



0000048249

RECEIVED
AZ CORP COMMISSION

BEFORE THE ARIZONA CORPORATION COMMISSION

JAN 19 3 48 PM '00

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CARL J. KUNASEK
Chairman
JAMES M. IRVIN
Commissioner
WILLIAM MUNDELL
Commissioner

Arizona Corporation Commission

DOCKETED DOCUMENT CONTROL

JAN 19 2000

DOCKETED BY 

IN THE MATTER OF THE
COMPLAINT OF AT&T
COMMUNICATIONS OF THE
MOUNTAIN STATES, INC. AGAINST
U S WEST COMMUNICATIONS, INC.
REGARDING ACCESS SERVICE,

DOCKET NO. T-02428A-99-0476
T-01051B-99-0476

**U S WEST COMMUNICATIONS, INC.'S
REPLY IN SUPPORT OF ITS MOTION TO
STAY PROCEEDINGS PENDING FCC
DECISION ON PREEMPTION, OR IN THE
ALTERNATIVE, TO SEVER CLAIMS
RELATING TO INTERSTATE SERVICE**

U S WEST Communications, Inc. ("U S WEST") hereby submits its reply in support of its motion to stay these proceedings pending the FCC's decision on whether this action is preempted or, in the alternative, to sever the claims brought by AT&T Communications of the Mountain States, Inc. ("AT&T") relating to interstate services.

I. INTRODUCTION

In this proceeding, AT&T alleges that U S WEST has failed to adequately provision AT&T orders for special access. In its original complaint, AT&T did not specifically state whether the orders in question related to intrastate services over which this Commission has jurisdiction. Accordingly, on October 20, 1999, the Commission entered an order granting U S WEST's motion for a

1 more definite statement and requiring AT&T to disclose the held
2 orders on which it bases its claims.

3 In its more definite statement, AT&T concedes that ninety-
4 one of the ninety-three held orders at issue in this proceeding
5 are for services rendered out of FCC interstate tariffs. Thus,
6 the threshold issue in this proceeding is whether this Commission
7 has the authority to change the terms under which U S WEST
8 provisions orders for interstate services. The FCC is now
9 considering this very issue and if it preempts AT&T's complaint
10 as U S WEST has requested, the effort and resources expended in
11 this proceeding will have been wasted. Accordingly, for the
12 reasons that follow, the Commission should stay this proceeding
13 until the FCC decides whether to preempt AT&T's complaint as to
14 orders purchased from interstate tariffs.

15 II. ARGUMENT

16 In its response to U S WEST's motion to stay, AT&T
17 erroneously argues that the Commission has jurisdiction to
18 consider all of AT&T's held order claims. On this point, AT&T is
19 simply wrong. The FCC has the exclusive jurisdiction and
20 authority to regulate interstate telecommunications. See North
21 Carolina Utilities Comm'n v. FCC, 552 F.2d 1036, 1046 (4th Cir.),
22 cert. denied, 434 U.S. 874 (1977) (recognizing primacy of FCC
23 jurisdiction); see also Southwestern Bell Telephone Co. v. FCC,
24 153 F.3d 523, 543 (8th Cir. 1998) (recognizing FCC
25 "responsibility to regulate interstate telecommunications"); 47
26 U.S.C. § 261(c) (state commission authority to impose additional

1 requirements limited to "intrastate services"). AT&T admits that
2 91 out of 93 of the held orders that are at issue in this case
3 were purchased out of the FCC tariff.

4 It is axiomatic that because AT&T purchased these services
5 out of the FCC tariff, they must go to the FCC to complain about
6 them because the FCC has exclusive jurisdiction over interstate
7 telecommunications services. By AT&T's own admission, only two
8 of the services at issue in this case was purchased out of the
9 Arizona tariffs. With the exception of these two, this
10 Commission lacks jurisdiction to decide AT&T's claims.

11 The filed-rate doctrine pre-empts AT&T's claims regardless
12 of what type of traffic is put on the facilities. The filed-rate
13 doctrine, also known as the filed-tariff doctrine, pre-empts the
14 Commission's regulation of the FCC services. AT&T v. Central
15 Office Tel., 524 U.S.214, 118 S. Ct. 1956, 141 L.Ed.2d 222
16 (1998). A carrier shall not "extend to any person any privileges
17 or facilities in such communication, or employ or enforce any
18 classifications, regulations, or practices affecting such charges
19 except as specified in such [tariff]." AT&T v. Central Office
20 Tel., 118 S. Ct. at 1962 (quoting 47 U.S.C. § 203(c)).

21 In AT&T v. Central Office, Central Office brought a lawsuit
22 in federal district court alleging that AT&T had promised and
23 failed to deliver various services, provisioning, and billing
24 options in addition to those set forth in the tariff, and that
25 AT&T's conduct was willful, so that consequential damages were
26 available under the tariff. 118 S. Ct. at 1961-62. Central

1 Office's state law claims rested on the premise that its
2 agreements with AT&T were not limited to AT&T's tariffs, but also
3 included certain understandings derived from representations and
4 statements made by AT&T representatives. Id. The United State
5 Supreme Court held that the filed tariff doctrine pre-empted
6 Central Office's claims. Under the filed-tariff doctrine, the
7 "rate" a carrier duly files in its tariff is the only lawful
8 charge. Even if a carrier intentionally misrepresents its rates
9 and a customer relies on the misrepresentation, the carrier
10 cannot be held to the promised rate if it conflicts with the
11 filed tariff. Id. at 1963. "'Ignorance or misquotation of rates
12 is not an excuse for paying or charging either less or more than
13 the rate filed. This rule is undeniably strict and it obviously
14 may work hardship in some cases, but it embodies the policy which
15 has been adopted by Congress in the regulation of interstate
16 commerce in order to prevent unjust discrimination.'" Id. at
17 1963 (quoting Louisville & Nashville R. Co. v. Maxwell, 237 U.S.
18 94, 97 (1915)).

19 In an extremely broad opinion, the United States Supreme
20 Court ruled that the filed tariff doctrine applies to much more
21 than just rates, and it applies to the claims that AT&T has made
22 in this case.

23 The Ninth Circuit thought the filed-rate doctrine
24 inapplicable "[b]ecause this case does not involve rates
25 or ratesetting, but rather involves the provisioning of
26 services and billing." 108 F.3d, at 990. Rates,
however, do not exist in isolation. They have meaning
only when one knows the services to which they are
attached. Any claim for excessive rates can be couched

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." Competitive Telecommunications Assn. v. FCC, 998 F.2d 1058, 1062 (C.A. D.C. 1993). The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges," 47 U.S.C. § 203(a); and when it makes it unlawful to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges" except those set forth in the tariff, § 203 (c).

AT&T v. Central Office, 118 S. Ct. at 1963 (emphasis added).

It is "clear that discriminatory 'privileges' come in many guises, and are not limited to discounted rates." Id. "[A] preference or rebate is the necessary result of every violation of [the analog to § 203(c) in the ICA] where the carrier renders or pays for a service not covered by the prescribed tariffs."¹ "Id. (parenthetical in original) (citing United States v. Wabash R. Co., 321 U.S. 403, 412-413 (1944)). In AT&T v. Central Office, the additional services and guarantees that Central Office claimed it was entitled to were based on the representations of AT&T representatives and AT&T sales brochures on topics specifically including faster provisioning and service support. Id. at 1964. Therefore, AT&T v. Central Office is directly

1 applicable to the case at bar because AT&T is alleging that
2 U S WEST has obligations concerning the provisioning of access
3 facilities in addition to the terms and conditions in the tariff.
4 Those claims are barred.

5 To the extent AT&T claims U S WEST is violating intrastate
6 tariffs, this Commission has jurisdiction to hear those claims.
7 Even if the Commission determines it should go forward and hear
8 AT&T's claims regarding U S WEST's intrastate tariffs, however,
9 it should dismiss AT&T's remaining claims. Further, as AT&T has
10 yet to identify any provision of U S WEST's intrastate tariffs
11 that has been violated, if the Commission decides to hear AT&T's
12 claims regarding these tariffs, it should order AT&T to identify
13 the provision it claims has been violated.

14 In any event, whether this Commission has jurisdiction to
15 decide these issues will be decided shortly by the FCC when it
16 rules on U S WEST's petition for declaratory ruling. Judicial
17 economy requires that the Commission not allow these proceedings
18 to continue pending that decision.

19 III. CONCLUSION

20 For these reasons, and those set forth in its Motion, U S
21 WEST respectfully requests that the Commission grant its Motion
22 and either stay these proceeding pending the FCC's ruling on the
23 petition or sever from this proceeding AT&T's claims relating to
24 services purchased out of interstate tariffs in order to allow
25 the FCC to resolve the jurisdictional issue.

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED this 19th day of January, 2000.

U S WEST COMMUNICATIONS, INC.
Thomas M. Dethlefs
Senior Attorney
1801 California St., Suite 5100
Denver, Colorado 80202
(303) 672-2948

and

FENNEMORE CRAIG

By: Mary Beth Phillip
Timothy Berg
Mary Beth Phillips
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913
(602) 916-5000

ORIGINAL AND TEN COPIES of the
foregoing filed this 19th day
of January, 2000, with Docket
Control, Arizona Corporation Commission.

COPY of the foregoing hand delivered
this 19th day of January, 2000, to:

Lynn Farmer, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

Deborah R. Scott, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing mailed this 19th
day of January, 2000, to:

Andrew D. Hurwitz
Joan S. Burke
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794
Attorneys for AT&T Communications of
The Mountain States, Inc.

1 Maria Arias-Chapleau
Richard S. Wolters
2 AT&T Law Department
1875 Lawrence Street # 1575
3 Denver, CO 80202

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Kathy Power
