

Service Date: July 2, 1999

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF U S WEST)	UTILITY DIVISION
COMMUNICATIONS, INC., Complaint by)	
CLARK FORK TELECOMMUNICATIONS,)	DOCKET NO. D99.2.26
INC., et al., Pertaining to Terminating)	
Access Charges)	ORDER NO. 6185

ORDER DISMISSING COMPLAINTS

Introduction

1. On February 5, 1999, Clark Fork Telecommunications, Inc., 3 Rivers Telephone Cooperative, Inc., Range Telephone Cooperative, Inc., Northern Telephone Cooperative, Inc., Ronan Telephone Company, Hot Springs Telephone Company, Lincoln Telephone Company, Blackfoot Telephone Cooperative, Inc., and InterBel Telephone Cooperative, Inc. (small companies or complainants), jointly filed before the Public Service Commission (PSC) a complaint against U S West Communications, Inc. (USWC). The small companies complain that, although until late 1998 or early 1999 USWC had paid terminating access charges to each of them for all USWC-transported interexchange telephone calls, regardless of the Montana exchange where the traffic originated, and as measured by the small companies' call-measurement methods, USWC is now paying terminating access charges only for USWC-transported calls which originate in USWC exchanges and only as measured by USWC methods. On March 11, 1999, USWC answered the small companies' complaint, raising several defenses, including jurisdictional defenses.

2. On March 24, 1999, USWC filed a motion to dismiss the small companies' complaint, based on absence of PSC jurisdiction (i.e., the authority or power to hear and decide the matter). On April 22, 1999, the small companies responded to USWC's motion to dismiss. On May 7, 1999, the PSC granted intervention to Valley Telecommunications, Inc., Nemont Telephone Cooperative, Inc., Triangle Telephone Cooperative Association, Inc., Project

Telephone Company, Inc., and Central Montana Communications, Inc. (also small companies, or intervenors). The intervenors claim the same or a similar interest as the complainants and have filed a complaint to that effect. In granting intervention the PSC also allowed the intervenors an opportunity to respond to USWC's pending motion to dismiss. On May 25, 1999, the intervenors filed their response in opposition to the motion. On June 11, 1999, USWC filed a reply to the complainants' and intervenors' arguments in opposition to dismissal.

Discussion

3. The small companies, some being PSC-regulated independents and some being unregulated cooperatives, each provide local exchange service to customers within their various local exchanges in Montana. USWC, a PSC-regulated telephone company, provides local exchange service to customers within its various local exchanges in Montana. Although the exact arrangements between the small companies, USWC, and the customers of both may vary, USWC also carries some, and in some instances most, of the intraLATA interexchange toll (i.e., long distance) traffic among the small company and USWC local exchanges.

4. The regulated small companies have PSC-approved tariffs and apparently all or most of the small companies (regulated and cooperative) have contracts with USWC, both of which govern payment of terminating access charges and measurement of the calls being terminated. The small companies allege that USWC is not complying with the small companies' terminating access tariffs or the small company / USWC terminating access contracts. The small companies request that the PSC enforce the tariffs and contracts against USWC.

5. The basis for USWC's motion to dismiss is lack of PSC jurisdiction over the claims made and remedies requested by the small companies. USWC argues that the small companies' complaints pertain to customer (i.e., USWC in this instance) compliance with tariffs, declaration of contract rights, and awards of monetary relief, all of which are not matters within the PSC's jurisdiction. USWC argues that PSC powers do not include judicial powers to declare contract rights and award monetary relief and jurisdiction over these matters presented can only be in the judicial system with the accompanying rights (e.g., jury trial) only that system can

provide. In regard to enforcement of tariffs, USWC argues it is a customer of the small companies and the PSC does not and cannot act to collect customer obligations, if any, owed to utilities, including when the customer is a utility. USWC argues that only the courts may lawfully entertain collection of customer obligations.

6. The small companies argue that USWC is a public utility and the PSC has full jurisdiction over all practices and acts of public utilities in the provision of regulated service. The small companies argue that the matter presented is a straight-forward tariff issue, over which the PSC has jurisdiction. The small companies argue that the PSC has jurisdiction over contracts, when the contracts relate to public utility rates and services.

7. Although the PSC has broad powers to hear and decide much regarding activities of public utilities, the PSC's jurisdiction is not limitless. The small companies' complaints and requested remedies in the complaints, regardless of the merits of the underlying claims, are not among those matters upon which the PSC can act.

8. The PSC has general supervisory powers over public utilities and may inquire into the management decisions of public utilities. Because of this, the small companies appear to conclude that the PSC has jurisdiction over any matter in which a public utility is alleged to be not acting properly. The small companies' conclusion is not accurate. All PSC general powers relevant to the present matters are qualified. The PSC's general supervisory powers provided at § 69-3-102, MCA, are expressly limited to regulatory activities contemplated by the statutes administered by the PSC. There is no statutory provision even slightly alluding to PSC authority over collection of obligations (whether arising from tariff, contract, or other means) owed to a public utility (or any other entity, e.g., a cooperative), even if the obligation is owed by another public utility. Additionally, all PSC general powers to inquire into the management of public utilities as provided as § 69-3-106, MCA, are expressly limited by that statute to the performance of PSC duties, which are also prescribed by statute, none of which appear to relate to PSC collection of obligations owed public utilities (or other entities) by customers.

9. The present situation is one where the small companies (at least the regulated independents) do have PSC-approved tariffs governing terminating access charges. Whether or

not USWC is responsible for paying terminating access charges for all USWC-transported calls in accordance with those tariffs, it is apparent that USWC is now only doing so for USWC-exchange-originated calls and then only as measured by USWC measurement methods. However, in this instance, in regard to compliance with a tariff, USWC is a customer of the small companies. The PSC has no power to hear and decide collection actions on unpaid customer obligations owed public utilities, even when the customer is a public utility. Utilities owed money by customers must collect through collection actions in court, not through PSC proceedings.

10. The same result applies to the arguments pertaining to PSC jurisdiction over contracts. USWC argues that the PSC does not have jurisdiction over interpretation and enforcement of contracts and would not have power to award the monetary relief requested even if USWC is in violation of the contracts. USWC argues that jurisdiction over contracts is only in the judiciary, with accompanying rights that only the judiciary, not the PSC, can provide. The small companies argue that the PSC does have jurisdiction over contract matters when the contracts impact the rates and services of a public utility. The PSC agrees with USWC's assessment in this instance. Section 69-3-103, MCA, states that the PSC does not have judicial powers. Case law, in discussing § 69-3-103, MCA, states that interpretation and enforcement of contracts are judicial functions. *City of Billings v. PSC*, 193 Mont. 358, 369, 631 P.2d 1295, 1303 (1981). Although the same case law states all contracts may be subject to state regulatory powers, and the PSC, having authority over rates and services of public utilities, has the power to supersede or modify contracts made by public utilities to the extent that rates and services are affected, *id.*, 193 Mont. at 370, 631 P.2d at 1303, applicable to the present matter, the fundamental rule in *City of Billings* remains that contract disputes are decided by courts not administrative agencies. When *City of Billings* refers to PSC regulatory powers which may affect (i.e., supersede or modify) contracts, it appears to have one type of situation in mind (a situation present in *City of Billings*, *id.*, 193 Mont. at 373, 631P.2d at 1305), and that is where a public utility has contracted to provide services at rates other than tariffed rates. In the present matter USWC has not contracted to provide utility services at rates other than USWC tariffed

rates. In the present matter USWC may have contracted to pay certain rates (i.e., terminating access charges). USWC's tariffs and rates are not in issue, USWC compliance with the small company tariffs is. To the extent the matter presented by the small companies is a contract dispute, the dispute does not pertain to the rates or services of the public utility to which the complaint is directed (i.e., USWC).

11. The small companies also argue that the PSC has jurisdiction over the matters here presented because: the PSC can hear and decide actions pertaining to public utility rates, practices, or acts of any kind affecting utility service which are in any respect unreasonable, insufficient, discriminatory, or inadequate, § 69-3-321, MCA; the PSC must set just and reasonable rates, § 69-3-807, MCA; the actions of USWC result in special privileges to some customers, in violation of § 69-3-305, MCA; and the PSC has jurisdiction to enforce compliance with tariffs, § 69-3-110, MCA. Each of these statutes are important provisions in the regulation of public utilities, but they are not applicable here. The nature of these statutes is such that they pertain to complaints against a public utility which pertain to the provision by that public utility of a public utility service. USWC compliance with contracts and the regulated small companies' tariffs, not USWC's provision of public utility services, are in issue in the present instance and the statutes referenced above cannot reasonably be so broadly construed to serve as the basis for PSC jurisdiction.

Order

IT IS HEREBY ORDERED that USWC's motion to dismiss is granted and the complaints by the complainant and intervenor small companies are dismissed. The basis for dismissal is absence of PSC jurisdiction over the matters presented by the small companies (i.e., enforcement of contracts, enforcement of tariffs against customers, collections of obligations owed to public utilities, award of monetary damages).

Done and dated this 29th day of June, 1999, by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chair

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner
(voting to dissent)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.