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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UT 119

In the Matter of the Investigation into Rate)
Schedules of U S WEST COMMUNICATIONS,)
INC., UNITED TELEPHONE OF THE NORTH-)
WEST, PACIFIC TELECOM, INC., and GTE)
NORTHWEST, INC., under ORS 759.184.)

ORDER

DISPOSITION: RECONSIDERATION DENIED; TARIFF AMENDED

On May 21, 1996, U S WEST Communications, Inc. (USWC) filed an application for reconsideration of Order No. 96-079 (the Order), pursuant to ORS 759.180. On June 14, 1996, MCI Telecommunications Corporation (MCI), AT&T Communications of the Pacific Northwest, Inc. (AT&T), and Electric Lightwave, Inc. (ELI) (joint respondents) filed a joint response to the application.

On June 28, 1996, USWC filed a motion to strike the joint response. MCI responded on July 9, 1996. MCI gave good and sufficient cause to deny USWC's motion. The motion to strike is denied.

In this order, we also deny USWC's application for reconsideration. We make one minor modification to the tariff adopted in Order No. 96-079 to correct an inadvertent omission.

OPINION

Procedural History of this Proceeding

On March 8, 1994, the Commission initiated this investigation into collocation rate schedules filed by U S WEST Communications, Inc. (USWC), United Telephone of the Northwest (United), Pacific Telecom, Inc. (PTI), and GTE Northwest Inc. (GTE). Order No. 94-490. The companies filed the rate schedules on February 4, 1994, pursuant to a direction from the Commission that the companies comply with the requirements of the Commission's Open Network Architecture (ONA) rules. OAR 860-35-110 et seq. The rules direct LECs to offer physical and virtual collocation. Physical collocation is a service to be offered by a LEC

that provides for placement and installation of equipment, software, and data bases, owned by the customer, on LEC premises. OAR 860-35-020(8). Virtual collocation is similar, in that the customer makes the selections, yet the selections are owned and maintained by the LEC. OAR 860-35-020(27).

In the course of this proceeding, Staff, AT&T, ELI, and OCTA entered into stipulations with GTE, PTI, and United regarding the terms of their collocation tariffs. The companies voluntarily included rates for unbundled interconnection rate elements.

On May 8, 9, and 10, 1995, a hearing was held in this matter before an Administrative Law Judge for the Commission. As part of its June 30, 1995, brief, Staff filed a rate schedule that it recommended the Commission substitute for the schedules filed by USWC.

On August 24, 1995, the Oregon Supreme Court issued its decision in *GTE Northwest, Inc. v. PUC and MCI Telecommunications Corporation*, 321 Or 458, 900 P2d 495 (1995). In that case, the Court found that the Commission's administrative rules requiring physical collocation constituted a taking.¹ The Court set aside the Commission's rules as they pertained to physical collocation.

On October 6, 1995, USWC revised its tariff proposal removing references to physical collocation and making other modifications as recommended by the parties. The tariff adopted the terms of USWC's currently effective interstate virtual collocation tariff for intrastate operations. On October 13, 1995, USWC filed a brief commenting on its virtual collocation tariff. The other parties to the docket and Staff filed answering briefs in mid-November. USWC filed its reply brief on December 6, 1995.

The Commission issued Order No. 96-079 on March 20, 1996. As part of that order, we prepared a virtual collocation tariff that we ordered USWC to adopt. USWC asks for reconsideration of portions of that order and provisions of the tariff.

Takings Clause of the Fifth Amendment

USWC claims the Commission order and prescribed tariff on virtual collocation

¹The Court determined that, under federal law, physical collocation was a physical invasion of the property of the LECs. The Court reasoned that the Commission could not order such a taking without statutory authority to do so.

effectuates a taking of USWC's property without compensation and, thereby, violates the Takings Clause of the Fifth Amendment of the US Constitution. US Const. Amend. V. Cl. 4. We reject that claim.

Merits of the argument. USWC claims that our order implicates the principle that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 426 (1982) (*Loretto*). In USWC's view, the order so divorces USWC as the owner of the virtually collocated equipment from all legal indicia of ownership that it results in the same legal situation proscribed in *GTE*. A physical occupation occurs when the government effects a transfer of ownership or requires the property owner to suffer the presence of a third party or a third party's property on its own. Such occupations are *per se* takings. Regulations that restrict use are not a *per se* taking but are evaluated as a regulatory taking. 458 US at 440. Whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. *Id.* at 437.

We agree with the joint respondents that USWC's assertion is without merit. Our virtual collocation tariff contains no provisions that invade USWC's property. Our tariff specifies service requirements while providing USWC possession and control of the facilities necessary to provide the service. Specifically, USWC:

- . Has possession and control of the equipment. Order No. 96-079 at 13.
- . Is responsible for installation and maintenance of the equipment, Tariff 1.1.2.
- . Approves the personnel maintaining and repairing the equipment, Tariff 1.3.7.2.
- . Receives compensation for use of its facilities. Tariff 1.6.

In contrast, the collocator has no physical access to USWC facilities, Tariff 1.1.8., and must pass on to USWC the warranties and access to technical support supplied with the equipment. Warranties and technical support are incidents of ownership of equipment and are supplied by the seller of equipment to the buyer. Order No. 96-079 at 13.²

²This provision was inadvertently omitted from the tariff. The tariff is amended to include this provision at the end of Tariff 1.2.4.1.

USWC claims that some provisions in our order and tariff constitute permanent physical invasions of its property because they require USWC to suffer the presence of a third party or of a third party's property on its own. These assertions are without merit.

USWC believes that the tariff provision requiring the customer to provide all equipment and software for virtual collocation and USWC to lease the equipment from the customer for one dollar contravenes *Loretto*. USWC claims:

Because the prescribed tariff is inconsistent with the Commission's own rules and, as drafted, effectuates a taking of U S WEST's property without compensation, U S WEST believes that it is imperative that the Commission reconsider its Order No. 96-079.

The definition of virtual collocation in OAR 860-35-020 provides that it is a local exchange carrier (LEC) service that provides for the placement and installation of customer selected equipment which is owned and maintained by the LEC. In contrast, our order and tariff specify that USWC must lease equipment from the customer for one dollar. The title to the equipment does not pass to the company. Tariff Sections 1.3.4.1 and 1.3.4.2.

USWC makes two separate arguments here. The first is that our tariff is inconsistent with the ONA rules. The second is that the tariff violates *Loretto*. We reject both claims. In the first place, our tariff provision is based on USWC's proposal.³ USWC did not feel compelled to offer a tariff consistent with the rule when it filed its testimony and proposed its tariff. In fact, USWC stated it would not oppose a finding by the Commission requiring a zero cost lease.⁴ It cannot feign prejudice now. Second, at no point did USWC indicate that its lease proposal constituted a taking under *Loretto*. Raising the claim now is improper. Moreover, as stated previously, there is no invasion of USWC property.

Third, the order acknowledged the conflict between the rule and tariff and

³USWC/1, Selinger/6. See also, USWC proposed tariff, October 2, 1995, 8.3.6.A.2. USWC proposed a zero cost lease. There is no substantive difference between a zero cost lease and a one dollar lease.

⁴Tr. Volume II, p. 42.

directed Staff to initiate a rulemaking to resolve the inconsistency. The discrepancy should be resolved in short order. Finally, we adopted USWC's proposed lease arrangement because we believed this provision best protected the company and ratepayers from stranded investment that might occur if a collocator terminated service before USWC recovered the costs of the collocated equipment. We presume that USWC offered it for the same reason. We do not understand why USWC, at this juncture, would suggest that we reinstitute a mechanism that imposes unnecessary risk on the company and ratepayers.

In addition to the lease provision, USWC objected to a number of other provisions of our tariff. We address each objection below:

1. USWC claims that we ordered it to provide virtual collocation for any type of telecommunications facilities or equipment. The next sentence states, "However, all facilities and equipment must meet industry standards for specific telephonic applications." Tariff 1.3.3.1. In addition, we do not agree that this provision supports the claim that our rules have effected a taking.

2. USWC notes that our tariff requires it to cooperate with the customer to ensure that the customer designated equipment will meet both the customer's specified needs and be compatible with the company's equipment requirements. Tariff 1.3.3.1. USWC states that it is unclear how the customer is expected to identify his or her needs or how USWC will be in a position to know what the customer's level of understanding of telecommunications is in order that USWC will be found to be in compliance with the prescribed tariff. We are surprised at USWC's puzzlement about this provision, because USWC proposed it. See USWC proposed tariff, October 2, 1995, 8.3.3.N.

3. USWC notes that our tariff entitles the customer to bring its cable (fiber, copper, or coaxial) to a manhole or other designated interconnection point mutually agreed upon up to and including the entry to the company central office. Section 1.3.6.1. USWC appears to suggest that this provision is a physical invasion. In fact, the next section specifies that USWC extends its facilities from the point of physical demarcation (at the

entrance) to the virtually collocated equipment (in the central office). Tariff 1.3.6.2. The customer is attaching its facilities at the point of demarcation. Everything on USWC's premises is under USWC's possession and control.

4. USWC claims the tariff requires USWC to lease customer provided equipment *to* the customer for \$1 in each central office. In fact, the equipment is leased *from* the customer. Tariff 1.3.4.1.

5. USWC complains that our order authorizes placement of a wide variety of equipment types at entrance facilities, the effect of which is to prematurely exhaust USWC's facilities. We fail to see how this requirement differs from any other demand placed upon USWC by its customers.

6. USWC claims that permitting interconnection among collocators on USWC premises transforms USWC's property into a telecommunications bazaar. In fact, USWC is required to interconnect equipment dedicated to a customer with equipment dedicated to another customer by means of USWC's tariffed interconnection services. Tariff 1.2.2. All of those facilities are under USWC's possession and control. The tariff specifies only the services that USWC must provide.

7. USWC claims that the charges that USWC may recover under the tariff will not necessarily satisfy the level of compensation mandated by the Fifth Amendment. As the order makes clear, all rates in our tariff are above cost. Order No. 96-079 at 9. See Exhibit USWC 2A and Selinger attachment A, May 1994 (updated June 1994).

Res judicata. The joint respondents assert that the doctrine of *res judicata* (claim preclusion) precludes USWC from claiming that our order on virtual collocation constitutes a taking. They claim that the issue was ripe for consideration and should have been raised as part of GTE's petition for judicial review of the Commission's ONA rules.

Claim preclusion requires that all claims arising out of a particular set of facts and that were of such a nature that they could have been joined in the first action

must be brought together. See *Robert Andrews v. Clayton Christenson and Cold Box Manu. Co.*, 71 Or App 442 (1984), citing *Rennie v. Freeway Transport*, 294 Or 319 (1982). In this case, we believe that it is unnecessary to address the joint respondents argument.

Commission Policies and the Telecommunications Act of 1996 (Act)

USWC asserts that the Commission has prejudiced it by presuming a specific outcome of the FCC's rulemaking under the Act. USWC fears that if the FCC adopt rules contrary to those envisioned by the Commission, it alone will be obligated to provide physical space to its competitors.

The order states on pages 3 and 21 that the Commission may have to reopen this proceeding to accommodate implementation of the Telecommunications Act of 1996. We see no reason to say it again.

Imputation Policies

USWC contends that the order errs in adopting the imputation policy from Order No. 94-1851 because: 1) the record is devoid of evidence regarding essentiality; 2) the Commission applies a policy recommended in a previous order as a legal presumption, without providing USWC an opportunity to refute the presumption, and 3) all services other than those found essential pursuant to ORS 759.195(6) are non-essential services.

First, the Commission is not required to readopt its policy on essentiality in every proceeding. In Order No. 95-313, we adopted a policy of treating all building blocks as essential functions until the incumbent LEC demonstrates otherwise. There is nothing in this record that indicates USWC has met this burden.

In its second argument, USWC contends that Order No. 94-1851 merely applies imputation policies to price matrices, whereas the current docket establishes a legal presumption that imputation policies apply to USWC's current rate structure.⁵ As a result, the

⁵USWC specifically relies on the following language from Order No. 95-313 interpreting Order No. 94-1851: Order No. 94-1851 requires only that the policies be incorporated in the price matrices filed by the LECs. It does not require that the policies be implemented immediately nor does it have any effect on existing utility rates, including rates for price-listed services. Order No. 95-313 at 2-3.

current docket amends Order Nos. 94-1851 and 95-313 without providing the affected utilities with notice and an opportunity to be heard pursuant to ORS 756.568. USWC further contends that since the language in Order No. 95-313 indicates that Order No. 94-1851 was not a final order affecting its rates, the company could not appeal the policy findings.

USWC ignores the fact that our decision on imputation derives from our ONA rule, OAR 860-35-080(1) which states:

A LEC which offers enhanced services on either a deregulated or regulated basis shall charge or impute to its own enhanced services operation the same tariffed or price listed rates for ONA services that the LEC offers to its customers.

Our references to Order No. 95-313 and Order No. 94-1851 illustrate the consistency of our policy statements on imputation.

USWC also ignores that Order No. 96-079 does not require it to file tariffs for services other than for virtual collocation. Existing rates remain untouched. We will address the application of our imputation policies to existing rates in dockets UM 351, Phase II, and UT 125, USWC's pending rate case.

As for USWC's third argument, this issue was addressed in Order No. 95-313 at 3-5. We will not discuss it further.

Findings Of Fact And Conclusions Of Law

USWC contends that the order fails to identify the findings of facts and the conclusions of law necessary for effective judicial review. USWC does not cite any specific sections or conclusions of the order that are void of the necessary findings. The only guidance provided by USWC in its petition was that there is a narrative discussion which precedes the ordering provisions of the order, without identification of ultimate and underlying facts found by the Commission, and without relating these facts to the legal authority of the agency.

This argument is without merit. In the order, we thoroughly reviewed the factual record and carefully weighed the many factors bearing on virtual collocation. Throughout the narrative portion of the Order, we identified and decided the merits of each party's position, determined the significant facts, drew legal conclusions and provided an

explanation regarding these conclusions. Furthermore, we emphasize that most of the issues regarding tariff provisions are policy matters.

Evidentiary Support And Right To Respond

USWC raises three arguments regarding the evidentiary support for the virtual collocation rates in our tariff. First, USWC alleges that many of the adopted rates are without specific evidentiary support and that USWC was never confronted with the Staff's calculation of many rates. According to USWC, only the rates in subsections .4 and .5 are in the evidentiary exhibits. Additionally, USWC's exhibits illustrate both nonrecurring and recurring charges,

whereas Staff only presented rates for recurring charges. Finally, the Commission ignored the costs associated with the preparation quotation fee and did not explain why the shareholders should bear those costs when a potential customer elects not to virtually collocate.

USWC is wrong when it alleges that it was never confronted with Staff's calculation of many rates and that the rates lack evidentiary support. Staff referred to its rate calculations in both its initial and answering briefs. In its initial brief, Staff offered to explain the construction of any particular item in the Staff tariff with which USWC took issue. In the answering brief, Staff noted that USWC did not single out any particular areas related to underlying costs for Staff to address.

In addition, USWC was fully aware of the underlying costs for the rates in our tariff. Our rates were based on cost studies that USWC itself provided under protective order. Order No. 94-733. Specifically, the cost studies for the rate elements included in our tariff can be found in Exhibit USWC 2A and Selinger attachment A, May 1994 (updated June 1994). The rates were calculated by applying the mark-up discussed in the order.⁶ Order No. 96-079 at 8.

Our tariff includes nonrecurring charges for several rate elements based on USWC's cost studies. Nonrecurring rates are set equal to USWC's estimated costs for labor and material costs. The labor rates are based on USWC's proposed virtual collocation tariff. As for the quotation preparation fee, we indicated these costs should not be substantial and can be absorbed in the mark-up.

Third, USWC believes the Commission erroneously made policy determinations regarding physical collocation since virtual collocation was the only issue in this proceeding. Accordingly, the parties only briefed matters regarding virtual collocation. USWC notes that the Commission made determinations on subjects not related to virtual collocation, such as the evidence on the cost of floor space and the cost of construction.

We made no decisions with respect to the cost of floor space and the cost of construction. We did decide that such cost decisions, when they are made, will be based on the principles set forth in UM 351, Phase I. The record includes a comprehensive discussion on the applicability of these principles to physical collocation. USWC's claim is rejected.

⁶The order did not specify the mark-up to avoid disclosure of costs that were submitted to the Commission under the protective order.

ORDER NO.

ORDER

IT IS ORDERED that:

1. U S WEST Communications Inc.'s application for reconsideration is denied.

ORDER NO.

2. The Section 1.2.4.1 of the tariff attached to Order No. 96-079 is amended to require the Customer to assign to USWC, for the duration of the lease, all warranties and technical support for the virtually collocated equipment.

Made, entered, and effective

.....
ROGER HAMILTON
ChairmanCommissioner

RON EACHUS

JOAN H. SMITH
Commissioner

A party may appeal this order pursuant to ORS 756.580.