

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION FOR AN)	FINDINGS OF FACT AND
ORDER DIRECTING U S WEST)	CONCLUSIONS OF LAW;
COMMUNICATIONS, INC. TO FILE UPDATES)	NOTICE OF ENTRY OF
TO ITS EXCHANGE AND NETWORK)	ORDER
SERVICES CATALOG, ACCESS SERVICE)	
CATALOG, ADVANCED COMMUNICATIONS)	TC98-187
SERVICES CATALOG AND PRIVATE LINE)	
TRANSPORT SERVICES CATALOG)	

On October 26, 1998, Staff of the Commission petitioned the Public Utilities Commission (Commission) to issue an Order requiring U S WEST Communications, Inc. (U S WEST) to file updates to its Exchange and Network Services Catalog, Access Service Catalog, Advanced Communications Services Catalog, and Private Line Transport Services Catalog. On November 3, 1998, the Commission received from U S WEST an Affidavit of Colleen Sevold concerning Staff's Petition. The Commission issued an Order for and Notice of Hearing on February 18, 1999, stating that the issue at the hearing was whether U S WEST shall file updates to its Catalogs with the Commission and, if so, in what format. On February 24, 1999, the Commission received a letter from U S WEST requesting a more detailed and definite statement of the matters to be heard at the hearing. Based on this request, the Commission issued an Amended Order for and Notice of Hearing which stated that the hearing shall determine whether U S WEST shall file revised and updated tariffs in hard copy form or some type of electronic form when changes are made to fully competitive service offerings. The Commission limited the proceeding to fully competitive services based on Ms. Sevold's affidavit, referenced above, which stated that U S WEST would continue to file tariff pages for noncompetitive and emerging competitive services.

On March 5, 1999, the Commission received a Deposition Subpoena and Subpoena to Produce Documents from U S WEST. On March 5, 1999, the Commission received a letter from U S WEST stating that Ms. Sevold's affidavit relied on by the Commission "no longer reflects the position of U S WEST." U S WEST went on to state that "U S WEST is or will be offering products designed to meet competition that are within the statutory classification of emerging competitive and noncompetitive services, and it is U S WEST's view that these competitive rate offerings do not have to be filed." On March 9, 1999, Commission Staff filed an Objection to Amended Order for and Notice of Hearing and a Motion to Quash the subpoenas. On March 10, 1999, the Commission received a Motion for Continuance from U S WEST.

At its March 11, 1999, meeting, the Commission considered these matters. After listening to the arguments of the parties, the Commission voted to amend the Notice of Hearing in order to clarify the issues and to grant U S WEST's Motion for Continuance. (Commissioner Nelson, dissenting). The parties came to an agreement on the Deposition Subpoena and Subpoena to Produce Documents so the Motion to Quash became moot. A Second Amended Order for and Notice of Hearing was issued on March 18, 1999. The issues listed in the order were as follows: whether U S WEST shall file changes to all of its catalogs or tariffs with the Commission and, if so, in what format; whether U S WEST has failed to properly file changes to its tariffs or catalogs, and if so, what is the remedy; whether product or service offerings designed to meet competition that are within the statutory classifications of fully competitive, emerging competitive, and noncompetitive services shall be filed with the Commission; and how is it determined whether product or service offerings are designed to meet competition.

A hearing on all issues raised in this docket was held on April 27, 1999. Briefs were submitted following the hearing by U S WEST and Staff. By order dated August 26, 1999, the Commission voted to defer action on this docket indefinitely pending completion of a new docket to reclassify U S WEST's intraLATA toll and wide-area telephone services from emerging competitive to fully competitive. (Commissioner Schoenfelder, dissenting). On September 17, 1999, Commission Staff filed a Petition for Reconsideration. On October 6, 1999, U S WEST filed an answer to Staff's petition.

In Docket TC99-099, the Commission reclassified U S WEST's intraLATA toll and wide-area telephone services from emerging competitive to fully competitive. *In the Matter of the Inquiry of Whether to Reclassify U S WEST Communications, Inc.'s IntraLATA Toll and Wide-Area Telephone Services*, Docket TC99-099, issued December 8, 1999. In addition, U S WEST petitioned the Commission to reclassify directory assistance and related services from noncompetitive to fully competitive. In Docket TC99-098, the Commission reclassified directory assistance services arising from the utilization of the 411 and 555-1212 numbers from noncompetitive to fully competitive. *In the Matter of the Petition of U S WEST Communications, Inc. to Reclassify U S WEST's Directory Assistance Service*, Docket TC99-098, issued December 8, 1999.

At its January 18, 2000, meeting, the Commission considered how to proceed with this docket following the reclassification of toll and directory assistance services. The Commission decided as follows: (1) with respect to the issue of whether updates to tariffs and catalogs should be filed as paper copies with the Commission, the Commission finds that U S WEST's offer to furnish the Commission with paper copies of all tariff and catalog changes that it posts on its website within 30 days of the effective date of that rate change or service offering is an acceptable solution; (2) with respect to the issue of whether U S WEST is required to submit for pre-approval its tariffs and catalogs regarding the grant of discounts, incentives, services, or other business practices necessary to meet competition, the Commission finds that U S WEST is not required to submit them for pre-approval. The Commission recognizes that this allows U S WEST to make the initial determination of whether the tariff or catalog change is necessary to meet competition, however, the Commission finds that Commission Staff, other interested persons, or the Commission on its own motion may open a docket to determine whether the tariff or catalog change or addition is necessary to meet competition; (3) with respect to the issue of how new services are classified, the Commission finds that if U S WEST does not request a different classification, intraLATA new products and services not functionally required to provide local exchange service will remain classified as noncompetitive pursuant to Docket F-3743; and (4) with respect to promotions that last ninety days or less, U S WEST shall inform the Commission of the beginning and ending date of the promotion in accordance with the public notice requirement of SDCL 49-31-86. The Commission also ruled to sustain Staff's objection to U S WEST's motion to admit the deposition of Harlan Best to the record in its entirety, a motion it had taken under advisement at the hearing.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On October 26, 1998, Staff of the Commission petitioned the Commission to issue an Order requiring U S WEST to file updates to its Exchange and Network Services Catalog, Access Service Catalog, Advanced Communications Services Catalog, and Private Line Transport Services Catalog.

2. Prior to May of 1998, U S WEST filed with the Commission all changes in rates, terms, and conditions affecting noncompetitive or emerging competitive services with the Commission for approval. Tr. at 19. If the Commission modified any rates, terms, or conditions then U S WEST would re-submit the tariff pages consistent with those modifications. Tr. at 19-20. U S WEST also submitted any changes to its tariffs or catalogs affecting fully competitive services. Tr. at 19.

3. On November 3, 1998, Colleen Sevoid, U S WEST's manager of regulatory affairs, filed an affidavit in response to Staff's petition. In her affidavit, she stated that "U S WEST *continues* to file tariff pages for non-competitive services with the Commission consistent with SDCL 49-31-12.4." Exhibit 10 (emphasis added). The affidavit further stated that "U S WEST *continues* to file tariff pages for emerging competitive services with the Commission consistent with SDCL 49-31-12.5." *Id.* (emphasis added). Later the Commission received a letter from U S WEST stating this was no longer its position.

4. An example of a filing made by U S WEST that was not submitted for approval was its Simple Value Calling Plan, a new service offering that was issued on August 4, 1998, and became effective on August 7, 1998. Exhibits 3A, 3B. This is a Message Telecommunications Service which is classified as emerging competitive. Tr. at 26. Emerging competitive tariff pages that state "a new price or a change in price or practice affecting any emerging competitive telecommunications service" are to be filed with the Commission pursuant to SDCL 49-31-12.5.

5. As stated earlier, Ms. Sevoid stated in a sworn affidavit that as of November 3, 1998, U S WEST "continues to file tariff pages for emerging competitive services with the Commission consistent with SDCL 49-31-12.5." Based on this affidavit, U S WEST should have filed its Simple Value Calling Plan since it was a change in price or practice affecting an emerging competitive service. See Exhibit 10. At the hearing, Ms. Sevoid stated that SDCL 49-31-12.5 applied only to "any increase in prices to an emerging competitive service." Tr. at 131. However, SDCL 49-31-12.5 is not limited to increases in prices. Therefore, the Commission finds that the affidavit was incorrect and highly misleading when it stated that as of November 3, 1998, U S WEST *continued* to file its tariff pages consistent with SDCL 49-31-12.5. The Simple Value Calling Plan was a new price and practice for an emerging competitive service that was put into effect on August 7, 1998, and it was not filed with the Commission.

6. With respect to fully competitive services, prior to July 1, 1998, U S WEST decided that it would no longer file changes made to fully competitive services with the Commission. Tr. at 127. U S WEST never informed the Commission of this change in policy until questioned by Commission Staff. Tr. at 127-128. It was U S WEST's position that the information could be accessed on its web-site. Tr. at 128.

7. Harlan Best, staff utility analyst, stated that he receives inquiries from the public regarding U S WEST's rates and services and that having printed copies makes it easier for him to respond to those inquires. Tr. at 40-41. He also stated that the web pages are not always accurate. Tr. at 42-44. In addition, he experiences difficulties in downloading the tariff and searches are very time consuming. Tr. at 49-50.

8. As late as April of 1999, a customer who requested a copy of the tariff that showed the increase in the price for Caller ID was directed by U S WEST's business office to get a copy from the Commission. Tr. at 81.

9. Prior to May of 1998, U S WEST filed tariff pages that introduced new services and requested that the new services be classified as fully competitive. Tr. at 116.

10. U S WEST's position was that if prices are changed to meet competition, even if the market is not fully competitive, then tariffs should not need to be filed or approved by the Commission. Tr. at 177. It was U S WEST's position that competition was lessened when competitors are given advance notice of U S WEST's price changes. Tr. at 168.

11. In its reply brief, U S WEST stated that it would furnish the Commission with paper copies of all tariff and catalog changes that it posts on its web-site within 30 days of the effective date of that rate change or service offering.

12. The Commission rejects the findings of fact and conclusions of law submitted by U S WEST.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31, specifically 1-26-17.1, 1-26-18, 1-26-19, 1-26-19.1, 49-31-1 through 49-31-4, 49-31-5, 49-31-7, 49-31-7.1, 49-31-11 through 49-31-12.5, 49-31-38, 49-31-38.1, 49-31-84, 49-31-86, 49-31-86.1.

2. With respect to the issue of whether updates to U S WEST's tariffs and catalogs should be filed as paper copies with the Commission, the Commission finds that, consistent with U S WEST's offer, U S WEST shall furnish the Commission with paper copies of all tariff and catalog changes that it posts on its web-site within 30 days of the effective date of that rate change or service offering. The Commission finds that the filing of paper copies showing changes in tariff and catalog pages will enable Commission Staff to more efficiently answer inquiries from the public and track filings that U S WEST has not filed for approval because U S WEST believes the purpose of the filing was to meet competition.

3. Pursuant to SDCL 49-31-12.4 and 49-31-12.5, U S WEST is required to submit tariffs affecting noncompetitive or emerging competitive services for approval. However, SDCL 49-31-84 provides, in pertinent part, that "[n]otwithstanding any other provisions of chapter 49-31, any telecommunication company may grant any discounts, incentives, services, or other business practices necessary to meet competition."

4. The Commission finds that SDCL 49-31-84 creates an exception to the filing requirements of SDCL 49-31-12.4 and 49-31-12.5. Therefore, U S WEST is not required to submit for pre-approval its tariff and catalog pages which provide discounts, incentives, services, or other business practices necessary to meet competition.

5. The Commission recognizes that this allows U S WEST to make the initial determination of whether the discount, incentive, service, or business practice is necessary to meet competition. However, the Commission finds that Commission Staff, or other interested persons may petition the Commission to open a docket, or the Commission on its own motion may open a docket to determine whether the discount, incentive, service, or business practice was necessary to meet competition after the tariff or catalog pages have been implemented. The Commission finds that this procedure will allow U S WEST to implement, without delay, discounts, incentives, services, or other business practices which it believes are necessary to meet competition but with the knowledge that if the changes are not necessary to meet competition or if the changes are, in fact, designed to hinder competition, the Commission will take the appropriate action necessary to ensure that the

laws are complied with, including, but not limited to, requiring the discount, incentive, service, or business practice to be filed in accordance with SDCL 49-31-12.4 or 49-31-12.5.

6. The Commission finds that SDCL 49-31-84 does not give U S WEST the right to decide how a service is classified. Thus, a service that has been classified by the Commission will remain in that classification unless reclassified in accordance with SDCL 49-31-3.2 and 49-31-3.4. Further, with respect to new services, the Commission finds that if U S WEST does not request a different classification for intraLATA new products and services that are not functionally required to provide local exchange service, those new products and services will remain classified as noncompetitive pursuant to Docket F-3743. *In the Matter of the Inquiry into the Competitive Status of MTS, WATS and New Products and Services in South Dakota*, Amended Decision and Order, Docket F-3743, issued June 30, 1989.

7. Pursuant to SDCL 49-31-86, U S WEST may not increase prices for residential and business local exchange service and if U S WEST reduces prices it may not subsequently increase the price unless the reduction is a promotion that lasts ninety days or less. U S WEST is required to publicly announce the beginning and ending date of any such promotion.

8. The Commission finds that U S WEST shall inform the Commission of the beginning and ending date of the promotion in accordance with the public notice requirement of SDCL 49-31-86.

9. The Commission rejects the findings of fact and conclusions of law submitted by U S WEST.

It is therefore

ORDERED, that U S WEST shall furnish the Commission with paper copies of all tariff and catalog changes that it posts on its web-site within 30 days of the effective date of that rate change or service offering; and it is

FURTHER ORDERED, that U S WEST is not required to submit for pre-approval its tariff and catalog pages which provide discounts, incentives, services, or other business practices necessary to meet competition; and it is

FURTHER ORDERED, a service that has been classified by the Commission will remain in that classification unless reclassified in accordance with SDCL 49-31-3.2 and 49-31-3.4; and it is

FURTHER ORDERED, that if U S WEST does not request a different classification for intraLATA new products and services that are not functionally required to provide local exchange service, those new products and services will remain classified as noncompetitive pursuant to Docket F-3743; and it is

FURTHER ORDERED, that U S WEST shall inform the Commission of the beginning and ending date of promotions in accordance with the public notice requirement of SDCL 49-31-86.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 23rd day of February, 2000. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 23rd day of February, 2000.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: *Helaine Kelbo*

Date: *2/23/00*

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner