

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

---

|   |                     |
|---|---------------------|
| IN RE:<br><br>U S WEST COMMUNICATIONS, INC. | DOCKET NO. INU-99-3 |
|---|---------------------|

---

**ORDER DENYING RECONSIDERATION**

(Issued April 20, 2000)

**INTRODUCTION**

On March 1, 2000, the Utilities Board (Board) issued an order in this docket denying a petition for deregulation filed by U S WEST Communications, Inc. (U S West). In its petition, U S West sought deregulation of certain alleged competitive zones, pursuant to Iowa Code § 476.1D (1999). The Board found that, based on the record made in this proceeding, U S West's local telecommunications services in the alleged zones are not subject to effective competition and therefore cannot be deregulated.

On March 21, 2000, U S West filed a petition for reconsideration of the Board's order. U S West argues the Board's decision is not supported by the record and asks that the decision be revised to find that effective competition exists in the zones at issue.

On March 31, 2000, MCI WorldCom, Inc. (MCI), filed a resistance to U S West's petition for reconsideration, arguing that the petition is really an application for rehearing and that rehearing is not available in Board proceedings

that are not contested cases, citing the Board's "Order Denying Motion For Rehearing Or Stay" issued January 10, 1997, in Docket Nos. ARB-96-1 and ARB-96-2. Because this docket is not a contested case, argues MCI, rehearing is not available to U S West and the petition for reconsideration should be denied.

On April 12, 2000, U S West filed a response to MCI's resistance, arguing that this docket is, in fact, a contested case, and that rehearing (or reconsideration) is therefore available to U S West.

### **IS RECONSIDERATION AVAILABLE IN THIS PROCEEDING?**

The first question the Board must consider is whether this proceeding is a contested case and, if it is not, whether U S West's petition for reconsideration is a permitted filing.

Iowa Code § 17A.2(5) defines a contested case as a "proceeding in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Thus, if the Constitution or a statute requires that the Board hold an evidentiary hearing in a deregulation docket, the matter is a contested case.

Iowa Code § 476.1D provides for deregulation of competitive telecommunications services based upon a Board "determination" of effective competition. The statute does not expressly require an evidentiary hearing, and in the past the Board has deregulated services through rule making proceedings. See, for example, Docket No. RMU-85-6 (deregulating pay phones), Docket

No. RMU-85-23 (deregulating riser cable), and Docket No. RMU-86-16 (deregulating most billing and collection services). Thus, the statute does not require that the Board hold an evidentiary hearing as a part of telecommunications deregulation.

The Constitution does not require a hearing in this matter, either. Article I, § 9 of the Iowa Constitution provides in relevant part that “no person shall be deprived of life, liberty, or property, without due process of law.” Assuming that this right extends to corporate entities such as U S West, the fact remains that a Board decision to deregulate does not, by itself, deprive any entity of life, liberty, or property. A telecommunications utility is not required to deregulate its facilities after the Board issues its finding. Deregulation of a service or facility for a utility is only effective after the utility elects to file a deregulation accounting plan, pursuant to Iowa Code § 476.1D(2)”b.” In the absence of such an election, the telecommunications service continues to be regulated, as it was prior to the Board determination, so the Board decision, by itself, does not and cannot deprive any person of any property interest.

Thus, a deregulation proceeding is not a contested case because neither the Constitution nor any statute requires an opportunity for evidentiary hearing as a part of the proceeding.

This leaves the question of whether reconsideration is available in a non-contested case proceeding. In the past, the Board has sometimes applied a policy that rehearing is not generally available in proceedings other than contested cases. However, the Board order cited by MCI in its resistance offers some insight regarding

the Board's policy. In that order, the Board denied U S West's application for rehearing based upon two findings: First, that the arbitration proceedings were not contested cases, and second, found that rehearing, and the delay associated with that process, would be inconsistent with the requirement under 47 USC § 252(b)(4)(C) that the Board complete the arbitration within nine months of the date of the original request for negotiations. This second factor does not apply in the instant case; there is no statutory time deadline that would argue that the Board should not grant reconsideration in a deregulation docket.

To summarize, there is no explicit statutory prohibition against reconsideration in other agency action; it is a policy based on the Board's construction of the statute, finding an implicit prohibition based on the fact that Iowa Code § 476.12 refers only to rehearing in contested cases and is silent with respect to other agency action. However, the Board does not need to reach the question of reconsideration in non-contested-case proceedings in this docket, because the Board will deny rehearing for the reasons described below.

**DOES U S WEST HAVE THE ABILITY TO DETERMINE  
PRICES IN THE ALLEGED COMPETITIVE ZONE?**

U S West argues that the Board's order is in error when it concludes that, based upon this record, it appears U S West has the ability to determine prices in the alleged competitive zones. This finding was based on the fact that South Slope's prices are significantly lower than U S West's, but U S West nonetheless retains a significant market share.

U S West argues this outcome is the result of cream-skimming by South Slope, that is, that South Slope is focusing its efforts on the lucrative business customers and ignoring the rest of the alleged competitive zones. U S West also argues that so long as it continues to be subject to regulation, it cannot control prices. U S West also argues that the Board's conclusion ignores the possibility that subscribers may have chosen U S West's service for reasons other than price, suggesting that U S West's past service quality may be one reason customers have chosen to stay with U S West rather than change to "an unknown and untried competitor." (Petition For Reconsideration at page 2.) Finally, U S West argues the order should be revised on reconsideration because it relies upon a market share test to determine U S West can influence prices, but the statute does not explicitly adopt a market share test for determining the existence of effective competition.

It appears U S West may have misunderstood the meaning of the Board's decision in this respect. U S West argues it cannot set its own prices because it is subject to regulation. However, the criterion in the Board's rules does not look at the company's ability to control its own prices, but at the company's ability to determine or control market prices. See 199 IAC 5.6(1)"a." Clearly, any non-regulated provider can determine its own prices, while a rate-regulated provider's prices are subject to Board oversight. The important question is whether the market can influence and direct the entity's pricing decisions. All evidence in this record indicates that neither South Slope nor the customers in the alleged competitive zones are responding to price signals in the manner that would be expected in an effectively competitive

marketplace. (Tr. 159-60.) This supports the Board's finding that U S West has the ability to determine or control prices in the relevant marketplace. Stated differently, it indicates that the competitive forces at work in the alleged zones are insufficient to assure just and reasonable rates without regulation. This is one of the statutory factors the Board may consider. See Iowa Code § 476.1D(1).

Without belaboring the point, the Board notes that the record in this proceeding contains no evidence that South Slope has engaged in cream-skimming or that South Slope's service quality is inadequate. Instead, the record supports a finding that South Slope has engaged in significant marketing activities throughout the alleged competitive zones (Tr. 160-61), that South Slope's success in the mall is at least partly a result of U S West's service delays (Tr. 104), and that South Slope's service quality is "very good and very comprehensive." (Tr. 155.)

The Board will not grant reconsideration on the question of whether U S West has the ability to determine or control prices in the alleged competitive zones.

### **DOES SOUTH SLOPE'S ENTRY SIGNIFY EASE OF ENTRY?**

U S West argues that South Slope's presence in the zones is sufficient to prove there are no barriers to market entry and that the resulting duopoly constitutes effective competition. (Petition for Reconsideration at pages 3-5.) U S West also argues the conclusion regarding the likelihood of other providers entering the market is inconsistent with the decision to reject the HHI analysis. The Board declined to apply the HHI index in this case because it would have required six wireline

competitors before the market could be declared competitive; the Board found it may be unrealistic to expect that there will ever be that many wireline competitors in this market.

U S West agrees that no other provider will be able to enter the competitive zones in the same manner as South Slope. (Petition for Reconsideration, page 4.) Thus there can be no reasonable dispute that South Slope's entry is an anomaly and cannot be used as a basis for determining whether any other prospective competitor will face entry barriers. The Board will not grant reconsideration to alter its conclusion on this point.

However, the Board will take this opportunity to clarify an apparent misunderstanding regarding the use of the HHI index in telecommunications deregulation proceedings under Iowa Code § 476.1D. In this record, the market on which the HHI was calculated was limited to wireline providers, so the resulting analysis would require the existence of six wireline carriers before a determination of effective competition could be made. The Board found it unlikely that there would ever be that many wireline carriers in these markets. Another definition of the market, one that included mobile, fixed wireless, or other competitors, for example, might have been more useful, if the record also established that those services were viable alternatives to U S West's services. As such, the Board will clarify its March 1, 2000, order by stating that it is rejecting only the application of the HHI used in this case, not all-possible applications of the HHI.

The Board will also clarify another possible misunderstanding. At page five of its petition for reconsideration, U S West argues that the Board order is inconsistent because it includes a finding on page 16 that a duopoly may be regarded as effective competition, but at page 20, according to U S West, the Board “expresses concern as to whether another competitor will enter the market.” U S West argues that South Slope’s presence in the alleged competitive zones, while a duopoly, constitutes effective competition. Id.

The alleged competitive zones could be characterized as duopolies with barriers to entry, because there are two providers of service but little apparent likelihood of entry by any other competitors. A duopoly with barriers to entry is unlikely to ever amount to effective competition. A duopoly without such barriers may be effective competition, but that case is not before the Board in this docket.

**ARE THE SERVICES OFFERED BY SOUTH SLOPE  
SUBSTITUTES FOR U S WEST’S SERVICES?**

Finally, U S West argues that the Board should reconsider its finding that the record does not establish that South Slope’s services are substitutes for U S West’s services. In the March 1, 2000, order, the Board stated that Exhibit 100 shows the services offered by South Slope in the alleged competitive zone, but no exhibit showed the services offered by U S West. (Order at page 21.) The Board found this record insufficient to prove that all U S West services were subject to effective competition, simply because those services were undefined in this record.

U S West argues this finding was arbitrary and capricious. (Petition for Reconsideration, page 5.) U S West says it sought deregulation of all regulated retail services in its Tariff No. 1, a document that is several hundred pages long and broken up into numerous sections, including 911 emergency services, obsolete services, and similar services that might or might not be considered “retail.” (Tr. 61.) U S West apparently expected the Board to review the tariff and identify the services in question:

[t]his Board is expected to have technical expertise and an understanding of the telephone industry. To conclude that it does not have sufficient understanding or knowledge to conclude whether Mr. Brumley [a South Slope witness] or Mr. Phillips [a U S West witness] were correct in stating that the two companies offer comparable retail telephone services approaches disbelief [sic].

(Petition for Reconsideration, page 6.) While the Board may agree that it has “technical expertise and an understanding of the telephone industry,” it is not the Board’s duty or obligation to build the record for U S West. Moreover, the testimony of the witnesses on this point is far from clear. The U S West witness was unable to answer specific questions about U S West’s Tariff Number 1; for example, the witness was uncertain whether obsolete services were proposed to be deregulated, and did not know whether South Slope offered trunking services comparable to U S West’s. (Tr. 60-62.) The South Slope witness was also unable to say with certainty that South Slope was capable of providing all of the retail services offered by U S West; in fact, the witness’s answer on this point was prefaced with the statement that “I haven’t read their whole tariff.” (Tr. 176.) This record simply falls

short of establishing that South Slope offers services that are substitutable for all of the services that U S West is proposing to deregulate.

**CONCLUSION**

The Board will deny U S West's petition for reconsideration.

**ORDERING CLAUSES**

**IT IS THEREFORE ORDERED:**

The petition for reconsideration filed by U S WEST Communications, Inc., on March 21, 2000, is denied.

**UTILITIES BOARD**

\_\_\_\_\_

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr.  
Executive Secretary

/s/ Diane Munns

Dated at Des Moines, Iowa, this 20<sup>th</sup> day of April, 2000.