DECISION MEMORANDUM

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FROM:BRAD PURDY

DATE:JANUARY 13, 1998

RE:CASE NO. USW-T-97-18; U S WEST’S TARIFF ADVICE REQUESTING AUTHORITY TO REVISE ITS TERMINATION LIABILITY ASSESSMENT FOR CONTRACTS, PRIVATE LINE TRANSPORT SERVICES AND ADVANCED COMMUNICATIONS IN NORTHERN IDAHO.

On August 7, 1997, U S WEST submitted Tariff Advice Nos. 97-12-N, 97-13-N and 97-14-N to revise its liability assessments on contracts, private line transport and advanced services that are discontinued prior to the normal contract expiration date.  These tariffs were suspended on September 9, 1997.  On October 2, 1997, the Commission issued a Notice of Modified Procedure,  requesting comments within 21 days.  On October 3, 1997, U S WEST submitted Tariff Advice No. 97-11-S which requests modification of termination liability assessments for Centrex 21 in U S WEST South.  Staff filed a Motion to consolidate on October 6, 1997, to include this latest tariff into this case because the tariff seeks to implement essentially the same changes as were requested in the other tariff advices in this case.  The Motion was granted by the Commission on October 17, 1997, in Order No. 27167.  Finally, a Notice of Modified Procedure was issued on October 21, 1997, to extend the deadline for comments to November 10, 1997.  The only parties to file comments in this case were Staff and U S WEST.

Commission Staff

In its tariff advice, U S WEST proposes to eliminate the language that specifies a 15% assessment factor.  Where, currently, U S WEST charges a termination charge of “100% of the minimum service . . .  and 15% of the minimum billing level for the remaining term of the agreement,” the Company proposes to charge “10% of the rates for the minimum service . . . plus the minimum billing level multiplied by the termination liability percentage specified in the service agreements.”  Staff notes that this revision will not affect existing contracts.

According to U S WEST, the Company only has two existing contracts in northern Idaho, indicating that the future application of this tariff revision will affect only a very small number of customers.  U S WEST contends that history has proven that the 15% assessment is not a sufficient deterrent to customers who terminate contracts before their expiration date.  Staff points out, however, that the Company was unable to provide Staff with any data showing loss of business or costs related to the termination of the contract.

Staff observes that, at first blush, it appears that this tariff revision will only affect large companies.  The revision, however, will also apply to private line subscription and to various data services that might be used by individuals and small business customers.  Consequently, Staff have the following concerns:

1.  The termination liability assessment is a penalty charge and is not related to any costs.  When U S WEST submitted tariffs for services, it also provided evidence that the costs, including fixed costs, for providing these services are fully recovered by the one-time and recurring charges in the tariff.  While contract rates are less than monthly rates for the services, U S WEST’s cost support data routinely shows the costs of the services to be recovered by the reduced rates.  Staff reluctantly recommended approval of this assessment when U S WEST first proposed it but felt, and still feels, that penalty charges are not an appropriate function of a regulated entity.

2.  Staff believes the possibility exists that contract cancellations in the face of a 15% penalty may be a result of performance and availability conditions.  U S WEST was not able to provide the reasons for cancellations.  If the cancellations are a result of inadequate products or services, then increasing the penalty won’t help, Staff contends.

3.  U S WEST advises that in all of the northern LATA, there are presently only two customers with contracts, although the contract option has been available for several years.  U S WEST does not expect many, if any, new contracts which will be subject to this increased penalty in northern Idaho.  Along these lines, Staff believes that if the current tariff is operating without a problem, then it should be left alone.

4.  U S WEST contends that the penalty is necessary in a competitive environment to retain customers.  Staff does not feel, however, that there is competition for these services in northern Idaho.

5.  Staff posits that large penalties may be prohibitive to small users who want or need U S WEST private line and data services and who do not have any alternative providers.  As a rule, the services that U S WEST provides under long-term contracts are services that are costly to begin with, Staff asserts.  Small users can benefit from contract terms, but Staff notes that if the services do not provide the benefits expected, small users need the ability to terminate onerous contracts.  Staff observes that some small business owners have already indicated that they find the current termination penalties to be too much to risk.

6.  Finally, U S WEST indicates that the primary reason for proposing this tariff change is to maintain consistency in its tariffs throughout its 14 state area.  Staff does not believe that this is a valid reason for accepting a tariff that may otherwise prove harmful.

Staff is sympathetic for the need for stringent early termination policies whenever a company faces the distinct possibility that competitors may win its customers away from it.  In an area such as northern Idaho, however, where there is no competition, Staff contends that an early termination penalty simply hurts the small customer who may have selected services that do not satisfy his or her needs as anticipated.  If, as U S WEST asserts, there are only two customers in northern Idaho subject to these tariff changes and their contracts will not be modified by this tariff revision, then Staff does not believe that it is in the public interest to increase penalties.

U S WEST

U S WEST filed comments regarding both its northern Idaho and its Centrex 21 southern Idaho tariff filings.  U S WEST notes that all services it offers for sale under contract are available on a standard month-to-month basis from the Company’s tariffs for catalogs.  No customers were required to execute a contract to obtain any U S WEST service, the Company contends.  As a result, the Company argues that customers are free to avoid entering any agreement which contains termination liability language.  Moreover, U S WEST asserts, the monthly rates available to customers for all regulated services have been approved by the Commission as being fair, just and reasonable.  U S WEST argues, therefore, that the controversy here is limited solely to those customers who choose to enter a written agreement with the Company to obtain services on some basis other than through the approved monthly rates.  Finally, the Company notes that existing contracts will not be affected by the Commission’s approval of the tariff filings being considered in this docket.

U S WEST argues that the contractual agreements it offers are a common means for customers to receive prices which are discounted from the standard month-to-month tariffed prices.  In exchange for the customer’s agreement to maintain a certain level of contracted services for a particular term, the Company notes, they receive better prices than customers who purchase the same services on a standard month-to-month basis.  U S WEST notes that the TLA provision in its contracts come into play only when a customer elects to discontinue a service under contract prior to the normal expiration date.  U S WEST points out that this type of provision is basic to every contract for service offered by all of U S WEST’s competitors.  Consequently, the Company believes that this filing brings its TLA in line with the TLA’s found in competitive contracts.  U S WEST notes that if there were no penalty for early contract termination, it would be foolish for any customers to pay the tariffed rate when he or she could execute an agreement to obtain the lowest possible contract rate.  In fact, there would simply be no basis for charging customers different rates if they were all subject to the same conditions for the use of the services.

U S WEST also points out that TLAs do not come into play for services which are considered “basic.”  For instance, these do not apply to the sale of residence and business lines, custom calling features (on a stand-alone basis, or for small volume pole services).  Instead, they apply to large volume toll, ISDN, private transport, frame relay and similar services.  To meet these needs, the Company states that it is increasingly necessary to install new facilities and unique technologies at particular customer locations.  The use of a new TLA is a means of protecting a greater portion of the investment of these capital improvements should a customer exit the contract.

U S WEST’s response to the concern addressed by one of the Commissioners at the last  decision meeting on this matter was, that a customer who may be experiencing a service delivery or reliability problem with the Company could be held hostage and required to retain the unsatisfactory service through the threat posed by the TLA provision of his or her contract.  U S WEST contends that this is the problem with remedies.  If a customer is experiencing such problems, those concerns can be carried to the Company as an executive complaint, to the customer’s sales contact or to the PUC as a formal or informal complaint.  Should the situation justify such a measure, release from TLA provisions is one possible outcome of service failures on the Company’s part.  The Company assures the Commission that customer atonement situations are dealt with on an individual case-basis  with the remedy adjusted to match the severity of the failure and the customer’s needs.

U S WEST also notes that it does not seek to hold customers to service arrangements that no longer meet their needs or customers who wish to remain with U S WEST but purchase different services, the Company is willing to negotiate a new contract with the customer and waive the TLA penalty.

U S WEST contends that the competitive nature of its industry requires flexibility in establishing TLAs.  It contends that TLA provision currently contained in its tariff is insufficient and that the Company needs greater flexibility in matching contracts to the characteristics of customers.  U S WEST contends, contrary to some assertions, there is competition in northern Idaho in the form of satellite services, cellular and other wireless operations as well as a proliferation of carriers placing fiber optic cable.  U S WEST believes that customers who have few competitive alternatives are unlikely to find themselves “tempted” to terminate their contracts early and are therefore less likely to face payment under a TLA.

Finally, U S WEST argues that consistency of tariff provisions across U S WEST states benefits the Company and its customers.  U S WEST believes that its customer prefer the simplicity of common pricing and contract language regardless of state boundaries.  It is also more convenient for the Company’s administrative personnel when responding to customer inquiries from different states.  U S WEST notes that the language requested in these four filings is already in place in the Company’s southern Idaho network and exchange services catalog, access services catalog and private line transport catalog.  In addition, the new TLA language is in effect for the Company’s operations in Arizona, Colorado, Iowa (catalogs), southern Idaho, Malheur, Minnesota, Montana, North Dakota, Nebraska, Oregon, South Dakota, Utah, Washington and Wyoming.  Approval is pending in New Mexico.

Commission Decision

How does the Commission wish to rule with U S WEST’s proposed tariff changes?

Brad Purdy

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