

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In Re the Complaint of	)	
	)	
AT&T COMMUNICATIONS OF THE	)	DOCKET NO. UT-991292
NORTHWEST, INC.,	)	
	)	
Complainant,	)	
v.	)	TENTH SUPPLEMENTAL
	)	ORDER
U S WEST COMMUNICATIONS, INC.	)	
	)	
Respondent,	)	ORDER GRANTING
	)	MOTION TO DISMISS
Regarding the Provision of Access Services.	)	
.....	)	

**Synopsis:** In this docket, AT&T complains against U S WEST, alleging that U S WEST violates statutes, rules, and tariffs in provisioning AT&T's orders for access services. U S WEST challenges the Commission's jurisdiction to hear this complaint. The Commission finds that it has jurisdiction over the subject matter of the complaint, but dismisses the complaint for AT&T's failure to establish a *prima facie* case.

**Proceedings:** The Commission heard this matter pursuant to due and proper notice to all interested persons in Olympia, Washington on February 1 through February 4, 2000, before Chairwoman Marilyn Showalter, Commissioners Richard Hemstad and William R. Gillis, and Administrative Law Judge C. Robert Wallis.

**Appearances:** Complainant, AT&T, appeared by Mary Tribby, Susan Proctor, and Michel Singer Nelson, attorneys, Denver, Colorado; the respondent, U S WEST Communications, Inc., by Lisa A. Anderl, attorney, Seattle; Commission Staff, by Shannon Smith, Assistant Attorney General, Olympia; and Intervenor, Washington Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER), by Arthur A. Butler, attorney, Seattle.

**I. INTRODUCTION**

1 On August 18, 1999, AT&T Communications of the Northwest, Inc. (AT&T), Complainant, filed a complaint against US WEST Communications, Inc. (U S WEST), Respondent, alleging that U S WEST has failed to provide adequate and consistent

quality of access services by: (1) failing to provision necessary access facilities; (2) failing to timely provision access facilities it does provide in violation of agreed upon measures of quality; and (3) favoring itself, its affiliates, its own customers, and certain communities in deciding where to provision facilities. U S WEST answered the complaint, denied its allegations, and offered the defense that the Commission is deprived of jurisdiction to hear the complaint because of federal preemption.

2 The Commission convened a prehearing conference on September 2, 1999, and granted a petition to intervene by Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER).

3 On September 16, 1999, U S WEST moved to dismiss AT&T's complaint. U S WEST noted that many of AT&T's asserted instances of violation occurred in provisioning services that were priced under interstate tariffs under the federal "10%" rule.<sup>1</sup> U S WEST argued that the Commission "lacks jurisdiction to consider any complaint or claims related to interstate services." By order dated November 12, 1999, the Commission denied U S WEST's motion to dismiss. The Commission held that:

[T]he FCC has not clearly provided that it preempts state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the "ten percent rule" preempts all state regulatory authority, we decline to so rule.

4 On December 15, 1999, U S WEST filed a petition for declaratory ruling with the FCC. In that petition, US West asked the FCC to preempt the Commission's consideration of the issues in this case.<sup>2</sup> Concurrently, US West filed a motion in this case to hold the schedule in abeyance until the FCC resolves the jurisdictional issues. The Commission denied the motion.

5 During the hearing and at the close of AT&T's case, U S WEST moved to dismiss the complaint on the basis that the complainant had not established facts or law establishing that it is entitled to relief. The Commission heard oral argument on the motion, informed the parties that it would make a decision on the motion based on the evidence at that

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<sup>1</sup>This rule is found in Part 36 of the FCC's rules: "Subcategory 1.2 - Interstate private lines and interstate WATS lines. This subcategory shall include all private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line." 47 CFR § 36.154(a).

<sup>2</sup> *In the Matter of Petition of US West, Inc. for Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Service* (Dec. 15, 1999).

point in the proceeding, and took the matter under advisement. U S WEST then presented its evidence.

## **II. AT&T's Motion to Compel Production, to Reopen Record, and to Permit Additional Briefing**

- 6 On March 8, 2000, AT&T filed a Motion to Compel Production, to Reopen Record, and to Permit Additional Briefing. AT&T requests that the Commission: 1) order U S WEST to produce the information that it submitted in a similar proceeding at the Minnesota PUC, including Washington-specific data; 2) re-open the record to admit the evidence; and 3) allow AT&T to supplement its Post-Hearing Brief and allow other parties to respond.
- 7 The additional information sought by AT&T involves U S WEST's priorities for servicing wire centers. AT&T argues that U S WEST should have produced its responses to data requests in the Minnesota proceeding in response to AT&T's data requests in this proceeding. Both sets of requests sought information regarding U S WEST's use of Gold, Silver, and Bronze designations to indicate priorities for wire centers. In the alternative, AT&T argues that the information produced in the Minnesota case constitutes "new evidence" that is relevant to AT&T's claims.
- 8 U S WEST argues that there is no basis to grant AT&T's motion. U S WEST argues that none of the data requests reasonably require production of the Minnesota responses. It states that the Minnesota discovery requests were specific, whereas the requests at issue here are general. It asserts that AT&T fails to explain how the information is essential to any showing of discrimination against AT&T or any other carrier. U S WEST argues that, therefore, the evidence is not relevant to this case.
- 9 The Commission finds that U S WEST adequately responded to AT&T's general data requests and provided the information regarding the Gold/Silver/Bronze designations that the data requests called for. AT&T's general data requests in this case do not call for the detailed responses provided in response to several PUC staff requests in the Minnesota proceeding.<sup>3</sup> AT&T also chose not to pose specific requests similar to those in Minnesota as a follow-up to U S WEST's general responses, even though the opportunity was available. U S WEST is not obligated to provide the requested information pursuant to the data requests served by AT&T.
- 10 WAC 480-09-820(2) sets out the guidelines for reopening the record in a contested case:

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<sup>3</sup> The Commission compares the Minnesota PUC's data requests, and U S WEST's responses, attached to AT&T's motion with AT&T's data requests cited in its motion and U S WEST's responses in Exhibit Nos. HC-305, 306, C-308, and HC-311.

(2) Reopening \* \* \*

(b) In contested proceedings, the commission may grant a petition to permit receipt of evidence which is essential to a decision and which was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause.

- 11 Thus, WAC 480-09-820(2)(b) establishes a two-prong test for reopening: the information is essential to a decision and was unavailable at the time of hearing. An exception is allowed for good and sufficient cause. AT&T's motion is rejected on each of these three points.
- 12 AT&T fails to show how the requested information is essential, or that it could affect the result of the proceeding. Further, AT&T fails to make a sufficient showing that information comparable to that made available in Minnesota was unavailable and not reasonably discoverable with due diligence. AT&T has the burden of proof in this case, and its actions demonstrate that it was prepared to proceed on the basis of the general information in its possession. Finally, the Commission finds no good and sufficient cause for an exception to the rule's requirements.

### **III. U S WEST's Motions to Dismiss**

#### **A. U S WEST's First Motion to Dismiss**

- 13 U S WEST previously filed a Motion to Dismiss contemporaneous with its answer to AT&T's complaint. U S WEST argued that the Commission lacks jurisdiction to consider AT&T's claims because the FCC has exclusive jurisdiction over all aspects of U S WEST's services provided under interstate tariffs; the filed-rate doctrine bars AT&T from obtaining interstate access service from U S WEST on terms and conditions other than those set forth in the pertinent tariffs and the FCC's mixed-use facilities rule, which allows customers to elect to take service under interstate tariffs when the traffic is 10% or more interstate, and as much as 90% intrastate.
- 14 The Commission considered U S WEST's motion, responses of the other parties, and U S WEST's reply, and denied the motion. In pertinent part, the Commission held that AT&T's complaint met the threshold for stating a claim on which relief could be granted; that case law regarding the filed-rate doctrine does not speak to or control the issues presented to the Commission in this docket; and that the parties cited no binding legal authority providing that the FCC has exclusive, preemptive jurisdiction over the provisions of intrastate service even though it may be provided under an interstate tariff. The Commission stated that the jurisdictional issue is one of concern and stated the expectation that AT&T's evidence would demonstrate a sufficient volume of intrastate traffic to warrant proceeding to a decision on the claims presented.

## **B. U S WEST's Second Motion to Dismiss**

- 15 At the conclusion of AT&T's case in chief at the subsequent hearing, U S WEST renewed its motion to dismiss, and further argued that the evidence presented did not establish sufficient amounts of intrastate traffic in order for the Commission to warrant proceeding to a decision on the merits. The Commission took the motion under advisement, and informed the parties that it would rule based on the evidence that had been presented at that point in the proceeding. It allowed the hearing to continue to its conclusion, and requested that briefs be filed on the motion.
- 16 U S WEST's motion is made pursuant to Civil Rule 41(b)(3) addressing an involuntary dismissal upon a defendant's motion after the plaintiff rests. WAC 480-09-420(8) states that the Commission may refer to the rules of the Superior Court of Washington as guidelines for handling motions. The Commission finds that the standards applicable to a motion made under CR 41(b)(3) are appropriate to use in reviewing U S WEST's motion to dismiss.
- 17 AT&T, as the complainant in a proceeding under RCW 80.04.110, has the burden of proof. U S WEST argues that AT&T must meet two requirements at least minimally: 1) it must present facts that support a finding of state jurisdiction over the claims -- including a showing of significant amounts of intrastate traffic affected by the allegations; and 2) it must make a *prima facie* showing that a state statute, rule, or tariff has been violated.

## **C. State Jurisdiction over the Claims**

### ***1) Quantities of Interstate Traffic***

- 18 U S WEST argues that the Commission's Third Supplemental Order denying its prehearing motion to dismiss established an evidentiary requirement in this case that AT&T show that there are sufficient quantities of intrastate traffic at issue to warrant a decision on the merits. AT&T responds that the evidence includes specific access orders placed under state tariffs, and argues that even if there is a second "standard" that requires proof that significant amounts of intrastate traffic are involved (which it disputes), such proof exists.
- 19 Commission Staff argues that the Commission has jurisdiction over the provision of intrastate telecommunications services, and that AT&T properly invokes the Commission's jurisdiction by alleging and proving a single violation regarding a single intrastate facility. Staff refers to evidence of six held intrastate orders discussed in U S WEST's motion and argues that AT&T has therefor alleged sufficient facts upon which the Commission can evaluate whether U S WEST has violated state law in its provision of intrastate access services.

20 The Commission rules that its Third Supplemental Order did not "require" that AT&T's evidence must demonstrate a sufficient volume of intrastate traffic but stated its "expectation" that such evidence would be provided. The issue was not to decide jurisdiction, but to determine the extent of state involvement in terms of seriousness and remedies.

## 2) *Mixed-Use Facilities*

21 U S WEST states that jurisdiction of a shared-use facility is determined according to the percent of interstate usage (PIU) reported by the carrier, and argues that the evidence in this case showed that AT&T submitted orders for special-access facilities declaring the PIU to be 100%. However, according to U S WEST witness Charlotte Field's deposition, Ex. 20, industry guidelines for special-access orders provide that the only two acceptable values for such an application are 100 and zero. Therefore, the 100% PIU designation on special-access orders is not determinative.

22 The FCC's mixed-use facilities rule,<sup>4</sup> popularly known as the "10% rule," authorizes purchases of special-access services under the federal tariff for transporting both intrastate and interstate traffic. Under the federal rule, long-distance carriers may order special-access facilities from the interstate tariff to transport intrastate traffic if more than 10% of the traffic carried on that facility is interstate and as much as 89.99+% is intrastate. AT&T estimates that a significant percentage of traffic over special access circuits provided to all AT&T end-user customers is intrastate, and U S WEST estimates that a significant percentage of all switched access traffic in Washington is intrastate.<sup>5</sup> In addition, we find no indications in the record of any evidence to contradict the conclusion that facilities purchased by AT&T under U S WEST's interstate tariff are used to transport intrastate traffic

23 Based on the nature of the federal rules, the evidence of record, and the Commission's expertise regarding carrier practices and network utilization, the Commission finds that AT&T transports intrastate traffic over facilities purchased under U S WEST's interstate tariff in the state of Washington for purposes of deciding jurisdiction, and that there is a substantial public interest in ensuring that those access services are provided in a manner consistent with state statutes, rules, and tariffs.

24 U S WEST maintains its position, advanced in its earlier motion, that the tariff out of which services are purchased is determinative for all purposes, and that services purchased out of the FCC tariff are subject only to FCC jurisdiction. AT&T responds that the network facilities over which access services are provided are the same without

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<sup>4</sup> 46 CFR §36.154(a), set out above at footnote 1.

<sup>5</sup> The actual percentages for both estimates are treated as confidential information in this proceeding.

regard to whether the services are priced through the intrastate or interstate tariff, and that the issue of service quality is independent from the jurisdictional pricing mechanism. AT&T argues that the "mixed use facilities" rule is determinative of the scope of states' ratemaking authority, and not necessarily of regulation of service quality.

- 25 As we previously stated, the Commission in the past has examined a similar "10% rule" relating to billing by competitive access providers selling unswitched interstate and intrastate services exclusively pursuant to a federal tariff. The Commission found that telecommunications companies offering intrastate service were not exempt from registering with the Commission despite offering services exclusively under federal pricing regulation.
- 26 The Commission's interpretation of the "10%" rules is consistent with Section 2(b) of the Communications Act of 1934. With certain irrelevant exceptions, that section says that nothing in the Communications Act of 1934 shall be construed to give the FCC jurisdiction over charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service.
- 27 AT&T further argues that the Commission has broad jurisdiction to regulate service quality in the public interest and that such jurisdiction is not preempted by the FCC. AT&T asserts that there is a presumption of concurrent jurisdiction by the Commission and the FCC over exchange access services that is rebuttable by statutory directive or implication. Commission Staff also refers to the relevant state and federal tariffs, and argues that because the provisioning service intervals are the same regardless of whether the service is purchased from the federal or state tariff, evidence of U S WEST's performance for interstate access service is probative of U S WEST's timeliness in providing intrastate access services.

### ***3) Commission Discussion and Decision on the Issue of State Jurisdiction***

- 28 The Commission agrees with the parties that the FCC retains sole jurisdiction over the enforcement of rate terms in tariffs filed pursuant to federal statute. However, the Commission rejects U S WEST's contention that its provision of intrastate services under federal tariffs within the 10% rule is totally free from state control in any manner. The FCC has not preempted state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule. The significance of intrastate traffic to the public and to the economy of the state, and the Commission's need to ensure that intrastate services are free from discrimination and barriers to competitive entry, require us to assert jurisdiction when it is lawful for us to do so.
- 29 When U S WEST provides intrastate access services under its Washington tariffs, U S WEST is bound by those tariff provisions, and the Commission is guided by those

provisions when deciding whether U S WEST has complied with its statutory duty. However, in the event of any inconsistency between tariffs and the statutes, it is the statutes that must control. The Commission agrees with Staff's observation that U S WEST may violate a state statute without committing a violation of its intrastate tariffs.<sup>6</sup> In such situations, the Commission can order that U S WEST revise its tariffs or its practices under the tariffs to ensure that they are applied consistently with state law.

30 When U S WEST provides intrastate access services under its federal tariff, U S WEST is not excused from its duty to comply with pertinent state statutes relating to that provision of service.<sup>7</sup> The Commission exercises concurrent jurisdiction with the FCC to ensure that intrastate services provisioned under interstate tariffs otherwise comply with state statutes. The Commission may consider whether U S WEST's actions in provisioning mixed-use facilities for intrastate traffic constitute a violation of state statutes and rules regarding discrimination and barriers to competitive entry. The Commission may look to state tariffs for guidance and impose whatever additional service-quality requirements are necessary to ensure that the letter and spirit of state laws are upheld.

#### **D. Discussion and Decision on Whether AT&T Met it's Burden to Present a *Prima Facie* Case**

##### ***1) Violations of Statutes, Rules, and Tariffs***

31 The Commission's decision on jurisdiction is not determinative of U S WEST's motion. U S WEST also pleads that AT&T must make a *prima facie* showing that a state statute, rule, or tariff has been violated. U S WEST argues that AT&T failed to sustain its burden.

32 U S WEST reviews AT&T's direct evidence in its motion and argues that AT&T failed to identify any specific amount of intrastate traffic transported over its interstate facilities. According to U S WEST, AT&T presented nothing more than a general estimate, based on AT&T's experience nationwide, of how much traffic might be intrastate. U S WEST argues that AT&T did not tie this testimony to any specific service order in this case. U S WEST states that a total of six orders of record were placed under the intrastate tariff, but argues that AT&T failed to link those orders to any violation of statutes, rules, or tariffs.

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<sup>6</sup> Conversely, U S WEST may violate its tariffs without *per se* committing a violation of a state statute.

<sup>7</sup> We do not reach the question of whether there is conflict between any US WEST interstate tariff and any intrastate tariff or rule.



- 33 AT&T argues in response that U S WEST's service-quality standards are inadequate and its provisioning performance unreasonable.
- 34 The Commission finds that AT&T's analysis so aggregates disparate and irrelevant data that its entire body of evidence is unreliable. AT&T explains its body of evidence by stating "time and resources limited the analysis that could be done." Time and money undeniably influence the quality of any presentation. However, in this case, any such limitations on AT&T were self-imposed. In August 1999, AT&T filed what initially appeared to be a straightforward complaint case involving the failure to provision service and demanded that it be heard on an expedited schedule. Over objections by U S WEST, the Commission set hearings for mid-December in response to AT&T's request for prompt action on a schedule that the Commission deemed appropriate and reasonable for the allegations, the issues, and the expected evidence in this proceeding.

## ***2) AT&T's Original Motion to Compel Discovery***

- 35 AT&T served a set of 90 broad data requests on U S WEST, which in some instances was unable to respond in a timely manner and in other instances refused to comply. On October 15, 1999, AT&T moved to compel the production of information in response to 61 of 90 data requests, pursuant to the Commission's order invoking the discovery rule in this proceeding. AT&T stressed that it did not want the hearing date delayed even though it seemed clear that evidence based on some of the requested discovery would take time to produce, could change the tone of the case, would require extensive revision to the direct evidence if offered into the record, would require extensive response, and would require extension of the schedule. AT&T did not present a detailed motion to compel, which increased the complexity of the matter submitted to the Commission and increased the time required for its resolution.
- 36 The Commission rejected some of U S WEST's objections to the data requests and ordered the company to respond, but accepted other objections, finding that some of AT&T's requests were not proper. The Commission granted data requests that it believed were not unduly burdensome and were related to the specific allegations of the complaint. The order found that some inquiries were addressed not to the individual incidents complained of, but to matters such as corporate policy.
- 37 The Commission determined that the inquiry into corporate policy was not beyond the bounds of the complaint, which does allege discrimination, but that it was beyond the focus on specific discriminatory incidents. However, AT&T demanded discovery that could not be accomplished in the time frames it proposed. The Commission granted several of the requests for this sort of information, with specified limits, but conditioned U S WEST's obligation to respond to these inquiries upon AT&T's election to forego the hearing date previously set and to delay the start of the hearing.

38 Despite the requirement that AT&T make a timely election, AT&T declined to do so and instead filed a Motion for Reconsideration and Clarification. AT&T acknowledged the demanding nature of its case and repeated its request that U S WEST be ordered to provide responses on the existing schedule, stating:

While AT&T appreciates the Commission's concerns regarding AT&T's ability to digest and review late filed documents in time to prepare its written testimony and trial strategy in this case, AT&T believes that the late nights and weekends it will take to do so are worth it in order to adequately prepare its case.

39 AT&T argued further, "only AT&T is hurt by the shortness of time to prepare its case." The Commission rejected AT&T's assertion that the grant of its data requests on the existing schedule would impose burdens only on itself and would affect no other party. The Commission found that AT&T declined to make an election under the terms of the order, ordered U S WEST to provide responses to the data requests, and rescheduled the hearing to begin in February 2000.

### ***3) Provisioning Data***

40 The record demonstrates that voluminous data were available for AT&T's analysis.<sup>8</sup> AT&T made the tactical decision to combine and present data broadly to demonstrate its cumulative impact. However, AT&T failed to segregate Washington-specific data reliably from regional data; failed to segregate intrastate data reliably from interstate data; failed to segregate switched-access data reliably from special-access data; failed to account for access orders submitted with requested due dates shorter than the standard interval; failed to account for AT&T special-access orders submitted with requested due dates longer than the standard interval; failed to account for delays caused by inaccurate or incomplete orders submitted by AT&T; failed to account for special projects or negotiated intervals; and failed to account for orders held and provisioned on an individual case basis (ICB) in any meaningful way.

### ***4) Identification of Violations***

41 Most significantly, AT&T failed to link U S WEST's performance on AT&T's access orders with alleged violations of law. AT&T argues that statistical averages of U S WEST's provisioning performance demonstrate inadequate exchange access service in the state of Washington. However, the snapshot of held orders on which AT&T principally relies, suffers from AT&T's failure to discriminate adequately between categorically different provisioning data. A complainant must present evidence of

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<sup>8</sup> See Exhibits 5, 14, 15, C-118, C-119, C-211, C-216, C-218, and C-220. Additionally, AT&T witness Wilson testified that he limited his analysis to DS1 facilities, and did not consider data regarding DS0 and DS3 facilities that were available.

specific orders in sufficient detail to establish that they collectively constitute a violation of statute, rule, or tariff before the Commission can consider remedies based on their cumulative impact.

### **5) Bulk Access Facilities**

42 The Commission does not agree with AT&T that alleged violations regarding bulk-access facilities under the FCC special-access tariff also constitute a failure to provision switched services adequately. AT&T did not present evidence of specific orders for switched access adversely affected by U S WEST's alleged failure to provision bulk facilities under the interstate special-access tariff. The Commission cannot conclude that U S WEST committed violations of law for its alleged failure to provision switched-access services based on what is essentially conjecture.

### **6) Held Orders**

43 In support of the sufficiency of its complaint, AT&T cites the volume of orders held for lack of facilities. AT&T argues that the volume is *per se* unreasonable and that the interval on which held orders are provisioned is unreasonable.<sup>9</sup> The vast majority of held orders documented by AT&T involve lineside access facilities between AT&T customers and U S WEST wire centers where AT&T maintains a point of presence. AT&T argues that U S WEST has the obligation to anticipate and meet AT&T's demand for facilities.

44 Forecasting demand is an essential part of strategic telecommunications network planning. The only forecasts submitted to U S WEST by AT&T refer to entrance facilities and multiplexing equipment. These network components are not subjects of AT&T's claims. AT&T's argument that U S WEST alone must bear the risk of investing in its network to meet speculative and unforecasted demand in an increasingly competitive market for access services is not persuasive. AT&T did not produce sufficient evidence to support its claim that U S WEST unreasonably plans and provisions facilities to meet AT&T's unforecasted requirements.

### **7) Discrimination Based On Preferential Treatment**

45 AT&T also failed to produce sufficient evidence in support of its discrimination claim that its orders were held where facilities were available, or that U S WEST provisions services on a preferential basis. AT&T relies on Ex. C-211, an exhibit attached to the direct testimony of U S WEST witness Halverson, to demonstrate that U S WEST provisions its own retail customers faster than it provisions AT&T's wholesale services, based on the average interval between the order date and completion date. However, the data-set is regional in scope, includes orders missed due to customer reasons, and

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<sup>9</sup> Orders held because facilities are not available are subsequently provisioned on an individual case basis.

includes special projects and negotiated dates. AT&T characterizes the comparison as "apples to apples," but the mixing of entirely different data prevents a meaningful or reliable comparison of U S WEST's performance.

46 AT&T's witness Wilson addressed other statistical derivations in U S WEST's Exhibit C-211 that contradict AT&T's claims, and concluded that it would "take a lot more discovery to figure out the data analysis that is taking place." AT&T did not conduct that discovery, and concedes that it doesn't understand the analysis. Nonetheless, it argues that the same document is reliable to the extent it supports its case. The Commission finds that the questions about the exhibit render the document worthy of little weight in support of AT&T's complaint.

#### **8) Discrimination Based on Wire Center Priorities**

47 AT&T failed to identify any access orders that were adversely affected by U S WEST's priority list of wire centers. On a broader perspective, AT&T also failed to produce any credible evidence that U S WEST's priority list of wire centers was discriminatory or that provisioning practices occasioned by the list resulted in some localities not receiving the same quality or quantity of services as others.

#### **9) AT&T's Burden of Proof**

48 The Commission's findings in *GTE-NW v. Whidby Telephone Company*,<sup>10</sup> cited by U S WEST, bear repeating in the context of this case. AT&T chose to bring a complaint case under RCW 80.04.110. In making this choice, AT&T assumed the burdens of the moving party in a complaint proceeding. It was AT&T's responsibility to analyze and determine what it believed to be the elements of a *prima facie* case; it was AT&T's responsibility to determine what proof would establish each of those elements by a preponderance of the evidence; and it was AT&T's responsibility to proffer the requisite evidence in its direct case.

49 AT&T did not in its urging for an early hearing allow sufficient time for the volume of discovery needed to prepare its case or for the actual preparation. AT&T did not appear to analyze sufficiently the voluminous data that were available in this case, or link that data to violations of statutes, rules, or tariffs.

#### **10) Commission Conclusion on Motion to Dismiss**

50 Based upon the facts and the law, AT&T has established no right to relief. Therefore, the Commission grants U S WEST's motion and dismisses AT&T's complaint for failure to establish a *prima facie* case.

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<sup>10</sup> *GTE Northwest Incorporated v. Whidby Telephone Company*, Fifth Supplemental Order, Docket No. UT-950277, April 2, 1996.

- 51 The Commission is concerned that the outcome of this case, taken by itself, could be perceived as an unwillingness to take strong action to remedy discrimination or anti-competitive actions by carriers or to protect the public interest. Any such conclusion would be seriously mistaken. The Commission's decision to exercise jurisdiction under state law in this case demonstrates that it is prepared to oversee inter-carrier relations and service-quality issues that affect the provision of intrastate access services. Further, the Commission's recent record, considered in its entirety, should send a clear signal to the regulatory community that it will continue to exercise oversight and use whatever means are reasonably necessary in order to fulfill its statutory duty in the public interest.<sup>11</sup>
- 52 AT&T's allegations regarding special-access services parallel the allegations regarding the provisioning of local interconnection services in the MCImetro case, and AT&T requests the same type of relief that the Commission found to be appropriate in that case. However, any similarity between the claims in these two cases is overshadowed by the differences in the evidence presented: AT&T simply did not demonstrate the occurrence of violations.
- 53 Under CR 41(b)(3), unless an order for dismissal otherwise specifies, a dismissal under that subsection operates as an adjudication upon the merits. Obviously, in dismissing AT&T's complaint, the Commission does not intend its action as a comment on the merits. The Commission is concerned about the issues raised in the complaint, and it is conceivable that some of the same information received in this record could support AT&T's claims if additional facts were developed and analyzed.
- 54 U S WEST has asked the Commission to dismiss AT&T's complaint with prejudice. Nowhere in its motion or its memoranda does U S WEST outline a persuasive argument why the dismissal should be with prejudice. The reason for dismissal is AT&T's failure to carry its burden of proof to sufficiently demonstrate that specific individual orders are linked to violations of statutes, rules, or tariffs. AT&T is free to file future complaints. To prevail, it must persuade the Commission by means of sufficient evidence that violations occurred and that the sanctions it may request are warranted upon the proof that is offered.

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<sup>11</sup> See, e.g., *Washington Utilities and Transportation Commission v. USLD Communications, Inc.*, Commission Order Accepting Settlement, Docket No. UT-000067 (April 12, 2000) in which the Commission fined USLD Communications, Inc., one million dollars for breaking service rules and, in addition, ordered the company to refund about \$700,000 to an estimated 113,000 pay phone callers. See also, *MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc.*, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, In Part, and Affirming, In Part, Docket No. UT-971063 (February 10, 1999), in which the Commission found that U S WEST's failure to adequately forecast network growth and timely provision local interconnection services violated state law, and the Commission granted relief requested by MCImetro.

#### IV. FINDINGS OF FACT

- 55 1. The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate tele-communications companies offering service to the public for compensation.
- 56 2. U S WEST Communications, Inc. (U S WEST), and AT&T Communications Northwest, Inc. (AT&T), are engaged in providing telecommunications services for hire to the public in the state of Washington.
- 57 3. On August 18, 1999, AT&T filed with the Commission a complaint against U S WEST alleging that U S WEST has failed to provide adequate and consistent quality of access services by: (1) failing to provision necessary access facilities; (2) failing to timely provision access facilities it does provide in violation of agreed upon measures of quality; and (3) favoring itself, its affiliates, its own customers, and certain communities in deciding where to provision facilities.
- 58 4. A hearing was held on February 1 through February 4, 2000. At the conclusion of AT&T's direct case, U S WEST moved to dismiss the complaint.
- 59 5. AT&T failed to link U S WEST's performance on AT&T's access orders with alleged violations of law.

#### V. CONCLUSIONS OF LAW

- 60 1. The Washington Utilities and Transportation Commission has jurisdiction over the parties and subject matter of this proceeding.
- 61 2. AT&T failed to demonstrate that reopening for the purpose of securing and presenting identified data was appropriate under tests set out in WAC 480-09-820.
- 62 3. AT&T failed to make a *prima facie* showing that U S WEST violates statutes, rules, or tariffs when provisioning access services.
- 63 4. The complaint by AT&T against U S WEST should be dismissed without prejudice.

#### VI. ORDER

- 64 AT&T's motion to compel production of information and to reopen the proceeding is denied. AT&T's complaint in this docket is dismissed without prejudice.

DATED at Olympia, Washington, and effective this      day of May, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

**NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**