DECISION MEMORANDUM

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FROM:DON HOWELL

DATE:OCTOBER 22, 1998

RE:TEL-SAVE COMPLAINT AGAINST U S WEST, CASE NO. USW-T-98-7

On June 22, 1998, Tel-Save filed a complaint against U S WEST alleging violations of state and federal law.  More specifically, Tel-Save alleged that U S WEST does not permit customers to lift “PIC freezes”(footnote: 1) by means of E-mail. Attempts to informally resolve the complaint were unsuccessful.  Consequently, on September 1, 1998, the Commission issued a summons requiring U S WEST to answer the complaint.  On September 22, 1998, U S WEST filed its answer and affirmative defenses.  On October 13, 1998, Tel-Save filed a reply.

THE COMPLAINT

Briefly, Tel-Save alleged that U S WEST’s practice of not permitting customers to lift PIC freezes by E-mail violates Sections 201(b) and 202 of the Communications Act and Idaho Code §§ 61-301 and 61-315.  Section 201 of the federal Act requires all telecommunication practices to be just and reasonable and Section 202 prohibits a carrier from discriminating or from granting an unreasonable preference in its delivery of services.  These federal statutes mirror Idaho Code §§ 61-301 and 61-315, respectively.  Tel-Save claimed that U S WEST’s failure to accept E-mails unreasonably “delays, impedes, and often thwart[s] attempts to lift PIC freezes in order to switch their long-distance service to that provided by [Tel-Save].”  Complaint at 2.  Tel-Save requested the Commission order U S WEST to cease and desist from imposing unreasonable requirements on lifting PIC freezes.  In addition, the Company requested the Commission order U S WEST to accept E-mail requests to lift PIC freezes from both customers and as forward by Tel-Save.  Id. at 6.

U S WEST’S ANSWER

In its Answer, U S WEST admitted “that it does not presently allow PIC freezes to be removed by end-use customers solely by means of E-mail. . . .”  Answer at ¶ 5.  The Company further stated that PIC freezes are put in place upon a customer’s verbal request without charge.  Id. at ¶ 15.  U S WEST indicated that when a customer requests a PIC freeze, it advises the customer that the freeze “will preclude a subsequent PIC change without verbal authorization from the customer.”  Id.  U S WEST acknowledged that it does require that end users with PIC freezes verbally authorize any subsequent PIC change.  “Thus, customers are made aware that neither a PIC change, nor a removal of a PIC freeze, can be authorized by a third party.”  Id. at 4, ¶ 15.

U S WEST explained in its Answer how PIC freezes are initiated.  The Company noted that an account

with a PIC freeze has a Code placed in the account information which prevents an electronic PIC change request received from an interexchange carrier from being processed.  Absence such protection, an interexchange carrier can electronically implement a PIC change, regardless of whether the customer has authorized the change.  A PIC freeze does not need to be removed from an account in order for a PIC change to take place.  Rather, U S WEST manually overrides the PIC freeze when it confirms with the customer that the PIC change should in fact take place and is actually authorized by the customer.

Id. at ¶16 (emphasis added).  The Company stated that it is currently investigating the possibility of accepting E-mails directly from end users to establish and remove PIC freezes.  U S WEST stated that it expects “to complete its investigation in the near future.”  Id. at 5, ¶ 18.

U S WEST also asserted as an affirmative defense that Commission action on the complaint is preempted by federal law.  More specifically, the Company alleged that Section 258(a) of the Communications Act provides that practices related to interstate PIC freezes are subject to FCC jurisdiction while practices pertaining to intrastate services fall within the jurisdiction of this Commission.(footnote: 2)  U S WEST maintained that Tel-Save’s complaint is not limited to simply intrastate services, but apparently applies as well to PIC freeze practices related to interstate long-distance service.  Answer at ¶ 21.  The Company insisted that the FCC has not prescribed verification procedures regarding the removal of PIC freezes by E-mail or otherwise.  “Thus, in as much as there are no ‘such procedures with respect to intrastate services’ for the Commission to enforce, the complaint falls within the jurisdiction of the FCC, not the Commission.” Id. at 6, ¶ 21.

TEL-SAVE’S RESPONSE

In response, Tel-Save provided an extensive pleading asserting that the Commission is not preempted from granting Tel-Save’s requested relief by Section 258 of the Communications Act.  Tel-Save reiterated that it seeks a Commission Order directing U S WEST to accept E-mail requests to lift PIC freezes.  The Company urged the Commission to distinguish between a PIC freeze and a PIC change request.  A PIC “freeze is a restriction placed by the LEC on a customer’s account which is intended to prevent the processing of a [PIC] change request without some form of expressed authorization from the customer.  A [PIC] change request is an order placed by the customer to switch his or her current carrier.”  Reply at 2 (emphasis original).  Tel-Save is not proposing to change the requirements for verifying change requests but is urging the Commission to direct U S WEST to stop discriminatory PIC freeze practices.

Tel-Save argued that Section 258 is not applicable to lifting PIC freezes.  Even if it was applicable, the Company maintained that this Commission is not preempted from granting the requested relief.  Reply at 3.  The remainder of Tel-Save’s Reply is devoted to its arguments why the Commission is not preempted even if Section 258 were applicable to PIC freezes.

Staff Analysis and Recommendation

At this stage of the proceeding, U S WEST has simply alleged as an affirmative defense that Tel-Save’s complaint and the relief it seeks are preempted by federal law.  U S WEST offered no detailed legal analysis or argument other than simply stating its affirmative defense to the complaint.  In response, Tel-Save has submitted an extensive legal argument and provided documents supporting its contention that the Commission is not preempted in this matter.  Given the legal and jurisdictional arguments offered thus far, Staff believes that it is appropriate to preliminarily decide the jurisdictional or preemption issue.  Staff suggests that the Commission require U S WEST to submit a legal brief or memo regarding its affirmative defense of federal preemption.  Once U S WEST has filed its brief, then Tel-Save may file a final reply brief, if necessary.

At this juncture, Tel-Save’s complaint only seeks affirmative relief against U S WEST.  Tel-Save does not allege that any other LEC engages in similar conduct nor does it seek relief against other LECs.  Although Staff considered broadening the scope of this complaint to examine the practices of other LECs, Staff believes that this course of action is not necessary.

Commission Decision

1.Does the Commission desire to rule upon the jurisdictional and preemption issues as a preliminary matter?  If so, does the Commission desire that U S WEST file a legal brief addressing its affirmative defense?

2.Does the Commission agree that Tel-Save may file a reply brief if it deems necessary?

3.Should this complaint be expanded to include other LECs?

4.Should U S WEST disclose the results of its investigation of accepting E-mail from customers or when its review might be completed?

Don Howell

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**FOOTNOTES**

1:

PIC means the primary interexchange carrier chosen by a customer to carry that customer’s long-distance calls.  In other words, when the customer dials “1” plus a long-distance telephone number, the call is routed to the customer’s PIC.  A PIC “freeze” is initiated when a customer notifies its local exchange carrier that the customer chooses to “freeze” or lock the customer’s PIC selection.  PIC freezes prohibit the unauthorized switching of interexchange carrier, i.e., slamming.

2:

Section 258(a) provides that no “telecommunications carrier shall submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the [FCC] shall prescribe.  Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.”