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{PRIVATE } (Decision No. C93-1197)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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RE: INVESTIGATION AND SUSPENSION OF PROPOSED CHANGES IN TARIFFS FILED BY U S WEST COMMUNICATIONS, INC., IN ADVICE LETTER NO. 2425	))))	DOCKET NO. 93M-526T

COMMISSION ORDER REJECTING TARIFF ON CONDITIONS

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Mailing Date: September 28, 1993
Adopted Date: September 24, 1993
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BY THE COMMISSION:

This matter comes before the Colorado Public Utilities Commission ("Commission") on several motions: Office Of Consumer Counsel's ("OCC") Motion To Dismiss or, in the alternative, Motion For Summary Judgment; Colorado Municipal League's ("CML") Motion to Dismiss; Commission Staff's Motion For Clarification and Motion To Expand Notice. For the reasons set forth below, U S WEST Communications, Inc. ("U S WEST") shall have until September 29, 1993, at 10:00 a.m. to amend its Advice Letter No. 2425 to extend the effective date of same for sufficient time to allow the company to expand its notice to include business customers and Part 3 customers. Should the company fail to file the appropriate advice letter amendment by the deadline, Advice Letter No. 2425 will be rejected without prejudice to refiling. We grant staff's motion for clarification as set forth below.

DISCUSSION

On July 28, 1993, U S WEST filed Advice Letter No. 2425. This advice letter was prompted by changes in accounting guidelines for post-employment employee benefits ("OPEB") of the Financial Accounting and Standards Board Rule ("FASB 106") so that businesses must now account for certain retired employee benefits on an accrual basis. FASB 106 not only requires accrual on a prospective basis, but also requires that businesses include a "catch-up" amount of OPEB liability that reflects what would have accrued in past periods had the business accounted for this liability on an accrual basis. Advice Letter No. 2425 indicates that U S WEST calculates its OPEB revenue requirement for its Colorado intrastate jurisdictional operations based on a 1992 test year to be approximately $28 million, which includes an amount to amortize over the next 17 years to reflect the past service cost.

I. Notice Issues

U S WEST states in its Advice Letter that it seeks to recover all its OPEB costs from residential ratepayers only - businesses and Part 3 customers[1] would not be allocated any OPEB costs under the company's proposal. The company asserts that it desires to keep business rates low for competitive reasons. To this end, U S WEST has provided notice of the proposed rate increase only to residential ratepayers.

Unless it is amended, we will reject Advice Letter No. 2425 on the basis that the company's notice is inadequate. If we were to proceed on the path as laid out by the company, we would be effectively foreclosed from assigning any OPEB costs to business customers or Part 3 customers. To foreclose our options at this early stage is clearly inappropriate. We normally assign costs to those on whose behalf the costs were incurred. We must assume at this early stage of the

[1] Part 3 customers are those users of services and products regulated under Part 3 of article 15, Title 40, C.R.S. (1993).

proceedings that one possible determination we may make in this proceeding is that business and Part 3 customers are as responsible for OPEB costs as are residential customers and, therefore, should shoulder some share of those costs.

U S WEST has offered in response to this problem that it will only seek to recover from residential ratepayers that portion of OPEB costs that are attributable to that class. It is unclear whether the company would attempt to recover the balance from other rate classes in later proceedings, or whether this would be costs simply passed on to its shareholders.

In either case, however, we believe that the notice is still inadequate. In U S WEST's last rate case, we set rates for business, residential, and others. Those rates reflected a balance that we found to be just and reasonable. By loading OPEB costs only on to residential ratepayers, this balance would presumably be disrupted and we would not be in a position to correct it.

Moreover, by assigning only to residential ratepayers and not to businesses and others what we will presume for the moment to be recoverable business expense, we would appear to be approving preferential or discriminatory rates contrary to statute.[2] In effect, business customers and Part 3 customers would be getting lower rates - discounted rates - than would otherwise be appropriate because OPEB costs are not included in those rates. Thus, even though residential customers are paying only their fair share in their rates, business and Part 3 customers are not paying costs that they can fairly be said to have caused.

Moreover, we have no basis to assume that these costs should not be assigned to business

[2] Section 40-3-1060(1)(a), C.R.S.(1993) prohibits preferences or unreasonable differences as to rates.

and Part 3 customers for competitive reasons. We take administrative notice that we have never entered an order to the effect that all business customers are subject to emerging or full competitive forces and, therefore, entitled to flexible pricing. Nor have we determined that all Part 3 services and products are entitled to relaxed regulatory treatment and flexible pricing. There is a statutory process which telecommunications providers must use in order to classify their products and service as subject to emerging competitive forces or fully competitive. See generally, Article 15, Title 40, C.R.S. (1993). U S WEST has not availed itself of that process for all of the categories of service that have been excluded from the notice. Therefore, we must assume at this time that business and Part 3 customers cannot avoid their fair share of OPEB costs on the basis that they face competitive pressures and, therefore, require flexible pricing.

Finally, we decline U S WEST's proposal to provide expanded notice within the 210 day period effective from the advice letter's current effective date of October 1, 1993. If we were to accept it, we would place business and Part 3 customers at a distinct disadvantage in this case because, in contrast to residential customers, they would have less than the 210 day period in which to prepare their case. We think this is neither just nor reasonable.

For these reasons, we believe U S WEST's notice in this case is inadequate. We will allow U S WEST until September 29, 1993, at 10:00 a.m. to file an amended Advice Letter No. 2425 that extends the effective date of the advice letter for sufficient time to allow the company to issue notice to its business and Part 3 customers and allow the same the normal notice period of thirty days. Should the company decline to timely amend Advice Letter No. 2425, we, by this order, reject the Advice Letter.

II. Piecemeal regulation

All parties agree that this Commission has the discretion to authorize "piecemeal" regulation. U S WEST requests that the $28 million in OPEB costs be approved without consideration of whether it is over or under earning. This request for a piecemeal approach to OPEB is made pursuant to our Alternative Form of Regulation plan ("AFOR"),
approved in Decisions No. C92-854 and No. C92-1377, in Commission Docket No. 90A-665T. OCC and CML, on the other hand, urge us to reject U S WEST's piecemeal approach. They note that a number of events have taken place since the last rate case that

suggest that the Company may be enjoying declining costs and increased revenues. They also point out that the $28 million rate increase is the same magnitude as the $32 million rate increase settlement which results from U S WEST's last rate case in which they requested over $100 million. Under these circumstances they argue that it would be inappropriate to grant U S WEST a "pass-through" of OPEB costs without a full examination of all expenses and revenues. We agree.

Under our AFOR plan we set up a regulatory mechanism that allows the company to retain a portion of earnings in excess of the authorized return on equity. In return, the company agreed not to seek a rate increase for Part 2 services during the life of the plan, with certain exceptions, which include the pass-through to ratepayers of certain costs related to the RFIP and SAFE programs. We determined that if there were a consumer complaint or Commission show cause order filed against U S WEST, either of which instituted a general rate case, we would allow the company to withdraw from AFOR. See Decision No. C92-1377, page 5. We also left open the question of whether OPEB costs could be passed through to ratepayers on the same basis.

Having considered the arguments of all parties, we will adopt a "piecemeal" approach as defined in this Decision. As we noted above, the proposed increase is quite large and rivals the results of the company's last general rate case. Interest rates today are much different than they were three years ago. The last general rate case had a test year that is now three years old. We will not assume without consideration of the entire company picture that the OPEB recovery is appropriate. Therefore, in order to determine what portion, if any, of the OPEB expenses can be recovered, we will permit parties to offer any evidence that there are offsetting costs and revenues. We use "offsetting" in this decision to include positive and negative changes.

In reaching this conclusion, we have carefully and thoughtfully considered whether this

approach we have taken here violates either the terms or the spirit of our AFOR decision, and thus allows U S WEST to back out of the plan. It does not for several reasons. First, we note that the AFOR plan itself recognized that part of the debate over whether to allow OPEB costs to be passed through may include consideration of all other offsetting costs and revenues. See footnote 31, page 45, Decision No. C92-854.

Second, the company's request here for a pass-through of OPEB costs is a departure itself from the general concept of the AFOR plan. The plan frees the company for five years of any revision of its rates based upon its earnings level. Under this plan, any cost increases must be absorbed by the company (except for RFIP and SAFE expenses). The Commission cannot initiate any general rate case for five years without allowing the company to opt-out of AFOR, and the company cannot alter Part 2 rates for the same five year period. Any over earning is shared between the company and ratepayers. The OPEB request is a departure from this general plan in the sense that, instead of absorbing this cost under AFOR, the company would like to pass it through to ratepayers. Moreover, this pass-through is long after the last rate case at which we set rates so that revenues would presumably cover expenses and allow for a fair rate of return. As we observed above, we can no longer be assured that rates are in equilibrium with the company's revenue requirement.

In order to evaluate the fairness of the company's request to allow the pass-through of OPEB costs at the same time the AFOR plan is in effect, we believe it is appropriate to consider any other offsetting costs or revenues. The purpose of such a proceeding is to determine to what extent it is appropriate that OPEB costs be recovered in higher rates. The purpose of the proceeding is not to institute a general rate case that, for example, resets the return on equity threshold under AFOR. Our focus here is simply to determine how much, if any, of the OPEB

costs should be passed on to ratepayers. Unlike a general rate case, if the result indicates that rates should be increased by more than the cost of OPEB, rates will be capped by the maximum appropriate OPEB cost. If the result indicates that rates should be reduced, there will be no rate adjustment. Moreover, regardless of what other offsetting costs and revenues there may be, we may ultimately determine that regulatory principles dictate that only some or none of the OPEB costs should be passed on to ratepayers, as it has been suggested has occurred with competitive sector businesses. This is clearly distinguishable from a general rate case by which the company may elect to remove itself from AFOR. Moreover, we do not intend to alter or amend the AFOR decisions in connection with reviewing OPEB expenses, and we do not intend to set a new authorized rate of return for U S WEST.

Third, and finally, this review is initiated by U S WEST's action in filing for the recovery of OPEB costs. U S WEST is not automatically entitled by virtue of AFOR to recover OPEB costs. We are free under the AFOR decision to craft a process that we believe leads to a just and reasonable result. We conclude that if U S WEST elects to request recovery of this out-of-period cost, we will consider it, but only in connection with all other offsetting out-of-period costs and revenues. Thus, the election to proceed is in the hands of the company, not the Commission or any other party.

THEREFORE THE COMMISSION ORDERS THAT:

1. Staff's Motion for Expanded Notice is granted. U S WEST shall have until September 29, 1993, at 10:00 a.m. to file an amended Advice Letter No. 2425 that sets off the effective date of the tariff changes for sufficient time to allow expanded notice to Part 2 business customers and Part 3 customers as discussed above.

2. If an amended Advice Letter No. 2425 is not timely filed, Advice Letter No. 2425 is by this decision rejected as of September 29, 1993, at 10:00 a.m. and shall be rejected and shall be without force and effect, but without prejudice to refiling.

3. Staff's Motion for Clarification is granted as set forth above.

4. The OCC's Motion to Dismiss or, in the alternative, Motion for Summary Judgment, and CML's Motion to Dismiss are granted to the extent they are consistent with this decision. In all other respects they are denied.

This order is effective upon its Mailed Date.

ADOPTED IN SPECIAL OPEN MEETING September 24, 1993.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER CHRISTINE E. M. ALVAREZ
CONCURRING IN PART AND DISSENTING IN
PART.

COMMISSIONER CHRISTINE E. M. ALVAREZ CONCURRING IN PART AND DISSENTING IN PART:

I join my colleagues in granting staff's Motion for Expanded Notice of Advice Letter No. 2425. The notice provided by U S WEST (also referred to herein as "the Company") solely to residential ratepayers is inadequate in that the notice effectively limits the full exercise of the Commission's authority to review proposed rates to determine whether they are just, reasonable, and nondiscriminatory. It would be inappropriate to proceed in a manner which would allow the Company to determine unilaterally which ratepayers should be responsible for the potentially significant burden imposed by these costs.

Like my colleagues I also am unwilling to accept U S WEST's proposals that: (1) the faulty notice be cured by the Company's willingness to seek recovery of allowed expenses only from residential ratepayers, but in an amount limited to expenses attributable to that class; and, (2) expanded notice be provided within the 210-day period effective from the advice letter's current effective date of October 1, 1993. As stated in the majority opinion, these options do not cure the problems caused by the inadequate notice in that they potentially allow one class of ratepayers to avoid responsibility for costs caused by that group, and the failure to set back the proposed effective date of the tariff places litigants on unequal footing.

However, I would have rejected the Company's filing as inadequate (instead of allowing the notice problem to be cured through amendment) and **also** would have granted the motions of the Office of Consumer Counsel and the Colorado Municipal League to dismiss the filing without prejudice on the grounds that the relief requested in the Company's filing is inadequately supported. This procedure would have allowed the parties to commence on equal footing with a clean slate, and without some of the procedural snags left unmended by the majority decision. The rejection and dismissal of the tariff filing would have been carried out in conjunction with a decision granting staff's Motion for Clarification of certain elements of the

AFOR decision. Of course, the Commission's rejection or dismissal of the filing would not have precluded the Company from making a subsequent filing if it chose to do so. And, the Commission's decision would have: (1) clearly identified the type of notice required in a subsequent filing; (2) clarified the Commission's intent in the AFOR decision to defer the question regarding the scope of an investigation that the Commission would institute upon the filing of a request by U S WEST to recover OPEB costs; and, (3) clarified the Commission's current decision that, in order to adjust a single element of the Company's ratemaking formula to reflect changed or future events [an option specifically contemplated for OPEB costs in the AFOR decision], the Commission must consider potentially offsetting changes in other critical elements of the ratemaking formula. I agree with my colleagues that this broad investigation of the OPEB request can be made without violating the spirit or provisions of AFOR, and it is important to note that the Commission was unanimous in its intent to proceed with the AFOR experiment. It is also clear to me that neither the dismissal order sought by CML and OCC nor the Commission's decision here, can reasonably be considered to be the type of "initiation" of a general rate case which the Commission ruled would allow U S WEST to opt out of AFOR.

A new Company filing brought about by a rejection or dismissal of Advice Letter No. 2425 would have yielded an additional, important benefit. A new filing, unlike an amended advice letter, would have been required to comply with Rule 4.1 of the Commission's rules on costing and pricing, 4 CCR 723-27. Advice Letter No. 2425 was filed two days before the effective date of this rule, thereby exempting U S WEST from filing fully distributed cost ("FDC") studies required by Rule 4.1. In the costing and pricing rulemaking docket this Commission determined, despite the Company's strong arguments in opposition, that FDC studies provide needed information in Commission deliberations to determine just and reasonable rates. For the past several years U S WEST has sought consistently to avoid filing these cost studies. The

Commission, in adopting the new rule, agreed to accept and use the Company's total service long run incremental cost studies in its deliberations, but clearly and firmly rejected the Company's arguments that FDC studies should not be required. I agree that U S WEST's carefully timed filing afforded it a technical respite from providing the required FDC studies. However, its successful timing strategy was nullified by its faulty notice, and neither law nor equity demand the indulgence granted by my colleagues here. The rate increase requested by the Company is large. The additional effort imposed by the Rule 4.1 requirement for FDC studies is neither unduly burdensome nor costly to the Company and, more importantly, is reasonable when weighed against the additional burden the Company seeks to impose on ratepayers by its proposed increase in rates.

The majority decision actually affords U S WEST more than one option:

° The Company may proceed with its request for pass-through of OPEB costs via an amendment to its advice letter.

°The Company may decline to amend and may elect instead to proceed with a new filing.

°Or, in my opinion, the Company may withdraw its filing and await a determination arising out of filings made in connection with the mid-term adjustments contemplated by AFOR.

If the Company decides to proceed, it is clear from the majority opinion that my colleagues intend that the scope of the Commission's investigation into the tariff filing will be expanded to include factors not put at issue in the Company's original filing. However, it is not clear how the majority intends to effect this change.

I agree with my colleagues that if the Company proceeds with its request for a pass-through of OPEB costs--and this opinion applies to whatever procedure the Company elects to use as it goes forward--notice must be provided to all classes of ratepayers, and the scope of the

inquiry must be expanded to include consideration of potential positive and negative offsetting changes in other critical elements of the ratemaking formula. Hopefully my colleagues will vote to dismiss an amended filing which falls short of these requirements.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioner