

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: QWEST CORPORATION, f/k/a U S WEST COMMUNICATIONS, INC.	DOCKET NO. RPU-00-1 (TF-00-64)
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ORDER DENYING REQUEST TO TAKE OFFICIAL NOTICE

(Issued January 4, 2001)

On November 13, 2000, in conjunction with its reply brief in this matter, Qwest Corporation, f/k/a U S WEST Communications, Inc. (Qwest), filed a request that the Utilities Board (Board) take official notice of a 1999 Federal Communications Commission (FCC) report containing information regarding telephone service rates in sample cities across the United States. Specifically, Qwest asks the Board take notice of certain information in the report describing Illinois service rates for the purpose of impeaching the testimony of Dr. August Ankum, a witness for McLeodUSA Telecommunications Services, Inc. (McLeod).

At the hearing in this docket, Dr. Ankum responded to questions from a Board member by testifying that the UNE loop rate in Chicago is \$2.59 and the residential rate in Chicago is \$8 or \$9 per month. (Tr. 613.) Dr. Ankum later clarified that he was referring to measured residential service, rather than flat-rate service. (Tr. 637-38.) Then, in response to cross-examination by counsel for Qwest, Dr. Ankum denied that the average 1FR rate in Illinois is greater than \$20 per month. (Tr. 638-39.)

Qwest alleges that the FCC report shows average monthly residential rates in Chicago from 1990 through 1998 were greater than \$17 and that average monthly residential telephone rates in Decatur and Rock Island were greater than \$20, citing Table 1.3 of the FCC report, attached to Qwest's request.

On November 17, 2000, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a resistance to Qwest's request, arguing that the Board cannot take official notice of the FCC report at this time. Consumer Advocate argues the contents of the FCC report are not the kind of facts of which judicial notice may be taken and the procedural due process requirements of Iowa Code § 17A.14(4) (1999) have not been satisfied because the request for official notice comes so late in this proceeding that it prejudices other parties.

Consumer Advocate argues that § 17A.14(4) only permits official notice of "all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency." Rule 201(b) of the Iowa Rules of Evidence defines "facts of which judicial notice may be taken" as those facts which are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Consumer Advocate argues the contents of the FCC report cannot be described as "not subject to reasonable dispute" or "within the specialized knowledge" of the Board.

Consumer Advocate also argues that § 17A.14(4) requires that parties must be "notified at the earliest practicable time, either before or after the hearing, or by

reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source.” The statute also requires that the parties “be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness does not require an opportunity to contest such facts.” Consumer Advocate notes that Qwest’s request was filed after the evidentiary record was closed, after initial briefs were filed, and concurrent with the filing of simultaneous reply briefs. Consumer Advocate argues that granting the request at this late date would be prejudicial to the other parties because they would have no opportunity to confront Qwest’s evidence.

On November 27, 2000, McLeod filed a resistance to the request to take official notice, agreeing with and supporting Consumer Advocate's arguments. McLeod also argues the report, which is based on information as of October 15, 1998, is outdated, irrelevant, and cannot be used to dispute October 10, 2000, testimony regarding “current” rates in Illinois.

On November 29, 2000, Qwest filed a reply to Consumer Advocate’s resistance, responding to each argument raised. First, Qwest argues that the contents of the FCC report are not subject to reasonable dispute, although Qwest agrees that parties may argue over the significance of those facts. Second, Qwest argues that the general subject of telephone rates is within the specialized knowledge of the Board, making them appropriate for official notice pursuant to § 17A.14(4). Third, Qwest argues that Consumer Advocate has been afforded an

adequate opportunity to contest the FCC report in the form of Consumer Advocate's resistance to the request to take official notice. Fourth, Qwest argues its request was not untimely, as the evidence was offered at the earliest practical moment. Qwest notes that it could not have reasonably anticipated that it would need this report at the hearing, as the evidence is being used to impeach testimony that was initially presented at the hearing.

Finally, on December 6, 2000, Qwest filed a reply to McLeod's resistance, arguing that the FCC report is the most recent information available from that agency and therefore is not "outdated", that some lag time is unavoidable in the creation of reports of this nature; that McLeod's objections go to the weight that should be accorded to the report, not to its admissibility; and that if McLeod thought the numbers in the FCC were incorrect, McLeod could have presented conflicting evidence.

The Board finds that it is permitted to take official notice of the FCC report, as requested by Qwest, but that the report is irrelevant to this docket and will be rejected. Iowa Code § 17A.14(4) permits official notice of (1) all facts of which judicial notice may be taken and (2) other facts within the specialized knowledge of the agency. The FCC report appears to satisfy both of these tests; it is a judicially-noticeable fact because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and it is a report concerning telephone service rates, which is a subject within the specialized knowledge of the Board.

Iowa Code § 17A.14(4) also requires that the parties to a proceeding be notified “at the earliest practicable time” of facts proposed to be noticed and that they be given an opportunity to contest the facts before a final decision is announced unless the agency determines that fairness does not require such an opportunity. It is arguable whether the parties were given notice of Qwest’s request “at the earliest practicable time”, Qwest could have filed its request for official notice at any time after the hearing, but instead waited until all parties were filing their reply briefs. However, that fact by itself did not deprive the parties of an opportunity to contest the facts; if they were relevant, the Board could still accommodate the parties within the context of this docket.

However, the Board finds the FCC report is irrelevant to this docket because it does not tend to prove or disprove the truth of any matter before the Board. The Board is not concerned with setting Illinois rates or UNE prices in this docket, so the information has no direct relevance. Qwest offers the evidence for impeachment of Dr. Ankum, but the report does not tend to disprove Dr. Ankum’s knowledge or truthfulness. The relevant portions of Dr. Ankum’s testimony are as follows:

BOARD MEMBER MUNNS: I wanted to ask you, to, because I didn't understand, I know at one point you said that increasingly we are finding that local service is not subsidized. You mentioned Michigan, Verizon New York, Verizon Massachusetts, and Illinois.

THE WITNESS: Yes.

BOARD MEMBER MUNNS: In those states where this finding has been made, do you know, is the--what is the relationship of the UNE loop rate to the 1FR?

THE WITNESS: All the Ameritech states in Michigan and Illinois, the UNE loop rate is below the residential rate. In Chicago, as I noted earlier, the unbundled loop is \$2.59. I believe that local residential service is something like eight dollars or nine dollars.

BOARD MEMBER MUNNS: In Chicago?

THE WITNESS: Yeah.

(Tr. 613.)

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REDIRECT EXAMINATION

BY MR. STOFFREGEN:

Q. I believe during cross-examination by the Board Members you mentioned several price figures in Chicago. Do you recall those figures?

A. Yes.

Q. Were those measured or flat rate prices that you were talking about?

A. I think that's measured, so you have to add to that.

(Tr. 638-39.)

* * *

RE-CROSS-EXAMINATION

BY MR. DUARTE:

Q. Dr. Ankum, isn't it true that the average 1FR or flat-rated residential rate in Illinois is over 20 dollars?

A. That is not true.

(Tr. 638-39.) The most that can be said from this testimony is that Dr. Ankum testified that residential rates for measured service in Chicago are “something like eight dollars or nine dollars” and that the average 1FR rate in Illinois is not over 20 dollars. Qwest’s FCC report does nothing to contest either of those statements. In fact, Table 1.3 of the report, at page 5, shows that the monthly rate for measured residential service in Chicago on October 15, 1998, was \$8.98, which is consistent with Dr. Ankum’s testimony that the rate was “eight dollars or nine dollars” on October 10, 2000.

With regard to the average 1FR rate in Illinois, the report shows that in the sample cities (Chicago, Decatur, and Rock Island) the residential rate as of October 15, 1998, ranged from \$17.18 in Chicago to \$20.18 in the other two cities; the report offers no information as to how these numbers can be combined to produce an average statewide rate, but given the concentration of Illinois population in Chicago, it is possible that the statewide average is less than \$20. In any event, it is not possible to use the FCC report, standing alone, to prove whether the average 1FR rate in Illinois is greater than or less than \$20 per month.

Iowa Code § 17A.14(1) provides that in contested cases, “[I]rrelevant, immaterial, or unduly repetitious evidence should be excluded.” “Evidence is irrelevant where it has no tendency to prove or disprove any issue of fact involved.” *Black’s Law Dictionary* 744 (5th ed. 1979). Because the FCC report does not tend to prove or disprove any issue of fact involved in this docket, it is irrelevant and should be excluded.

IT IS THEREFORE ORDERED:

The "Request For Judicial Notice" filed in this docket on November 13, 2000,
by Qwest Corporation is denied.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper /s/ Diane Munns
Acting Executive Secretary

Dated at Des Moines, Iowa, this 4th day of January, 2001.