

P-421/EM-95-674

ORDER FINDING PROMOTION FAILS TO MEET STATUTORY STANDARD AND  
REQUIRING THE PAYMENT OF CREDIT



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs  
Tom Burton  
Marshall Johnson  
Dee Knaak  
Don Storm

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of a Proposal by US WEST  
Communications, Inc. to Offer Its Business  
Multiproduct Service Promotion

ISSUE DATE: November 8, 1995

DOCKET NO. P-421/EM-95-674

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**PROCEDURAL HISTORY**

On June 30, 1995, US WEST Communications, Inc. (US WEST or the Company) filed a proposal for a promotion which would waive the nonrecurring charges for all business customers who purchased any of a list of products from July 6 through August 4, 1995. In order to be eligible for the promotion, the business customer was required to place the order through a specific 1-800 number, or to reference the promotion when placing the order through the US WEST business office.

US WEST ran the promotion from July 6 through August 4, 1995.<sup>1</sup>

On July 31, 1995, the Department of Public Service (the Department) filed comments. The Department recommended that the Commission approve the promotion, which had nearly run its course at the date of the comments. The Department believed, however, that the promotion did not fulfill statutory requirements. The Department argued that the requirements of ordering the product through a 1-800 number or referencing the promotion failed to create a reasonable distinction between customers, as required under the promotion statute. The Department recommended that US WEST: 1) change its future promotions to conform to the statutory standard, and 2) provide a credit to all business customers who would have qualified for the promotion if it had been properly structured.

The Department projected that if US WEST offered the promotion to all business customers, without the proposed requirements, US WEST would no longer be able to cover the incremental cost of each of the products listed in the promotion. The Department believed that US WEST's future promotions should cover the incremental cost of each service in a multiproduct offering.

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<sup>1</sup> The promotion statute, Minn. Stat. § 237.626, provides that a promotion may take effect with one day's notice to the Commission.

On August 14, 1995, US WEST filed reply comments. US WEST argued that it had met the standard of the promotion statute, because each US WEST business customer was given notice of the promotion and an opportunity to take advantage of it. Because no violation of the statute had occurred, no credit was necessary or just. US WEST also argued that the promotion statute, Minn. Stat. § 237.626, should be interpreted to mean that the incremental costs of a multiproduct promotion must be recovered in the aggregate.

The Department filed reply comments on August 16, 1995, in which it reiterated its original position.

The matter came before the Commission for consideration on October 3, 1995.

## **FINDINGS AND CONCLUSIONS**

### **I. THE PROMOTION STATUTE**

The promotion statute, Minn. Stat. § 237.626, provides as follows:

A telephone company may promote the use of its services by offering a waiver of part or all of a recurring or a nonrecurring charge, a redemption coupon, or a premium with the purchase of a service. Section 237.09 does not apply to promotions under this section, but the customer group to which the promotion is available must be based on reasonable distinctions among customers. No single promotion may be effective for longer than 90 days at a time. The service being promoted must have a price that is above the incremental cost of the service, including amortized cost of the promotion. A promotion may take effect the day after the notice is filed with the commission. The notice must identify customers to whom the promotion is available and include cost information demonstrating that the revenue from the service covers incremental cost, including cost of the promotion. A telephone company that offers a promotion under this section shall file a report on the promotion with the commission and the department within 90 days of the conclusion of the promotion.

Minn. Stat. § 237.09, referred to in the promotion statute, is the anti-discrimination statute. It forbids any telephone company from charging two customers different rates for like services under similar circumstances.

### **II. REASONABLE DISTINCTION OF THE CUSTOMER GROUP**

When the legislature enacted the promotion statute in 1992, it removed the anti-discrimination strictures of Minn. Stat. § 237.09, but still required that the availability of promotions be based upon reasonable distinctions among customers. The statutory structure reflects the legislature's desire to balance traditional protections for customers of monopoly providers with the necessary flexibility as the telecommunications industry moves to a more competitive environment. The statute marks the widening of rigid ratepayer categories appropriate to a monopoly environment, with the emphasis on the *protection* of customers, to include categories

chosen in light of competition, with the emphasis on *flexibility* and *opportunity* for customers and companies.

The structure of the promotion statute means that each promotion must be individually examined to determine if its provisions retain the delicate balance of the statute.

In this case, US WEST's effort to reach its targeted group, business customers, was comprehensive. On each business customer's bill, the Company placed a message describing the products offered in the promotion and including the 1-800 number for placing the order. In addition, the Company sent a separate direct mail offering to about 35% of its business customers.

This promotion fails to meet the statutory standard, however, because of the requirements placed on the customers responding to the notices. Although the promotional material does not specifically say so, the business customer wishing to order from the promotional list *must* place the order through the special 1-800 number, or else mention the promotion specifically when placing the order through the US WEST business office. If the business customer fails to do either, proceeding instead to place the order through the US WEST business office in the usual manner, the customer does not qualify for the discount. Thus, in a way not apparent or rationally related to the type of customer, some business customers are in effect "selected" by US WEST's process as eligible for a discount, while other similarly situated business customers are not. US WEST has therefore failed in this case to create a reasonably distinct group of customers.

The Commission does not agree with US WEST that this promotional scheme is analogous to a coupon offering. In a coupon offering, the means of access to the promotion is clear and the customer's choice of partaking of the promotion or not is also clear.

The Commission therefore agrees with the Department that this US WEST promotion fails to meet the statutory standard of a clearly distinct group of customers under Minn. Stat. § 237.626. The Commission will therefore implement the Department's recommended remedy: US WEST will be required to apply a credit corresponding to the nonrecurring charges paid by business customers who would have qualified for the promotion, but for the failure to dial the 1-800 number or to reference the promotion. The Commission will also require the Company to submit a report verifying that all applicable credits have been applied.

### **III. PRICING ABOVE INCREMENTAL COST**

#### **A. Background; Summary of the Development of the Issue**

Earlier in 1995, US WEST proposed a multiproduct promotion which covered aggregate incremental costs but failed to cover the incremental costs of certain individual services. Docket No. P-421/EM-95-17. Although the Commission approved the proposed promotion, the Commission expressed concern regarding the statutory requirement of covering incremental costs in multiproduct promotions. The Commission urged the Company and the Department to meet with Commission Staff to delve further into this issue. In its April 7, 1995, Order in that docket, the Commission stated as follows:

Although this promotion will recover the combined incremental costs of the services being promoted, some individual services are priced below incremental costs. This is a concern in light of the statutory requirement that promotional prices recover incremental costs, including the costs of the promotion. Minn. Stat. § 237.626. The Commission urges continuing discussion of this issue and asks all parties to develop it fully should it recur.

Since that time, the parties have had time to discuss these issues and the Commission has had time to consider the implications of the statute. In a move from its original position, the Department has now come to the conclusion that a multiproduct promotion must cover the incremental cost of each service included. The Commission agrees with this interpretation of the statute.

#### **B. Positions of the Parties**

##### **1. US WEST**

US WEST stated that reasonable persons could differ in their interpretation of Minn. Stat. § 237.626. US WEST urged the Commission to find that the statute requires coverage of the aggregate of costs for multiproduct promotions, not the cost of each service included.

In many industries, US WEST noted, multiproduct promotions are used to package related products, some of which may result in profit while others do not. A company offering such a package expects to achieve an aggregate benefit from the offering as a whole. US WEST argued that the promotion statute was meant to extend this more competitive approach to the telecommunications industry.

US WEST argued further that if the legislature had meant to require each and every service in a multiproduct offering to recover its incremental cost, it would have clearly manifested this intent in the promotion statute. Because it did not, the singular term “service” can be read to include the plural, or aggregate of services, under the canons of statutory construction. Minn. Stat. § 645.08 (1994).

Finally, US WEST argued that this promotion would recover its aggregate incremental

costs, and would also recover the cost of each individual service *if the Commission did not require the Company to provide a credit to every business customer*. It would therefore be unfair to find that this offering failed to conform to the statute because it failed to recover incremental costs.

## **2. The Department**

After examining the legal issues raised in the Commission's April 7 Order, the Department concluded that Minn. Stat. § 237.626 must be interpreted to require recovery of incremental costs for each service included in a multiproduct offering. The Department recommended that the Commission require US WEST to structure its future promotions to meet this requirement.

### **C. Commission Action**

#### **1. The Requirement under the Statute**

The Commission agrees with the Department that the Minnesota legislature meant the promotion statute to require the recovery of incremental costs for each service included in a multiproduct promotion. The Commission finds that the legislative intent is apparent in the language of the statute.

The legislature included both the singular and the plural of the term "service" in the provisions of the promotion statute:

A telephone company may promote the use of its services by offering a waiver of part or all of a recurring or a nonrecurring charge, a redemption coupon, or a premium with the purchase of a service.

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The service being promoted must have a price that is above the incremental cost of the service, including amortized cost of the promotion.

The use of the singular word in one part of the statute and the plural in another indicates that the legislature deliberately chose the singular form in a particular context and the plural in another. If the legislature deliberately chose the singular form in the context of incremental cost recovery, the legislature meant that *each* service must recover its incremental cost.

It is true, as US WEST pointed out, that statutory language is generally construed so that the singular includes the plural and the plural the singular. Minn. Stat. § 645.08 (1994). The same statute provides, however, that the singular/plural rule will not be followed if "...this construction would be inconsistent with the intent of the legislature or repugnant to the context of the statute." The statute also states that "Words and phrases are construed according to rules of grammar and according to their common and approved usage." These canons of statutory construction indicate that the legislature's deliberate choice of the singular noun in one portion of the statute and the plural in another should be interpreted to convey the

plain meaning intended: a company may offer a promotion for a group of *services* but each *service* in that group must recover its incremental cost.

The Commission will require US WEST to design its future multiproduct promotions such that each service included in the offering is priced above its long-run incremental cost, including the cost of running the promotion.

## **2. Pricing of This Promotion**

In this case, the promotion was designed to cover the incremental cost of each service included. The Commission has now required the Company to apply a credit to every business customer who would have qualified for the promotion, but for the failure to dial the 1-800 number or to reference the promotion. The Company's payment of the additional credits will result in some individual services falling below incremental cost. Because the Company did not anticipate paying the additional credits when it designed the promotion, the Commission does not find that this promotion fails to meet the pricing criteria of the statute.

### **ORDER**

1. US WEST is required to apply a credit corresponding to the nonrecurring charges paid by business customers who would have qualified for the proposed promotion, but for the customer's failure to dial the 1-800 number or to reference the promotion.
2. Within 30 days of the date of this Order, US WEST shall file a report verifying that all applicable credits have been applied.
3. Future US WEST multiproduct promotions shall be structured such that each included service is priced above long-run incremental cost, including the cost of running the promotion.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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