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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman

JIM IRVIN
Commissioner

MARC SPITZER
Commissioner

Arizona Corporation Commission
DOCKETED

MAR 13 2002

DOCKETED BY

IN THE MATTER OF THE GENERIC PROCEEDINGS CONCERNING ELECTRIC RESTRUCTURING	DOCKET NO. E-00000A-02-0051
IN THE MATTER OF ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. 4-14-2-1606	DOCKET NO. E-01345A-01-0822
IN THE MATTER OF THE GENERIC PROCEEDING CONCERNING THE ARIZONA INDEPENDENT SCHEDULING ADMINISTRATOR	DOCKET NO. E-00000A-01-0630
IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC POWER COMPETITION RULES COMPLIANCE DATES	DOCKET NO. E-01933A-98-0471
ISSUES IN THE MATTER OF TUCSON ELECTRIC POWER COMPANY'S APPLICATION FOR A VARIANCE OF CERTAIN ELECTRIC COMPETITION RULES COMPLIANCE DATES.	DOCKET NO. E-01933A-02-0069

EXPEDITED CONSIDERATION THROUGH TELEPHONIC ORAL ARGUMENT IS RESPECTFULLY REQUESTED

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MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 26 (c) of the Arizona Rules of Civil Procedure ("ARCP"), A.A.C. R14-3-101 (A) and A.A.C. R14-3-109 (O), as well as applicable administrative law authority from jurisdictions having similar if not identical rules of discovery, Arizona Public Service Company ("APS" or "Company") requests that the Chief Administrative Law Judge ("ALJ") of the Arizona Corporation Commission ("Commission") issue a Protective Order in the above-captioned proceeding quashing the subpoenas duces tecum and notices of deposition (collectively referred to herein as "Subpoenas") served on the Company on March 8, 2002 (excerpts attached).[1] The deposition of the Company's expert witnesses as sought by such subpoenas is unnecessary, unreasonable, oppressive, cumulative, and duplicative. The information sought is also obtainable through means more convenient, less burdensome, or less expensive than the proposed depositions. Finally, Intervenor Panda Gila River L.P. ("Panda") has had ample opportunity to obtain any information it needed concerning the Company's Application through the Commission's long-accepted means of submitting written data requests.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Depositions Upon Oral Examination are Unnecessary

As the ALJ is no doubt aware, depositions upon oral examination are exceedingly infrequent in matters before the Commission. Some Arizona agencies do not permit them under any circumstances. Such depositions are especially unneeded in Commission proceedings wherein, as is here the case, the parties (and most specifically APS) have pre-filed their direct testimony in writing. Unlike proceedings in Superior

[1]. If the ALJ denies the Company's Motion, such denial should be conditioned on the imposition of strict conditions on Panda's conduct of any depositions of the Company's experts.

Court, where a party would not know what an opposing witness will testify to on direct until the day of trial, Panda knows word-for-word what each of the Company's three witnesses will say and what exhibits they will sponsor.

The Commission is also extremely liberal as regards written discovery, allowing parties to intermingle requests for production of documents, written interrogatories, and even depositions upon written questions under the generic heading of "data requests." Response times for such data requests are vastly shortened from those allowed for written discovery under the ARCP, and the Commission imposes no limits on the number of such written requests. *See, e.g.,* Rule 33.1 (a) - party limited to 40 interrogatories (each question or subpart of a question counts as an interrogatory); Rule 34 (b) - party limited to 10 requests for documents (each document or category of documents constitutes a separate request); and Rule 36 (b) - party limited to 25 requests for admissions. To date, APS has already responded to ten sets of data requests (some with nearly 100 questions in a single set) and has two additional sets outstanding. These responses have without exception been within the time specified by the ALJ in her Procedural Order of December 11, 2001 ("Procedural Order"), and the Company (unlike Panda and the other merchant plant intervenors) has not objected to answering a single question on the grounds of relevancy, burdensomeness or vagueness.

2. The ALJ May Limit Discovery Under the ARCP and the Commission's Rules of Practice

Neither the ALJ's Procedural Order nor A.A.C. R14-3-109 (P) grant parties before the Commission any greater substantive rights when it comes to the means and scope of discovery than does Rule 26 ARCP. Rule 26 (a) provides for discovery via depositions upon oral or written questions, written interrogatories, requests for production, requests for admissions, etc. However, Rule 26 (b) allows the court, or in this case the ALJ, to limit the means of discovery for any of three general reasons:

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- the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive;
- the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- the discovery is unduly burdensome or expensive.

The first two of these reasons for quashing the Subpoenas are self-evident under the circumstances, and the third is also present given the existence of the others.

It cannot be argued in good faith that answering written data requests, even with the short 10-day turnaround ordered by the ALJ, is not "more convenient, less burdensome, or less expensive" than sitting for many hours (and in the case of two of the Company's witnesses, traveling long distances) through a mini-hearing, which is exactly what a deposition upon oral examination would become. Since the Company filed its Application nearly five months ago and its written testimony and exhibits over three months ago, Panda also cannot seriously contend that it has not had "ample opportunity by discovery in the action to obtain the information sought." Commission Staff alone has served five sets of data requests on the Company. It is not APS' fault if Panda has seen fit not to take full advantage of its opportunities for written discovery. Finally, it is obviously expensive and burdensome to prepare and sit for depositions.[2] This involves not just the experts' time, but also the time of their assistants and legal counsel.

The Company's position in this case has been known to Panda since October 2001, and its testimony and exhibits matters of public record since early December 2001. It is now barely seven weeks before the hearing in this matter will begin. Panda and the other merchant plant intervenors have filed no testimony, no exhibits, and have refused to answer virtually every data request from the Company. APS and its consultants, on

[2] Panda has scheduled an entire day for each witness, which itself may be inadequate given the many parties that will likely demand to participate in the depositions. Out-of-town experts must also allow additional time for travel to and from Phoenix.

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the other hand, are fully engaged in responding to further data requests from Commission Staff, consumer groups such as Arizonans for Electric Choice & Competition, and the merchant plant intervenors, including Panda. At the same time, the Company is also attempting to prepare for a hearing and gather data for anticipated rebuttal testimony. It is at this critical time that Panda, having had the Company's written testimony for thirteen weeks, now wishes to schedule day-long depositions. This is more than simply burdensome; it is fundamentally unfair.

The Commission's Rules of Practice, and most specifically A.A.C. R14-3-109 (O) predate the 1984 amendments to the ARCP, which as the State Bar Committee notes to Rule 26 (b) reveal, were intended (in part) to further limit the use of unnecessary and unnecessarily burdensome and expensive discovery. However, APS believes the standards set forth in A.A.C. R14-2-109 (O) for limiting or conditioning discovery are clearly broad enough to encompass the more specific criteria of Rule 26 (b).

The Company's position herein is far from unusual and has been upheld in several other jurisdictions having provisions similar or identical to Rule 26 (b), ARCP.[3] For example, in *Re the Application of Western Wireless Holding Co. for Designation as an Eligible Telecommunications Carrier*, 1999 Wyo. PUC LEXIS 530, the applicant therein, Western Wireless refused to make its witnesses available for deposition by independent local exchange carriers opposed to the application and filed a motion for protective order alleging that depositions were unnecessary, overly burdensome, duplicative, etc. After reviewing Rule 26 (b) of the Wyoming Rules of Civil Procedure [which is identical to Rule 26 (b), ARCP], the Wyoming Public Service Commission held that depositions were inappropriate given the requirement for pre-filed testimony by Western Wireless and the ready availability of written interrogatories as an alternative to depositions upon oral examination:

[3] Although these cases are available through LEXIS, copies are attached as a courtesy.

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> ... Western Wireless has shown good cause to support its motion for a protective order. Western Wireless has demonstrated, consistent with Rule 26 (b) (1) (B) [WRCP], that the discovery sought could have been obtained through sources that were more convenient, less burdensome or less expensive, and that the Independent Companies had ample opportunity to conduct discovery in a timely manner. Independent Companies chose not to utilize these other sources in a timely manner, but rather chose to depose witnesses at the eleventh hour. (*See* 1999 Wyo. PUC LEXIS 530 [*8]).

A similar holding was made in *In Re US West Communications Inc. and its Ability to Serve South Dakota Customers*, 1998 S.D. PUC LEXIS 27. Therein the South Dakota Public Service Commission ("SDPSC") denied US West's request to depose SDPSC Staff witnesses who had previously pre-filed written testimony:

> On the issue of depositions, the Commission ruled that it will not allow depositions since the Commission is requiring prefiled testimony. The Commission noted that the use of prefiled testimony, and the limitation of direct testimony at a hearing to what is contained in the written testimony has traditionally been used by the Commission in place of depositions and is designed to limit burdensome discovery in administrative appeals. (*See* 1998 S.D. PUC LEXIS 27 [p.2].)

3. The Subpoenas Are Overly Broad

The Subpoenas each require the APS witness to produce "any and all documents pertaining to this matter," specifically including such obviously irrelevant items as "billing records," and not attempting to exclude materials covered by attorney-client privilege or materials that are confidential. Even the text of the Subpoenas themselves indicates that requests for privileged or confidential documents are objectionable. *See* page 3, lines 15 - 20 of the Subpoenas.

4. Conclusion

The issue before the ALJ is not really a discovery dispute because there is simply nothing to "discover." Panda already knows what the Company's witnesses will testify to on direct and what exhibits they will present. At best, Panda in simply seeking a mock hearing to test its cross-examination without the risk of the Commission hearing the "wrong" answer to the questions. At worst, it is a belated attempt to disrupt the

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Company's hearing preparation. In sum, the reason why there have been so very few depositions taken in Commission proceedings over the years is not because there are no attorneys willing to take them or because the Commission hears only trivial cases. It is instead because they are so patently unnecessary and expensive, and alternative means of discovery so effective, that practitioners before the Commission have not sought to start a new and significant escalation of the procedural "war of attrition" that so characterized civil discovery in Arizona Superior Courts prior to the 1984 amendments to Rule 26 ARCP discussed herein. APS urges the ALJ not to permit the otherwise orderly discovery process before the Commission to degenerate into what is little more than full-scale "exhibition hearing" – a hearing not held before the Commission and in full view of the public, but a secret "invitation only" hearing.

RESPECTFULLY SUBMITTED this 13th day of March, 2002.

SNELL & WILMER L.L.P.

Thomas L. Mumaw

Thomas L. Mumaw
Jeffrey B. Guldner
Faraz Sanei

Attorneys for Arizona Public Service Company

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Original and 18 copies of the foregoing filed this 13th day of March, 2002, with:

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

Copies of the foregoing mailed, faxed or transmitted electronically this 13th day of March, 2002, to:

All parties of record

Judith Borrego

Snell & Wilmer
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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822 **NOTICE OF DEPOSITION OF JACK E. DAVIS**

YOU ARE HEREBY NOTIFIED that, pursuant to A.A.C. R14-3-109(P) and Rules 26 and 30, Ariz. R. Civ. P. , a deposition will be taken upon oral examination of the person whose name is stated below at the time and place stated below before an officer authorized by law to administer oaths. The deposition will continue from day to day until completed.

PERSON TO BE EXAMINED: **Jack E. Davis**
400 North Fifth Street
Phoenix, AZ 84072

DATE/TIME OF DEPOSITION: March 25, 2002 at 9:30 a.m.

PLACE OF DEPOSITION: Fennemore Craig
3003 North Central Avenue, S# 2600
Phoenix, AZ 85012-2913

DATED this 8th day of March, 2002.

FENNEMORE CRAIG, P.C.

By _____
C. Webb Crockett
Jay L. Shapiro
3003 North Central Avenue, S# 2600
Phoenix, AZ 85012-2913
Attorneys for Panda Gila River, L.P.

PHX/DRENFRO/1278917.1/73262.005

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822 **SUBPOENA DUCES TECUM**

THE ARIZONA CORPORATION COMMISSION TO:

Jack E. Davis
APS
400 North Fifth Street
Phoenix, AZ 85072

PURSUANT to Ariz. Const. Art. 15 § 4, A.R.S. §§ 40-241, 40-242, 40-244, A.A.C. R14-3-101 and R14-3-109, and 16 A.R.S. Rules of Civil Procedures, Rules 30 and 45, you are hereby commanded to appear and give your testimony at the time and place specified below.

YOU ARE COMMANDED to appear and produce any and all documents pertaining to this matter, including, but not limited to, books, papers, documents, tangible things, notes, correspondence, drafts and billing records and statements.

DATE AND TIME OF APPEARANCE AND PRODUCTION: March 25, 2002 at 9:30 a.m.

PLACE OF APPEARANCE AND PRODUCTION: Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913

If you object because you claim the information requested is privileged or subject to protection as trial preparation material, you must express the objection clearly, and support each objection with a description of the nature of the document, communication or item not produced so that the demanding party can contest the claim. See Rule 45(d)(2) of the Arizona Rules of Civil Procedure.

If you object to the subpoena in writing you do not need to comply with the subpoena until a court orders you to do so. It will be up to the party or attorney serving the subpoena to seek an order from the court to compel you to provide the documents or inspection requested, after providing notice to you. See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.

If you are not a party to the litigation, or an officer of a party, the court will issue an order to protect you from any significant expense from the inspection and copying commanded. See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.

You may also file a motion in the superior court of the county in which the case is pending to quash or modify the subpoena if the subpoena:

(i) does not provide a reasonable time for compliance;

(ii) requires a non-party or officer of a party to travel to a county different from the county where the person resides or does business in person; or to travel to a county different from where the subpoena was served; or to travel to a place farther than 40 miles from the place of service; or to travel to a place different from any other convenient place fixed by an order of a court, except that a subpoena for you to appear and testify at trial can command you to travel from any place within the state;

(iii) requires the disclosure of privileged or protected information and no waiver of exception applies; or

(iv) subjects you to an undue burden. See Rule 45(c)(3)(A) of the Arizona Rules of Civil Procedure.

If this subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial trade information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific event or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial travel expense.

The court may either quash or modify the subpoena, or the court may order to appear or produce documents only upon specified conditions, if the party who served the subpoena shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that you will be reasonably compensated. See Rule 45(c)(3)(B) of the Arizona Rules of Civil Procedure.

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822 **NOTICE OF DEPOSITION OF DR. JOHN H. LANDON**

YOU ARE HEREBY NOTIFIED that, pursuant to A.A.C. R14-3-109(P) and Rules 26 and 30, Ariz. R. Civ. P. , a deposition will be taken upon oral examination of the person whose name is stated below at the time and place stated below before an officer authorized by law to administer oaths. The deposition will continue from day to day until completed.

PERSON TO BE EXAMINED: **Dr. John H. Landon**
Two Embarcadero Center, S# 1750
San Francisco, CA 94111

DATE/TIME OF DEPOSITION: March 22, 2002 at 9:30 a.m.

PLACE OF DEPOSITION: Fennemore Craig
3003 North Central Avenue, S# 2600
Phoenix, AZ 85012-2913

DATED this 8th day of March, 2002.

FENNEMORE CRAIG, P.C.

By _____
C. Webb Crockett
Jay L. Shapiro
3003 North Central Avenue, S# 2600
Phoenix, AZ 85012-2913
Attorneys for Panda Gila River, L.P.

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822 **SUBPOENA DUCES TECUM**

THE ARIZONA CORPORATION COMMISSION TO:

Dr. John H. Landon
Two Embarcadero Center, Suite 1750
San Francisco, CA 94111

PURSUANT to Ariz. Const. Art. 15 § 4, A.R.S. §§ 40-241, 40-242, 40-244, A.A.C. R14-3-101 and R14-3-109, and 16 A.R.S. Rules of Civil Procedures, Rules 30 and 45, you are hereby commanded to appear and give your testimony at the time and place specified below.

YOU ARE COMMANDED to appear and produce any and all documents pertaining to this matter, including, but not limited to, books, papers, documents, tangible things, notes, correspondence, drafts and billing records and statements.

DATE AND TIME OF APPEARANCE AND PRODUCTION: March 22, 2002 at 9:30 a.m.

PLACE OF APPEARANCE AND PRODUCTION: Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822 **NOTICE OF DEPOSITION OF DR. WILLIAM H. HIERONYMUS**

YOU ARE HEREBY NOTIFIED that, pursuant to A.A.C. R14-3-109(P) and Rules 26 and 30, Ariz. R. Civ. P. , a deposition will be taken upon oral examination of the person whose name is stated below at the time and place stated below before an officer authorized by law to administer oaths. The deposition will continue from day to day until completed.

PERSON TO BE EXAMINED: **Dr. William H. Hieronymus**
200 Clarendon Street, T-33
Boston, MA 02116

DATE/TIME OF DEPOSITION: March 21, 2002 at 9:30 a.m.

PLACE OF DEPOSITION: Fennemore Craig
3003 North Central Avenue, S# 2600
Phoenix, AZ 85012-2913

DATED this 8th day of March, 2002.

FENNEMORE CRAIG, P.C.

By _____
C. Webb Crockett
Jay L. Shapiro
3003 North Central Avenue, S# 2600
Phoenix, AZ 85012-2913
Attorneys for Panda Gila River, L.P.

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE ARIZONA PUBLIC SERVICE COMPANY'S REQUEST FOR VARIANCE OF CERTAIN REQUIREMENTS OF A.A.C. R14-2-1606.	DOCKET NO. E-01345A-01-0822 **SUBPOENA DUCES TECUM**

THE ARIZONA CORPORATION COMMISSION TO:

Dr. William H. Hieronymus
200 Clarendon Street, T-33
Boston, MA 02116

PURSUANT to Ariz. Const. Art. 15 § 4, A.R.S. §§ 40-241, 40-242, 40-244, A.A.C. R14-3-101 and R14-3-109, and 16 A.R.S. Rules of Civil Procedures, Rules 30 and 45, you are hereby commanded to appear and give your testimony at the time and place specified below.

YOU ARE COMMANDED to appear and produce any and all documents pertaining to this matter, including, but not limited to, books, papers, documents, tangible things, notes, correspondence, drafts and billing records and statements.

DATE AND TIME OF APPEARANCE AND PRODUCTION: March 21, 2002 at 9:30 a.m.

PLACE OF APPEARANCE AND PRODUCTION: Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913

Service: **Get by LEXSEE®**
Citation: **1999 Wyo. PUC LEXIS 530**

*1999 Wyo. PUC LEXIS 530, **

IN THE MATTER OF THE APPLICATION OF WWC HOLDING CO., INC. (WESTERN WIRELESS) FOR AUTHORITY TO BE DESIGNATED AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

DOCKET NO. 70042-TA-98-1; (RECORD NO. 4432)

Wyoming Public Service Commission

1999 Wyo. PUC LEXIS 530

June 25, 1999, Issued

CORE TERMS: deposition, discovery, interrogatory, protective order, ample opportunity, burdensome, depose, conduct discovery, public hearing, timely manner, outstanding, intervenors, expensive, scheduled, prefiled, discover, unduly, production of documents, compel discovery, duces tecum, time period, cumulative, responsive, convenient, worthless, notice

[*1] STEVE ELLENBECKER, Chairman; STEVE FURTNEY, Deputy Chairman; KRISTIN H. LEE, Commissioner

ORDER DENYING MOTION TO COMPEL AND GRANTING MOTION FOR PROTECTIVE ORDER

This matter is before the Commission upon the Motion to Compel filed by Intervenors, Range Telephone Cooperative, Inc., RT Communications, Inc., Dubois Telephone Exchange, Inc., and Union Telephone Company (Independent Companies), and Western Wireless' Motion for a Protective Order regarding the Proposed Deposition of Western Wireless' Witness, filed in the above captioned matter. The Commission noticed these Motion filings for legal argument, which was held at the Commission's regular open meeting of June 10, 1999. Counsel for Independent Companies, Western Wireless and U S WEST presented argument on the Motions at the June 10, 1999, open meeting.

The Commission, having reviewed the respective motions, and having considered the argument of the respective legal counsel, FINDS and CONCLUDES:

1. Independent Companies in their Motion to Compel, and through argument of counsel, requested that the Commission compel the deposition of Western Wireless' witness Gene DeJordy. In support of its motion, Independent Companies **[*2]** state that Western Wireless was advised pursuant to a faxed message on or around June 1, 1999, of its desire to depose Western Wireless' witness Gene DeJordy. Independent Companies were advised on June 8, 1999, in a response from Western Wireless that Mr. DeJordy would not be made available for a deposition.

2. Independent Companies support their motion to compel the deposition *duces tecum* of Mr. DeJordy by citing the Commission's Rules 108 and 109 which provide that depositions and discovery will generally be governed in accordance with the provisions contained in the Wyoming Administrative Procedure Act which also references the provisions contained in the Wyoming Rules of Civil Procedure. Bruce Asay, counsel for the Independent Companies, further argued that as a party the Independent Companies had a right to engage in discovery

and the right to depose under the Wyoming Rules of Civil Procedure. Mr. Asay stated that although responses to Independent Company interrogatories were received, they were not responsive and were "worthless".

Mr. Asay argued at the motion hearing that Mr. DeJordy be compelled to appear in Cheyenne for the deposition on June 16, 1999, that there be **[*3]** no limits on the scope or duration of the deposition, and that the Independent Companies not be required to pay any costs associated with the deposition.

3. Roger Franzen, counsel for U S WEST, argued that the Independent Companies should be allowed to depose Mr. DeJordy and indicated the desire of U S WEST to attend and participate in the deposition.

4. Western Wireless, in its Motion for Protective Order opposes the taking of Mr. DeJordy's deposition, citing as grounds for its opposition the following:

a. that upon contacting Mr. Asay regarding his June 1, 1999 fax stating his desire to conduct a deposition *duces tecum*, Mr. Asay was unable to state what documents he wished to be produced at the deposition, why he had not requested the deposition sooner as the case has been pending for nearly nine months, and he was unable to state what he expected to discover through deposition that he would not have been able to discover through interrogatories;

b. that this subject proceeding has been on file for nearly nine months and scheduled hearings have been delayed several times at the request of the Independent Companies;

c. that the Independent Companies have had ample time and **[*4]** opportunity to discover Western Wireless' position, its testimony, and documents that Western Wireless will rely on, as well as other issues;

d. that no limitations on the number of interrogatories or discovery cut-off dates were imposed by the Commission during the pendency of this proceeding;

e. that counsel for Western Wireless wrote a letter to Mr. Asay on February 3, 1999, requesting that if there was any dissatisfaction on the part of Independent Companies regarding prior interrogatory responses, that she be advised prior to February 10, 1999, or the assumption would be that there were no discovery-related disputes outstanding, and that Mr. Asay did not respond by the February 10, 1999 date, nor did he file additional interrogatories or a prior Motion to Compel;

f. that intervenors to this proceeding have had access to the prefiled testimony and exhibits of Western Wireless' witnesses which provide advance notice to the Independent Companies and other parties as to the position of Western Wireless, and parties will have an opportunity for cross-examination of Western Wireless witnesses at the public hearing which is scheduled for July 1, 1999;

g. that the issues in this **[*5]** proceeding are limited in scope and straightforward in nature, thus negating the need for depositions in addition to interrogatories and advanced prefiled testimony;

h. that this late request for deposition is unduly burdensome, cumulative, unnecessary and an attempt to add additional expense and unnecessary barriers to the resolution of this filing; and,

i. that Independent Companies' request for production of documents is untimely and in violation of W.R.C.P. 34 which requires submission of a written request for production of

documents thirty days in advance.

5. Counsel for Western Wireless further argues that based upon the above-cited grounds, Western Wireless has met any and all grounds set forth in W.R.C.P. Rule 26(b)(1)(B) which would permit the Commission to find that the deposition is unnecessary.

6. W.R.C.P. Rule 26(b)(1)(B) states:

Limitations. - The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive: (ii) the party seeking **[*6]** discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

7. The Commission finds that Intervenor Independent Companies have had adequate and ample opportunity to conduct discovery in this matter during the approximate nine-month time period that this proceeding has been on file with this Commission. During this nine-month time period all parties have been afforded an opportunity to conduct discovery, which has been exercised by U S WEST and Independent Companies through the written interrogatory process. This Commission has conducted discovery hearings during the course of this proceeding for the purpose of ruling on discovery disputes. As recently as May 25, 1999, the Commission held a procedural hearing for the purpose of taking argument on U S WEST's second Motion to Compel Discovery against Western Wireless. **[*7]** As represented by counsel for Western Wireless, counsel for the Independent Companies has remained silent in failing to voice any objections to the written responses of Western Wireless to outstanding discovery requests. Independent Companies have chosen not to avail themselves, in a timely manner, of the processes available to them to compel discovery, given their prior determination that Western Wireless' responses to its interrogatories were not responsive and were "worthless". The Commission during the course of this proceeding has directed and encouraged the parties to attempt to resolve any and all discovery disputes, consistent with the provisions of Rule 26 (f) regarding discovery conferences. Although Western Wireless and U S WEST were able to resolve their disputes regarding outstanding interrogatory issues through attempts for reasonable resolution, and finally hearing before the Commission, the Independent Companies chose not to use this process.

8. The Commission finds and concludes based upon the representations of parties in their respective motions, and supporting oral arguments at the public hearing held in these discovery matters, that Western Wireless has shown **[*8]** good cause to support its motion for a protective order. Western Wireless has demonstrated, consistent with Rule 26(b)(1)(B), that the discovery sought could have been obtained through sources that were more convenient, less burdensome or less expensive, and that the Independent Companies had ample opportunity to conduct discovery in a timely manner. Independent Companies chose not to utilize these other sources in a timely manner, but rather chose to depose witnesses at the eleventh hour. The Commission is very cognizant of the need to afford parties an opportunity to prepare and present their positions in contested cases before the Commission. Although the Commission has made its determination not to allow the deposition of Mr. DeJordy, the Commission also believes that the Independent Companies will not be unduly prejudiced by this decision, as the Independent Companies have had access to the prefiled testimony and exhibits of Mr. DeJordy which were filed with the Commission and other parties on May 13, 1999, and Independent Companies will be allowed ample opportunity to cross-examine Mr. DeJordy at the public hearing scheduled to commence on July 1, 1999.

NOW, THEREFORE, IT IS **[*9]** HEREBY ORDERED THAT:

1. For the reasons stated above, the Motion to Compel filed by the Intervenors, Range Telephone Cooperative, Inc., RT Communications, Inc., Dubois Telephone Exchange, Inc., and Union Telephone Company (Independent Companies) be, and the same is hereby, denied, and Western Wireless' Motion for a Protective Order regarding the Proposed Deposition of Western Wireless Witness, be, and the same is hereby, granted.

2. This Order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this 25th day of June, 1999.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chairman

KRISTIN H. LEE, Commissioner

ATTEST:

DAVID J. LUCERO, Assistant Secretary

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1998 S.D. PUC LEXIS 27

IN THE MATTER OF U S WEST COMMUNICATIONS, INC. AND ITS ABILITY TO SERVE SOUTH DAKOTA CUSTOMERS

TC97-192

South Dakota Public Service Commission

1998 S.D. PUC LEXIS 27

February 20, 1998, Dated

CORE TERMS: prefiled, discovery, amend, depositions, typographical error, workpapers, listened, noticed

JAMES A. BURG, Chairman; PAM NELSON, Commissioner; LASKA SCHOENFELDER, Commissioner

ORDER CONCERNING MOTION TO AMEND AND MOTION FOR DISCOVERY

On December 12, 1997, the Public Utilities Commission (Commission) received a Petition for Order to Show Cause (Petition) from Commission Staff. The Petition requested that the Commission issue an Order to Show Cause ordering U S WEST Communications, Inc. (U S WEST) to appear before the Commission and demonstrate its financial, managerial and technical ability, produce corporate and personal records, and show cause why one or more remedies, as listed in the Petition, should not be imposed on U S WEST.

On January 8, 1998, the Commission received a response from U S WEST to the Petition. At its January 8, 1998, meeting, the Commission listened to arguments concerning the Petition from Staff Attorney, Camron Hoseck, and U S WEST Attorney, William Heaston. The Commission deferred action at that meeting.

At its January 20, 1998, meeting, the Commission again considered the Petition. The Commission has jurisdiction over this matter pursuant to SDCL 49-2-1, 49-2-2, 49-2-4, 49-13-4, 49-13-5, 49-13-13, 49-13-17, 49-31-3, 49-31-7, 49-31-7.1, 49-31-10, 49-31-11, 49-31-38, 49-31-38.1, and 49-31-38.2 and ARSD 20:10:01:45. The Commission voted unanimously to accept Staff's Petition and issue an Order to Show Cause with the following possible additional remedies: that U S WEST be ordered to improve its planning and provisioning in growth areas; that U S WEST be ordered to provision, in a timely manner, adequate and reliable service; and that U S WEST be ordered to upgrade obsolete and non-functioning infrastructure.

On January 29, 1998, the Commission received a Motion and Notice of Motion to Amend Order to Show Cause (Motion to Amend) from Commission Staff. The Motion to Amend requested that a typographical error be corrected in the paragraph numbered 4 on page 7 by replacing the words "paragraph 2, above" with "paragraph 3, above." The Motion to Amend further requested that the order be amended to say that Commission Staff "may" file prefiled testimony as opposed to "shall" file prefiled testimony in order to allow Staff to call witnesses from the public.

On January 29, 1998, the Commission also received a Motion for Discovery and Request for Expedited Ruling (Motion for Discovery) from U S WEST. In its Motion for Discovery, U S WEST requested that the Commission issue Subpoenas Duces Tecum for the following people: Harlan Best; Gregory Rislov; Steven Wegman; Leni Healy; Tammi Stangohr; Bob Knadle; and William Bullard. The subpoenas requested certain documents and the taking of depositions of the above listed people. Commission Staff filed a resistance to the motion on February 2, 1998.

On February 3, 1998, at a duly noticed meeting, the Commission listened to arguments on the motions. On February 10, 1998, at a duly noticed meeting, the Commission ruled on the motions. The Commission granted Staff's motion to amend paragraph 4 on page 7 because it was a typographical error. The Commission further decided to amend its order with respect to prefiled testimony to allow members of the public to testify without filing prefiled testimony. However, the Commission ordered the Commission Staff to give U S WEST a list of those members of the public who will testify along with a short description of the subject matter of their testimony to U S WEST ten days prior to the hearing.

With respect to the Motion for Discovery, the Commission found that it would allow U S WEST to request from Commission Staff all documents and workpapers that were specifically relied upon by Staff to develop or support Staff's activity in this docket. The Commission also found that, based on Staff's Petition or Staff's prefiled testimony, U S WEST can also request any workpapers used by Staff to develop any numbers or other assertions by Staff made in its Petition or prefiled testimony. The Commission noted that the requesting of information of Staff by parties through data requests is consistent with past Commission practice. In addition, the Commission ruled that the Staff members who shall respond to these requests are the Staff members who worked as Commission Staff in this docket. As named by Staff Attorney Karen Cremer at the meeting, these Staff people are Harlan Best, Leni Healy, Charlie Bolle, and Tammi Stangohr.

On the issue of depositions, the Commission ruled that it will not allow depositions since the Commission is requiring prefiled testimony. The Commission noted that the use of prefiled testimony, and the limitation of direct testimony at a hearing to what is contained in that written testimony, has traditionally been used by this Commission in place of depositions and is designed to limit burdensome discovery in administrative appeals.

It is therefore

ORDERED, that Staff's motion to correct a typographical error is granted; and it is

FURTHER ORDERED, that the Commission's order will be amended to allow members of the public to testify without filing prefiled testimony but Commission Staff must give U S WEST a list of those members of the public who will testify along with a short description of the subject matter of their testimony to U S WEST ten days prior to the hearing; and it is

FURTHER ORDERED, that Staff shall give to U S WEST those documents as specified in the Motion for Discovery to the extent those documents were specifically relied upon by Staff in developing its case and U S WEST may request any workpapers used by Staff to develop any numbers or other assertions by Staff made in its Petition or in any prefiled testimony; and it is

FURTHER ORDERED, that U S WEST's request for depositions is denied.

Dated at Pierre, South Dakota, this 20th day of February, 1998.

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner

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