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1999 SEP 30 P 1:12

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SEP 30 1999

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

DOCKETED BY
[Signature]

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

AT&T'S RESPONSE TO U S
WEST'S MOTION FOR MORE
DEFINITIVE STATEMENT,
MOTION FOR EXTENSION, AND
IN THE ALTERNATIVE, MOTION
FOR PARTIAL SUMMARY
JUDGMENT

AT&T Communications of the Mountain States, Inc. ("AT&T") submits its response to U S WEST Communications, Inc.'s ("U S WEST") motion for a more definitive statement, motion for extension and, in the alternative, motion for partial summary judgment ("Motion"). U S WEST's Motion is without merit and should be denied.

I. INTRODUCTION

U S WEST's Motion purports to raise a jurisdictional issue in an effort to significantly curtail the Arizona Corporation Commission's ("Commission" or "ACC") consideration of matters which are subject to Commission review under Arizona law. U S WEST's arguments ignore three undisputed factors. First, U S WEST's Service Quality Plan tariff, and the Commission's approval of that tariff, recognizes this Commission's jurisdiction over the interoffice facilities at issue in AT&T's Complaint. See U S WEST's Service Quality Plan tariff, § 2.5.4. Second, U S WEST's Motion concedes the Commission has some jurisdiction over the issues raised in AT&T's Complaint, making dismissal unwarranted. Third, the fundamental issue in this proceeding is that Arizona consumers are being denied access to telecommunications services based upon

U S WEST's unlawful and discriminatory actions in violation of Arizona statutes and U S WEST's Service Quality Plan tariff, which are clearly within the Commission's jurisdiction to investigate and enforce. U S WEST's attempt to summarily limit this proceeding at this juncture should be rejected. The scope of the Commission's authority to award AT&T its relief will be more fully developed through the record in this proceeding, but this in no way limits the Commission's jurisdiction and constitutional duty to proceed with AT&T's Complaint. A.R.S. Const. Art. 15, § 3.

II. BACKGROUND FACTS

In this proceeding, AT&T has clearly and specifically alleged that U S WEST has violated and continues to violate numerous Arizona statutes and U S WEST's Service Quality Plan tariff by failing to provide facilities necessary for access service, by failing to timely provision the facilities it eventually provides, and by favoring itself, its affiliates, and its own customers and certain communities in deciding where to provision facilities. In the current Complaint, AT&T has detailed the long history of this unfair and discriminatory treatment by U S WEST in the provision of both dedicated and switched access services. In fact, AT&T filed with the Commission a very similar complaint in February of 1997. *See* ACC Docket No. T-01051B-97-0117. After the parties reached a settlement agreement in January of 1998, U S WEST unilaterally terminated the agreement in July of 1998. U S WEST's access service has continued to decline through this period, and AT&T again was forced to seek the Commission's intervention. The current Complaint sets forth in detail the extent to which Arizona consumers have been harmed by U S WEST's actions. For the reasons set forth below, the Commission should investigate the Complaint allegations and has the authority to order the relief requested.

III. ARGUMENT

A. THE COMMISSION HAS ASSERTED JURISDICTION OVER THE FACILITIES ADDRESSED IN AT&T'S COMPLAINT

In December 1995, U S WEST filed its Service Quality Plan tariff in response to the Commission's Decision No. 59421 in Docket No. E-1051-93-183. The tariff became effective December 20, 1995. In Section 2.5.4, entitled "Interoffice Trunking," the tariff sets specific engineering design standards for interoffice trunk facilities. By requiring and approving the tariff, the Commission recognized that Arizona consumers are entitled to specific levels of quality for calls using such facilities.

AT&T's Complaint filed in this proceeding specifically alleges unlawful service with regard to both dedicated access facilities and switched access facilities. The switched facilities included within the Complaint have an even more substantial intrastate component than do the dedicated access facilities.

Although U S WEST's present motion is not styled as a motion to dismiss, it essentially seeks this result. U S WEST seeks to preclude the Commission from investigating or enforcing any state law requirements for access services which are priced and ordered under U S WEST's interstate access tariff on file with the Federal Communications Commission ("FCC"). Quite simply, U S WEST asks the Commission to require AT&T to file an amended complaint that excludes all allegations related to access services priced and ordered under its FCC tariff. U S WEST Motion at 4-5. The effect of the motion is to summarily limit the scope of the Commission's jurisdiction and authority to investigate and enforce state law requirements.

U S WEST seeks to insulate itself from this investigation even though the access services priced and ordered under its FCC tariff have definite and substantial intrastate components. U S WEST does not allege, nor can it, that access services ordered under the FCC tariff do not carry both intrastate and interstate traffic. Because a single access facility carries both interstate and

intrastate traffic, the U S WEST tariffs and FCC determinations set forth a method for choosing which tariff will govern price and ordering. The fact that price and ordering of an access service might be governed by U S WEST's FCC tariff does not make all of the traffic "interstate traffic." To the contrary, both the FCC and Arizona U S WEST tariffs require the application of a "Percent of Interstate Use" or "PIU" factor to ensure pricing will reflect the dual function of the access facility. See U S WEST's Arizona Intrastate Access Service Tariff, §§ 2.3.11 and 2.3.12 (Nov. 11, 1995); U S WEST Tariff F.C.C. No. 5, § 2.3.12 (July 27, 1994).) The PIU factors and tariffs merely reflect the FCC's regulation for apportioning access costs for facilities that carry both interstate and intrastate traffic. 47 C.F.R. § 36.154. Just as the intrastate nature of services is considered for pricing, the Commission must consider the intrastate nature of those services for regulatory and oversight purposes.¹

The Commission should not ignore its jurisdictional authority to the detriment of Arizona consumers. The Commission should act pursuant to its broad authority to regulate telephone companies to ensure the proper delivery of telecommunications services to the public.²

B. U S WEST HAS CONCEDED COMMISSION JURISDICTION OVER AT LEAST A PORTION OF THE COMPLAINT; JURISDICTIONAL DISPUTES REGARDING REMAINING CLAIMS CAN BE RESOLVED IN THE PROCEEDING

AT&T believes the Commission has full jurisdiction to grant the relief it has requested in its Complaint. Those arguments are addressed more fully below. Significantly, however, U S WEST's challenges only the Commission's jurisdiction to investigate U S WEST's provision

¹ "If the customer's estimate of the interstate charges on the bill constitutes more than ten percent of the total charges on that bill, the bill will be provided in accordance with the appropriate interstate rules and regulations specified in the Company's Interstate Access Service Tariff F.C.C. No. 5." U S WEST's Intrastate Access Tariff, § 2.3.12. In other words, the traffic may be 89% intrastate in nature, but the customer is *billed* under the terms of the interstate tariff. U S WEST argues the Commission has no authority over the facilities providing the service, although 89% of the traffic is intrastate.

² On September 20, 1999, the Minnesota Public Utilities Commission accepted jurisdiction of AT&T's Complaint filed with the Minnesota Commission. *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service*, Docket No. P-421/C-99-1183, Order Denying Motion, Accepting Jurisdiction, and Initiating Expedited Proceeding (Sept. 20, 1999).

of access services ordered from its FCC tariff. U S WEST's Motion at 3-4. U S WEST does not seek summary judgment with respect to allegations of unlawful and discriminatory provision of intrastate services, nor can it. U S WEST, in essence, concedes that the Commission has jurisdiction to investigate claims which relate to the provision of access service pursuant to its intrastate tariff. Moreover, U S WEST admits that the Complaint does include such allegations. *Id.* at 2. The conclusion is inescapable -- U S WEST concedes the Commission's jurisdiction over a portion of the Complaint.

At this early juncture, the Commission must decide only whether it has jurisdiction to proceed at all. It clearly does. The Commission need not summarily undertake the legal and factual analysis necessary to determine the full scope of the Commission's authority. It cannot be disputed that the transport facilities and access services provided by U S WEST carry both intrastate and interstate traffic. In the end, the Commission may have to consider the relief available regarding specific allegations based on the record evidence developed during the course of the proceeding. Yet, it would be premature and unnecessary at this time to fully insulate U S WEST from Commission investigation into actions which have left Arizona consumers without service.

C. **THE COMMISSION IS NOT PROHIBITED FROM INVESTIGATING HOW U S WEST'S PROVISIONING OF SERVICES THROUGH ITS FCC TARIFF IMPACTS ARIZONA CONSUMERS**

U S WEST argues that access services it provides pursuant to its FCC tariff are solely interstate in nature and within the exclusive oversight of the FCC -- not the Commission. U S WEST further claims the filed rate doctrine prevents the Commission from investigating this Complaint. This reasoning fails on both counts. First, it is not settled as a factual and legal matter that all facilities used to provide the access services *priced* pursuant to U S WEST's interstate tariff are considered "interstate" and subject solely to FCC oversight. Second, the filed rate doctrine restricts only the common law remedies of one who purchases services, not the regulatory oversight

of the Commission. This Commission has a statutory charge and responsibility to investigate these kinds of allegations for the protection of Arizona consumers. This statutory charge is unaffected by U S WEST's arguments.

1. U S WEST's Assertion that Services Ordered From its FCC Tariff are Exclusively Interstate in Nature is Unsupported

U S WEST baldly claims, without discussion, that access services provided pursuant to its FCC tariff are exclusively interstate in nature and subject to the exclusive jurisdiction of the FCC. U S WEST's Motion at 3-4. The Commission should not concede its lack of authority over service quality and telecommunications facilities under Arizona law, but instead should allow the record to be fully developed by the parties. First, all of the traffic at issue affects Arizona consumers. Consumers do not differentiate between intrastate and interstate service, and they look to the Commission to ensure they are treated fairly by entities subject to the Commission's jurisdiction in the provisioning of services. It would not be appropriate, especially at this early juncture, for the Commission to summarily abandon that role.

Second, a substantial portion of the traffic carried on the U S WEST access trunks *is* intrastate in nature. Nothing cited by U S WEST compels a finding that the FCC would have exclusive jurisdiction to oversee the provision and quality of those intrastate services. Such a finding would have far-reaching implications and cannot be made on the record currently before the Commission. Furthermore, such an argument also conflicts with the federal Act. 47 U.S.C. § 253(b) explicitly grants the Commission authority to impose requirements necessary "to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

U S WEST relies solely on the fact that some of the services are ordered through its tariff filed at the FCC, but that is not determinative.³ U S WEST's intrastate and interstate tariffs, and the FCC's determinations, contemplate that trunks will carry both intrastate and interstate traffic. *See* U S WEST Intrastate Access Tariff, §§ 2.3.11 and 2.3.12 (Nov. 20, 1995); U S WEST Tariff F.C.C. No. 5, § 2.3.12 (July 27, 1994). The U S WEST tariffs simply set forth a procedure to determine whether such facilities are ordered and priced under FCC or state tariffs. Even though the facility might be priced and ordered pursuant to a FCC tariff, the pricing requires consideration of the *scope* of the intrastate portion of service provided by application of the PIU factor. *See* U S WEST Tariff F.C.C. No. 5, § 2.3.12 (July 27, 1994). However, when determining what tariff to use to price the service, the fact that both intrastate and interstate traffic is carried on these facilities is not ignored but is a fundamental part of the analysis. U S WEST errs in suggesting that *pricing* through the FCC tariff makes all of the *traffic* "interstate traffic." On the contrary, the facilities that provide both interstate and intrastate access services are located in Arizona and are used to provide services to Arizona consumers, and regulatory oversight and control should reflect that as well. There is simply no legal or factual support to grant the motion for summary judgment submitted by U S WEST.

2. **The Filed Rate Doctrine Limits Common Law Remedies of a Purchaser, Not the Commission's Oversight of U S WEST's Services**

U S WEST's reliance on the filed rate doctrine is merely an attempt to confuse a purchaser's remedies with the Commission's investigation and oversight functions. U S WEST essentially mischaracterizes this proceeding by suggesting it is solely about AT&T's remedies for U S WEST's

³ Moreover, the cases cited by U S WEST in its Motion do not support its argument that the FCC has exclusive jurisdiction over all access services purchased out of the FCC tariff. In fact, U S WEST does not cite a single case in support of its strained tariff dichotomy argument. U S WEST cites the following two cases: *North Carolina Utilities Comm'n v. FCC*, 522 F.2d 1036 (4th Cir. 1977) *cert. denied*, 434 U.S. 874 (1977) (which address connecting terminal equipment to the interstate network) and *Southwestern Bell Telephone v. FCC*, 153 F.3d 523 (8th Cir. 1998) (which address the FCC's regulatory revisions to the local exchange carriers assessment of access costs). Neither case declares that state commissions do not have authority to regulated access to local exchange networks.

poor access services. Yet, this proceeding is of importance to the Commission because Arizona consumers have been left without adequate access service. The Commission must not allow U S WEST to confuse the Commission's broad obligations to protect Arizona consumers with AT&T's legal remedies. An investigation on AT&T's Complaint, for the benefit of Arizona consumers, is fully authorized by law, and unaffected by the filed rate doctrine.

The filed rate doctrine, on which U S WEST bases its entire motion, simply states that tariffed services must be provided and priced consistent with the tariff, and a *purchaser* cannot assert common law claims based on promises outside of the tariff. *AT&T v. Central Office Telephone Inc.*, 118 S. Ct. 1956, 1963 (1998). In *AT&T v. Central Office*, the purchaser sought damages for fraud and breach of contract even though the services were provided and priced consistent with the filed tariff. *Id.* at 1961-62. Ultimately, the Supreme Court held that the purchaser's rights and remedies were governed *by the tariff and applicable statutes*, but that the common law claims were preempted. *Id.* at 1964.

The filed rate doctrine has no importance in this proceeding. AT&T is not seeking monetary recovery pursuant to allegations based on any common law claims. It has filed a Complaint with the Commission and has asked the Commission to investigate alleged violations of Arizona law and tariffs. U S WEST has cited no legal authority to suggest that the filed rate doctrine in any way prevents a state commission from enforcing its own regulatory provisions which by their terms apply to U S WEST. As an example, if U S WEST marketed a service to Arizona consumers at a price of \$15.00 when the tariff price was \$20.00, the filed rate doctrine would allow U S WEST to collect \$20.00 from consumers. The filed rate doctrine would not, however, prevent the Attorney General from invoking consumer protection statutes to investigate and prosecute any false advertising as a violation of Arizona law. It would also not prevent this Commission from ordering U S WEST to stop such practices.

In addition to its vague reference to the filed rate doctrine generally, U S WEST also cites 47 U.S.C. § 203(c) for the proposition that carriers are prohibited from extending preferential treatment outside the scope of the tariff offerings. Apparently, U S WEST's argument is that it is required by federal law to consistently provide inadequate and poor access service to all customers in violation of Arizona laws or it will violate Section 203(c). Upon closer examination, however, it is clear that AT&T's Complaint is consistent with Section 203(c) because it is asking the Commission to stop U S WEST from giving its affiliates and certain customers preferential treatment prohibited by Section 203(a). *See e.g.*, Complaint at ¶¶ 70-78.

AT&T asks only that the Commission investigate alleged violations of Arizona law and tariffs and take appropriate enforcement action upon finding such violations. Nothing argued or cited by U S WEST, including the filed rate doctrine, prevents the Commission from investigating these violations pursuant to its responsibility to protect Arizona consumers.

D. U S WEST'S REQUEST FOR PARTIAL SUMMARY JUDGMENT FAILS TO MEET THE LEGAL REQUIREMENTS FOR SUCH RELIEF

Arizona is a "notice pleading" state. *See* Rule 8(a), Az. R. Civ. Pro. AT&T's Complaint meets the requirements of Rule 8(a).⁴ AT&T's Complaint provides U S WEST with sufficient notice of the factual and legal bases of the Complaint. Furthermore, as indicated in AT&T's Response to U S WEST's Motion, there are factual and legal bases for the Commission to hear the Complaint and grant AT&T relief.

Rule 56 of the Arizona Rules of Civil Procedure governs summary judgment. It provides, in pertinent part, that summary judgment shall be granted "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Arizona Supreme Court has held that:

The granting of summary judgment is only proper where two prerequisites have been met: first, after examining the entire record there is no genuine dispute as to any material fact and that only one inference can be drawn from the undisputed material facts; second, based upon the undisputed material facts the moving party is entitled to judgment as a matter of law.

Summary judgement is not designed to resolve factual issues nor is it a substitute for trial, even in the interests of the efficient administration of justice. The facts presented to the Court must be viewed in a light most favorable to the opposing motion.

Nicoletti v. Westcor, Inc., 131 Ariz. 140, 639 P.2d. 330, 332 (1982) (citations omitted). The Arizona appellate court has also commented on the legal standards for a motion for a summary judgment:

If there is the slightest doubt as to whether a factual issue remains in dispute, the granting summary judgment is erroneous and such doubt must be resolved in favor of a trial on the merits, and, even if there is no factual dispute, where possible inferences to be drawn from the circumstances are conflicting, summary judgment is unwarranted.

Morelos v. Morelos, 129 Ariz. 354, 631 P.2d. 136 (App. 1981) (citations ommitted).

U S WEST, in support of its request for partial summary judgment, provides no factual information.⁵ The Complaint is the only document upon which U S WEST's bases its Motion. U S WEST has filed no answer or affidavits in support of its Motion that contradict the facts in AT&T's Complaints. In its Motion, U S WEST argues that AT&T's complaint for inadequate access service must include service purchased out of an interstate tariff, and therefore, summary judgment should follow. AT&T has raised sufficient legal and factual justifications for this Commission to exercise jurisdiction over the facilities providing access service and the services themselves.

⁴ AT&T's Complaint also meets the requirements of the Commission's rules. R14-3-106.

⁵ In fact, U S WEST already has in its possession the information it seeks from AT&T because the orders for the services were placed with U S WEST. U S WEST was able to determine the information it argues it needs from its own records in an identical Minnesota case. *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service*, Docket No. P421/C-99-1183, Affidavit of Elizabeth Quintana (Sept. 2, 1999). It could have done so in Arizona.

The facilities used to provide the services carry both intrastate and interstate traffic. This is undeniable. The Commission has jurisdiction over intrastate facilities and services, including access. The Commission has jurisdiction over the quality of U S WEST's service, the inadequacy of U S WEST's facilities, the failure of U S WEST to make improvements to its facilities, and the unjust discrimination by U S WEST against certain Arizona customers and communities. *See* Complaint ¶ 3; 47 U.S.C. § 261(b) & (c) (states may enforce existing law or impose new requirements on telecommunications carriers for intrastate service or "exchange access"). Furthermore, the Telecommunications Act of 1996 recognizes that states are not precluded from imposing requirements necessary to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). AT&T's Complaint makes factual allegations that go to each of the issues upon which the Commission has been granted authority under state and federal law. Thus, there exist genuine issues of material fact regardless of the tariff from which AT&T purchases access service.

In short, U S WEST has failed to meet the legal requirements for summary judgment. Therefore, U S WEST's summary judgment request must be denied.

E. THE MOTION FOR EXTENSION TO ANSWER SHOULD BE DENIED

U S WEST, without any supporting arguments, requests an extension of time to answer AT&T's Complaint until 10 days after the Commission decides U S WEST motions. U S WEST's Motion should be denied.

AT&T filed nearly identical complaints in a number of states in U S WEST's region. In Minnesota, U S WEST was able to answer the complaint filed by AT&T. U S WEST was also able to determine from its own records the held orders that were ordered out of U S WEST's interstate

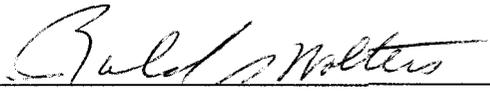
tariff.⁶ Furthermore, AT&T is not raising any claims under federal law. All claims raised by AT&T are supported by Arizona law and U S WEST's Service Quality Plan tariff. Therefore, U S WEST's request for an extension is unnecessary and simply a means to delay filing its answer. U S WEST should be ordered to file its answer immediately.

IV. CONCLUSION

For the above reasons, AT&T respectfully requests that the Commission deny U S WEST's Motion.

Respectfully submitted,

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MOUNTAIN STATES, INC.

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⁶ *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service, Docket No. P421/C-99-1183. See Affidavit of Elizabeth Quintana (Sept. 2, 1999).*

CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T's Response to U S WEST's Motion for More Definitive Statement, Motion for Extension, and in the Alternative, Motion for Partial Summary Judgement in Docket No. T-01051B-99-0476, were sent via overnight delivery this 29th day of September, 1999 to:

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and that a true and correct copy of the foregoing was sent via overnight delivery this 29th day of September, 1999 to the following:

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