, the Hearing Division determined that more time was needed to allow staff and the parties sufficient time to analyze and respond to the application. U S WEST provides no basis for reconsidering this analysis.

Experience in other jurisdictions has been that U S WEST itself is to blame for delays in prosecuting its Section 271 applications. In Montana, for example, U S WEST filed a wholly inadequate application, resisted discovery designed to determine the basis for its application, and then filed substantial new testimony shortly before the scheduled hearing. This approach required the Montana Public Service Commission to vacate the hearing date so that other parties

would have an opportunity to respond to U S WEST's newly filed information.<sup>1</sup>

This Commission and the Hearing Division have wisely attempted to avoid what happened in Montana. The Commission's Orders required that U S WEST file a complete application in the first instance. The Hearing Division's schedule provides for a discovery period long enough to allow discovery disputes to be resolved before intervenors must file their testimony. The wisdom of this approach is shown by the fact that U S WEST has now filed over 100 pages of objections to discovery, requiring intervenors to seek the Hearing Division's assistance in obtaining necessary information. In addition, even where it has not objected, U S WEST has only responded to about half of the propounded data requests, indicating only that it will provide further responses when it has gathered the requested information. By the time discovery motions are resolved and U S WEST has produced the required information, intervenors will need all of the time provided in the current schedule to prepare their responsive testimony.<sup>2</sup>

U S WEST's own failure to move quickly after the Hearing Division issued its Order demonstrates that U S WEST's real motive here may be strategic rather than its stated purpose of opposing delay. U S WEST waited two weeks to seek reconsideration. Because of this delay, by the time the Commission is able to review U S WEST's proposal, adoption of the proposal would leave very little time for intervenors to prepare testimony in advance of the proposed May 25, 1999, filing date. Moreover, under U S WEST's proposed schedule neither intervenors nor

---

<sup>1</sup> AT&T has serious concerns that U S WEST will file new evidence in this proceeding after AT&T has filed its response to U S WEST's initial testimony, denying AT&T an opportunity for discovery and to respond to such new evidence. See Response of U S WEST to Motion of Joint Movants to Require U S WEST to Supplement Its 271 Filing to Incorporate IMA Releases 4.0 at 3. ("[T]here will be many changes in the evidence in the five months between the filing of U S WEST's testimony and the hearing in this matter.")

<sup>2</sup> U S WEST misleadingly claims that the Hearing Division schedule extends the time for intervenors to file testimony from 30 to 90 days. In fact, the original procedural schedule provided intervenors with 30 **business** days to file testimony.

Staff would have sufficient time to obtain necessary discovery from U S WEST.<sup>3</sup> This alone provides sufficient reason for rejection of U S WEST's motion. The Hearing Division's Procedural Order makes sense and the Commission should reject U S WEST's proposals to revise that Order.

**B. There Is No Reason for the Commission to Order Additional Discovery from Intervenors.**

Apparently conceding that most of its discovery to date is not relevant, U S WEST now seeks to have the Commission rule on six of its original 41 discovery requests, claiming that these are the requests that are "central" to its application. The Hearing Division has not yet ruled on any of U S WEST's requests, making a motion for reconsideration premature. The Hearing Division has already required intervenors to provide information that Commission staff and the Hearing Division believe is relevant in determining U S WEST's application. Until this information is evaluated and the Hearing Division enters a final order on U S WEST's discovery, there is no reason for the Commission to intervene in the process.

Moreover, the discovery sought by U S WEST is not relevant. Two other commissions have ruled on almost identical discovery requests. These commissions determined that the requests do not seek information relevant to a determination of whether U S WEST meets the requirements of Section 271. These commissions, therefore, refused to permit U S WEST to use discovery as a tool to prevent intervenors in participating in Section 271 proceedings, and denied U S WEST's motion to compel responses.

The discovery at issue requires intervenors to reveal highly confidential internal procedures, systems and projected demand. According to U S WEST, it needs this information to argue that it should not be required to "develop the capability to support everything: every system, every [unbundled network element], every conceivable combination even if no

---

<sup>3</sup> U S WEST took almost three weeks to respond to Joint Movants' Motion to require U S WEST to supplement its Section 271 filing to incorporate IMA Release 4.0. Although it argued Joint Movants' Motion should be denied, it provided substantial supplemental material to Mr. Dean W. Buhler's affidavit to incorporate IMA Release 4.0. This supplemental filing necessitates maintaining the schedule adopted in the Procedural Order.

intervenor in the state needs the functionality.”<sup>4</sup> U S WEST’s argument is based upon the position that unless an intervenor is ordering an element or service today, there is no need for U S WEST to provide nondiscriminatory access to that element or service. This position is patently erroneous.

U S WEST has made this argument for limiting its duty to provide nondiscriminatory access to the Commissions in both New Mexico and Montana. Both of these Commissions have rejected U S WEST’s contention. As the New Mexico Commission pointed out,

Once again, U S WEST misconstrues the focus of this Section 271 case. The issue in this proceeding is not the system used by the CLEC; rather, U S WEST must show its OSS offers nondiscriminatory access to unbundled network elements and that the “OSS functions provided to competing carriers ... are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings.” Ameritech Michigan, FCC 97-137 at ¶ 139. See also Ameritech Michigan, FCC 97-137 at 141.<sup>5</sup>

For this reason, both the New Mexico and Montana Commission denied U S WEST’s requests for the same information it seeks here.

This analysis makes sense. In the first place, not every party that requires access to U S WEST’s systems is an intervenor in these proceedings. What intervenors need today cannot be the standard for what U S WEST must provide. Companies that are not involved in this proceeding or that have not yet begun to compete in Arizona may need access that the intervenors do not. What intervenors need or use today is simply not relevant to the issue of what U S WEST must provide to comply with the Act.

The standard for the access U S WEST must provide is objective and has been defined both by the FCC and the Act. U S WEST must provide access that “is equal to the level of

---

<sup>4</sup> U S WEST Motion for Reconsideration at 6.

<sup>5</sup> *In Re: U S WEST’s Compliance with Section 271(c) of the Telecommunications Act of 1996*, New Mexico State Corporation Commission, Dckt. 97-106-TC, Order Relating to Outstanding Discovery Motions, 9/21/98 (“*New Mexico Order*”) at ¶ 57.

access that the BOC provides to itself, its customers or affiliates, in terms of quality, accuracy and timeliness.”<sup>6</sup> As the New Mexico Commission noted concerning this standard,

Nondiscriminatory access is not defined in terms of providing the worst access to the operational support systems that the CLEC provides to itself.<sup>7</sup>

Instead, the measure is equal access. Until U S WEST allows new entrants to have the same access to its OSS as U S WEST provides for itself, it cannot be said to provide nondiscriminatory access and it cannot meet the requirements of Section 271.

The Hearing Division has taken a balanced approach to discovery. It has first requested that the intervenors respond to the Commission’s Attachment A and Attachment B questions. The Hearing Division will then determine whether further information is necessary.

This is an approach that makes sense. U S WEST does not need information in the intervenors’ possession to establish that it meets the requirements of Section 271. As the FCC has concluded:

The burden of proof with respect to factual issues [under Section 271] remains at all times with the BOC, even if no party opposes the BOC’s application.<sup>8</sup>

The intervenors have no obligation to participate in this proceeding. All of the information required to demonstrate U S WEST’s compliance with Section 271 is within U S WEST’s possession. Moreover, permitting U S WEST to undertake substantial discovery against the intervenors will discourage competitors from participating in Section 271 proceedings, denying relevant information to the Commission.

---

<sup>6</sup> *Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, Inter-LATA Services in Michigan*, FCC Docket No. 97-137, Memorandum Op. And Order (released 8/19/97) at ¶ 139 “*Ameritech Michigan Order*”).

<sup>7</sup> New Mexico Order, ¶ 49.

<sup>8</sup> *Ameritech Michigan Order*, ¶ 43.

### III. CONCLUSION

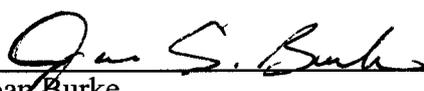
For all of these reasons, the Joint Intervenors request that U S WEST's Motion for Reconsideration be denied.

DATED this 3<sup>rd</sup> day of May, 1999.

Respectfully submitted,

**AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC. AND TCG  
PHOENIX**

Maria Arias-Chapleau  
Richard S. Wolters  
1875 Lawrence Street, Suite 1500  
Denver, Colorado 80202  
(303) 298-6527

  
\_\_\_\_\_  
Joan S. Burke  
Osborn Maledon, P.A.  
2929 North Central Ave., 21<sup>st</sup> Floor  
Phoenix, AZ 85012-2794

**SPRINT COMMUNICATIONS  
COMPANY L.P.**

Donald A. Low  
Sprint Communications Company, LP  
8140 Ward Parkway 5E  
Kansas City, MO 64114  
(913) 624-6865

**ELECTRIC LIGHTWAVE, INC.**

Michael M. Grant  
Gallagher & Kennedy  
2600 North Central  
Phoenix, AZ 85004-3020  
(602) 530-8291

**NEXTLINK ARIZONA, INC.**

Daniel Waggoner  
DAVIS WRIGHT TREMAINE  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688  
(206) 628-7789

**MCI WORLDCOM, INC.**, on behalf of  
its regulated subsidiaries  
Thomas F. Dixon  
MCI WorldCom, Inc.  
707 17<sup>th</sup> Street, Suite 3900  
Denver, CO 80202  
(303) 390-6206

**ACI CORP. D/B/A ACCELERATED  
CONNECTIONS, INC.**  
Thomas H. Campbell  
LEWIS AND ROCA  
40 North Central Avenue  
Phoenix, AZ 85004

ORIGINAL AND TEN COPIES of the foregoing  
hand-delivered for filing on May 3, 1999, to:

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

ONE COPY of the foregoing hand-delivered  
on May 3, 1999, to:

Mr. Jerry Rudibaugh  
Chief Hearing Officer  
Hearing Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

COPY of the foregoing mailed on May 3,  
1999, to:

Vince C. DeGarlais  
Andrew D. Crain  
Charles W. Steese  
U S WEST COMMUNICATIONS, INC.  
1801 California Street, #5100  
Denver, CO 80202

Timothy Berg  
FENNEMORE CRAIG  
3003 North Central Avenue, Suite 2600  
Phoenix, Arizona 85012-2913  
*Counsel for U S WEST Communications, Inc.*

Mark Dioguardi  
TIFFANY AND BOSCO, P.A.  
500 Dial Tower  
1850 North Central Avenue  
Phoenix, AZ 85004  
*Counsel for U S WEST COMMUNICATIONS*

Michael M. Grant  
Todd C. Wiley  
GALLAGHER AND KENNEDY  
2600 North Central Avenue  
Phoenix, AZ 85004-3020  
*Counsel for Electric Lightwave, Inc.*

Barry Pineles  
GST TELECOM, INC.  
4001 Main Street  
Vancouver, WA 98663

Robert Munoz  
WORLD COM, INC.  
225 Bush Street, Suite 1900  
San Francisco, CA 94107

Lex J. Smith  
Michael W. Patten  
BROWN & BAIN, P.A.  
P. O. Box 400  
Phoenix, AZ 85001-0400  
*Counsel for espire™ Communications, Inc. and  
Cox Arizona Telcom, Inc.*

Richard Smith  
Director of Regulatory Affairs  
COX COMMUNICATIONS  
2200 Powell Street, Suite 795  
Emeryville, CA 94608

Donald A. Low  
SPRINT COMMUNICATIONS COMPANY  
8140 Ward Parkway 5E  
Kansas City, MO 64114

Penny Bewick  
ELECTRIC LIGHTWAVE, INC.  
4400 NE 77<sup>th</sup> Ave.  
Vancouver, WA 98662

Richard M. Rindler  
Morton J. Posner  
SWIDLER & BERLIN, CHARTERED  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
*Counsel for GST Tucson Lightwave, Inc., GST  
Net (AZ), Inc., and MCI WorldCom*

Kath Thomas  
BROOKS FIBER COMMUNICATIONS  
1600 South Amphlett Blvd., #330  
San Mateo, CA 94402

Charles H. N. Kallenbach  
E-SPIRE™ COMMUNICATIONS, INC.  
133 National Business Parkway, Suite 200  
Annapolis Junction, MD 20701

Carrington Phillip  
COX COMMUNICATIONS, INC.  
1400 Lake Hearn Drive, N.E.  
Atlanta, GA 30319

Thomas H. Campbell  
LEWIS AND ROCA  
40 North Central Avenue  
Phoenix, AZ 85004  
*Counsel for MCI WorldCom, Inc. and ACI  
Corp. d/b/a Accelerated Connections, Inc.*

Thomas F. Dixon  
MCI TELECOMMUNICATIONS  
CORPORATION  
707 17<sup>th</sup> Street, #3900  
Denver, CO 80202

Frank Paganelli  
Colin Alberts  
BLUMENFELD & COHEN  
1615 M Street, Suite 700  
Washington, D.C. 20036  
*Counsel for ACI Corp. dba Accelerated  
Connections, Inc.*

Joyce Hundley  
UNITED STATES DEPT. OF JUSTICE  
Antitrust Division  
1401 H Street NW, Suite 8000  
Washington, DC 20530

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

Alaine Miller  
Director, Regulatory & Public Affairs  
NEXTLINK Communications  
500 108<sup>th</sup> Ave. NE, Suite 2200  
Bellevue, WA 98004

Daniel Waggoner  
DAVIS WRIGHT TREMAINE  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688  
*Counsel for NEXTLINK*

Steve Gibelli  
RESIDENTIAL UTILITY CONSUMER  
OFFICE  
2828 North Central Ave., #1200  
Phoenix, AZ 85004

Raymond S. Heyman  
Randall H. Warner  
ROSHKA HEYMAN & DeWULF  
Two Arizona Center  
400 N. 5<sup>th</sup> Street, Suite 1000  
Phoenix, AZ 85004  
*Counsel for Arizona Payphone Association*



A handwritten signature in cursive script, reading "Thomas H. Campbell", is written over a horizontal line.