

ISSUE DATE: June 16, 1999

DOCKET NO. P-421/EM-98-471

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Gregory Scott	Commissioner

In the Matter of U S WEST Communications,
Inc.'s Introduction of MegaBit Services

ISSUE DATE: June 16, 1999

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In the Matter of a Complaint Relating to
U S WEST Communications, Inc.'s Promotion
of its MegaBit Services

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ORDER ACCEPTING SETTLEMENT
AGREEMENTS

PROCEDURAL HISTORY

In April 1998, U S WEST Communications, Inc. introduced a new line of services, MegaBit services, which permit customers to conduct telephone conversations and high-speed data transmission at the same time, using a standard phone line. The services were designed to appeal to Internet users, telecommuters, and businesses wishing to link multiple work sites with a single computer system. MegaBit services move data at 5 to 250 times the speed of traditional technology.

On July 9, 1998, the Department of Public Service (the Department) filed a complaint claiming that U S WEST was violating Minn. Stat. § 237.626 by running a promotion of MegaBit services without first notifying the Commission and without filing cost information demonstrating that promotional prices covered incremental cost. This complaint was assigned docket number P-421/C-98-997.

On September 10, 1998, a second complaint was filed, this time by the Department and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG). This complaint claimed that U S WEST's marketing and delivery of MegaBit services violated the resale and non-discrimination provisions of state and federal laws governing local telephone competition. This complaint was assigned docket number P-421/EM-98-471.

On October 14, 1998, the Commission issued an Order that noted probable jurisdiction over both complaints, established a procedural framework for addressing them, and resolved discovery disputes between the parties.

On November 20, 1998, the Commission referred specific issues from both dockets to the Office of Administrative Hearings for evidentiary development before an Administrative Law Judge. The Commission retained jurisdiction over those issues that did not require evidentiary development.

On January 25, 1999, the Administrative Law Judge permitted SIHOPE Communications, Inc., an Internet service provider, to intervene in the proceeding, but cautioned that this decision did not expand the scope of the hearing beyond that defined by the Commission's Notice and Order for Hearing.

Over the course of contested case proceedings, U S WEST, the Department, and the RUD-OAG entered into and filed three separate settlement agreements. These agreements resolved, deferred, or established procedures to resolve, all issues in both complaints.

On February 8, 1999 the Administrative Law Judge issued an Order and Memorandum that recommended accepting all three agreements as in the public interest. The Memorandum stated that SIHOPE had agreed not to oppose the agreements in return for U S WEST's waiver of certain defenses it might otherwise have raised in a civil damages action planned by SIHOPE.

On January 25, 1999 Richard Baker, who was not a party to the case, filed comments. Mr. Baker raised two claims: (1) that the technical process of providing MegaBit service effectively "slams" MegaBit subscribers from state-regulated local service to an unregulated hybrid service, raising issues of privacy, consumer protection, and state authority; and (2) that on at least two occasions, U S WEST has billed customers for MegaBit services before those services were up and running.

On May 27, 1999, the matter came before the Commission. All four parties -- the Department, the RUD-OAG, U S WEST, and SIHOPE -- appeared, as did Mr. Baker. The Department, the RUD-OAG, and U S WEST supported the three settlement agreements. SIHOPE opposed them. Mr. Baker opposed them.

Having reviewed the record and having heard oral argument, the Commission makes the following findings, conclusion, and Order.

FINDINGS AND CONCLUSIONS

I. Factual Background

A. MegaBit Services

MegaBit services combine digital technology with standard copper wire to increase Internet access speeds -- and other data transmission speeds -- by 5 to 250 times the speed of traditional technology. They also permit customers to transmit data and carry on telephone conversations simultaneously, using a single line. The services are designed to appeal to Internet users,

telecommuters, and businesses wishing to link multiple work sites with a single computer system.

The service requires two MegaBit connections, one at the end-user's home or office and one at the Internet service provider or other hub through or to which the end-user will transmit data. The end-user service is called MegaSubscriber service; the hub service is called MegaCentral service.

Under the tariff at issue, MegaSubscriber rates run from \$40 to \$875 per month, depending upon transmission speed. Installation, set-up, and equipment fees total \$405.

MegaCentral monthly rates run from \$910 per port to \$1,456 per port, with additional monthly charges of \$5 or \$10 per Central Office Connecting Channel, and non-recurring charges of \$520.

B. The Complaints

This case involves two complaints, one claiming violations of the state statute regulating telephone service promotions, the other claiming violations of state and federal laws regulating local telephone competition.

Each complaint, together with the resolution proposed by the parties, is discussed below.

C. The Promotion Complaint

This complaint claimed that U S WEST failed to follow statutory procedures when it ran a promotion of MegaSubscriber services in May 1998, offering new subscribers a free digital modem, free Internet access set-up, and reduced-price site set-up and training.

Minnesota law requires telephone companies running promotions to notify the Commission in advance, to price promoted services above incremental cost, and to file cost information demonstrating that promotional prices cover incremental cost. Minn. Stat. § 237.626. The Department claimed U S WEST failed to notify the Commission, failed to file cost information, and may have failed to price the services promoted above incremental cost.

The parties did not settle this complaint, but agreed to submit it to the Commission for decision based on initial and reply comments, to be filed on a schedule negotiated between the parties.

D. The Competition Complaint

This complaint made two claims. The first was the legal claim that U S WEST's refusal to offer MegaBit services at wholesale rates to competing carriers violated state and federal resale requirements.¹ The parties agreed to defer this issue until the company received a *bona fide* request for wholesale service from a competitor, and U S WEST reserved its right to challenge state jurisdiction over the issue.

The second claim, that U S WEST violated state anti-discrimination statutes in the marketing and provision of MegaBit services,² had a much broader focus and included the following allegations:

- U S WEST introduced and promoted MegaSubscriber services when it knew or should have known that it would not have the facilities and equipment necessary to meet demand for MegaCentral service from Internet service providers (ISPs). It gave preferential treatment to its own ISP by installing MegaCentral services there first. It then exploited the shortage of MegaBit capacity it had created to steer customers to its own ISP.
- U S WEST limited participation in the MegaSubscriber promotion to customers choosing an ISP that already had MegaCentral service, but failed to promptly fill MegaCentral service orders from ISPs. This drove many customers to leave their ISPs for U S WEST.NET, one of the few ISPs with MegaCentral service up and running during the promotion.
- U S WEST promoted its own and only its own ISP on its web site, along with its regulated services.
- U S WEST's standard responses to end-users inquiring about MegaBit services favored its ISP over others.
- U S WEST's tariffs contain no time lines, quality standards, or customer remedies for MegaCentral installation, creating opportunities for abuse.
- U S WEST's installation of MegaSubscriber services has resulted in some customers' ISPs being changed without their consent.

¹ Minn. Stat. § 237.121(5) and 47 U.S.C. § 251(c)(4).

² Minn. Stat. §§ 237.09, 237.121.

Working through these claims and designing a blueprint for change were clearly complex undertakings. Ultimately, however, the parties reached three agreements designed to level the playing field between U S WEST.NET and other ISPs, through a package of financial rebates, joint marketing efforts, and operational changes. The main provisions of the three agreements are summarized below.

Financial Rebates

- U S WEST will waive or credit the \$45 it normally charges a MegaSubscriber customer to change ISPs, if the customer subscribed before December 31, 1998 and changed ISPs between May 1998 and 90 days after the Commission approves the settlement.
- U S WEST will spend \$30,000 on credits to ISPs who ordered MegaCentral services on or before September 30, 1998 and experienced delays in installation.

Changes in Consumer-Targeted MegaBit Marketing

- End-users who already have an ISP and inquire about MegaBit services will be steered to a “safe harbor” where U S WEST.NET will not be marketed. If the caller’s ISP does not have MegaCentral service, the caller will be referred to the yellow pages and to a web site listing all ISPs with MegaCentral service.
- U S WEST will list all MegaCentral subscribers on its web site. It will list new subscribers, not yet connected, as “pending,” within two business days of executing a contract. It will remove the “pending” designation within two business days of activation.
- U S WEST will introduce new procedures, developed by the parties and designed to ensure competitive neutrality among ISPs, for filling MegaSubscriber orders.

Joint Marketing Initiatives

- U S WEST will spend \$200,000 to provide 1000 MegaBit modems to MegaCentral subscribers (other than U S WEST.NET) for their use in promoting their services.
- U S WEST will spend \$206,000 jointly marketing and promoting MegaBit services with those ISPs that ordered MegaCentral service before December 31, 1998. U S WEST will match ISP contributions on a 2:1 basis, subject to a \$6,000 limit per ISP.
- U S WEST will run six newspaper ads for MegaBit services in the two major metropolitan dailies, listing all ISPs with MegaCentral service.

Improving Communication Between U S WEST and the ISPs

- U S WEST will establish a web site to inform and update ISPs subscribing to MegaCentral service on how much MegaBit capacity is available in each of its central offices.
- U S WEST will provide data within specified time frames on the MegaBit capacity of any central office when asked by an ISP that receives MegaCentral service, if the ISP shares specified marketing forecasts with U S WEST. U S WEST is prohibited from sharing those forecasts with U S WEST.NET.
- U S WEST will keep ISPs informed on technical changes to the network affecting MegaCentral service, will share with all ISPs receiving MegaCentral service any technical information it provides to U S WEST.NET, and will provide detailed technical information to the Department upon request.
- U S WEST will not accept orders for MegaSubscriber service in new metropolitan areas until six weeks after the company has held a meeting with the ISPs in the area and until MegaCentral service has been available in the area for six weeks.

Research Requirements

- In consultation with the Department and the RUD-OAG, U S WEST will commission a survey by an independent research firm on MegaBit customers' choices of ISPs.
- U S WEST will test new MegaBit ports at a designated lab, not at U S WEST.NET, unless the lab lacks the capability to perform the test.

Reporting Requirements

- U S WEST will file quarterly reports with the Commission detailing all ISP slamming incidents.
- U S WEST will file detailed quarterly reports for the next two years on installation intervals for MegaBit and MegaBit-related services.
- U S WEST will file quarterly reports for the next two years on the number and nature of complaints from ISPs and MegaSubscriber customers on installation problems, service quality, repair problems, and marketing practices.
- U S WEST will file quarterly reports for the next two years on the number of MegaBit service orders delayed or denied due to lack of capacity or facilities.

II. The Legal Standard

The telecommunications statutes encourage parties to Commission proceedings to settle their disputes. Minn. Stat. §§ 237.076, subd. 1, 237.011 (8). The Commission is to accept a settlement “upon finding that to do so is in the public interest and is supported by substantial evidence.” Minn. Stat. § 237.076, subd. 2.

III. Commission Action

A. Settlement Accepted

The Commission has examined the three settlement documents in light of the record and finds that accepting them would be in the public interest and supported by substantial evidence.

The package of forward-looking remedies negotiated by the three parties gives every promise of leveling the playing field between U S WEST.NET and other ISPs, without hindering the spread of MegaBit services and the significant network improvement they represent. The two issues deferred — U S WEST’s compliance with the promotion statute and with its resale obligations — were appropriate for deferral. The first will be decided on the merits after full briefing by the parties, the second upon the emergence of a competitor presenting an actual request for resale.

The Commission is satisfied that the interests of U S WEST, the general public, and all classes of ratepayers (including Internet service providers) were well represented in this case. The Commission finds substantial evidence that U S WEST’s ownership of an ISP poses inherent risks of discrimination against other ISPs and substantial evidence that the measures to which the parties have agreed will effectively counteract those risks.

The Commission finds that the settlement documents present a reasonable, forward-looking approach to the risks of discrimination inherent in U S WEST’s owning an ISP. In fact, the flexibility of the settlement process has yielded an approach that is in many ways more creative, more likely to spur competition, and more likely to speed the advance of new technologies, than standard regulatory remedies. (It is unlikely, for example, that any Order coming out of the contested case would have included the joint marketing, web site communications, and network update provisions of the settlement.)

The settlement therefore not only meets the substantial evidence and public interest tests of Minn. Stat. § 237.076, but furthers several of the telecommunications policy goals set forth at Minn. Stat. § 237.011. It clearly encourages the economically efficient deployment of infrastructure for higher speed telecommunications services and greater capacity for voice, video, and data transmission. It improves quality of service, promotes customer choice, and ensures consumer protection in the transition to a competitive marketplace. Its acceptance encourages the voluntary resolution of issues between and among competing providers and discourages litigation. Minn. Stat. § 237.011 (3), (5), (6), (7), and (8).

For all these reasons, the Commission will accept the settlement, as the Administrative Law Judge recommends.

B. SIHOPE's Comments

The Commission notes that SIHOPE, the Internet service provider that intervened in the case, has seemingly withdrawn its earlier agreement not to oppose the settlement.

SIHOPE's goal in this case has always been the recovery of significant monetary damages against U S WEST. Since SIHOPE's claim, like the second complaint, rested on allegations of discrimination, the Administrative Law Judge permitted intervention, but cautioned that SIHOPE could not expand the scope of the case beyond that already established by the Commission.

The Administrative Law Judge reported that SIHOPE had agreed not to oppose the settlement, in return for U S WEST's waiver of specific defenses it might otherwise have raised in SIHOPE's civil damages action. Although at hearing SIHOPE's attorney reported receiving that waiver, SIHOPE stated it opposed the settlement for failure to make specific findings of discrimination and for failure to assess what it considered adequate monetary penalties.

Setting aside the issue of SIHOPE's ability to repudiate its earlier agreement, the Commission finds that the relief SIHOPE seeks is beyond the scope of this case, beyond the Commission's jurisdiction, and in no way jeopardized by the Commission's acceptance of this settlement. This settlement leaves SIHOPE free to sue U S WEST in district court, the appropriate forum for the individualized determination and imposition of civil damages SIHOPE seeks. (It also gives SIHOPE the added benefit of defense waivers by U S WEST.)

Not only does the Commission lack institutional expertise in calculating business damages, it appears to have no authority to award them. The Commission's focus is systemic; its charge is to protect and promote the broad public interest. It is not designed or empowered to resolve commercial disputes. The courts, on the other hand, are designed and empowered for that very purpose, and they are the proper forum for SIHOPE's claims.

Since SIHOPE's opposition to the settlement is grounded in a quest for relief the Commission cannot grant, its opposition, even if valid following its earlier assent, does not preclude acceptance of the settlement.

C. Mr. Baker's Comments

Richard Baker, an attorney and a MegaSubscriber customer who was not a party to the case, spoke in opposition to the settlement. Mr. Baker raised two claims: (1) that the technical process of providing MegaBit service effectively "slams" MegaBit subscribers from state-regulated local service to an unregulated hybrid service, raising issues of privacy, consumer protection, and state authority; and (2) that on at least two occasions, U S WEST has billed customers for MegaBit services before those services were up and running.

Neither of these claims is decided by the settlement, and the Department and U S WEST have assured the Commission that these issues are under discussion by the parties. The Commission concludes that Mr. Baker's concerns do not undermine the public interest or substantial evidence bases for accepting the settlement.

D. Conclusion

The three settlement agreements are in the public interest and are supported by substantial evidence. They will be accepted.

ORDER

1. The Commission accepts the three settlement agreements jointly submitted by U S WEST Communications, Inc., the Department of Public Service, and the Residential Utilities Division of the Office of the Attorney General.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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