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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

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In the Matter of the Petition of U S WEST)
Communications, Inc., to Exempt from)
Regulation U S WEST's DS3 Service.)

ORDER UPON
RECONSIDERATION

**DISPOSITION: ORDER NO. 00-003 RECONSIDERED AND
AMENDED IN PART**

On January 3, 2000, the Commission issued Order No. 00-003 granting the petition of U S WEST Communications, Inc. (USWC) to exempt from regulation its DS3 Service pursuant to ORS 759.030(3) and (4).

On March 3, 2000, USWC filed an application for reconsideration. The application sought removal of two conditions the Commission had set forth in Order No. 00-003. It requested no other change in the order. No participant to the proceeding filed a response to the application.

The Application

The conditions USWC seeks removed are as set out in the Order as follows:

- (2) U S WEST shall not provide to its unregulated DS3 operations any customer lists or information not available to the general market, and U S WEST will charge the unregulated DS3 operations the Commission-approved tariffed rate for any customer information provided.
- (3) U S WEST will adhere to OAR 860-035-090 in any customer proprietary network information access provided to its DS3 unregulated operations.

USWC's application is based on its argument that the limitations in the Order conflict with the interpretation of the applicable federal statute, 47 U.S.C. § 222, by the Federal Communications Commission (FCC). The FCC, according to USWC, has

ruled in *FCC Order and Further Notice of Rulemaking*, 13 FCC Rcd. 8061 (1998) that its authority over customer proprietary network information (CPNI) extends to both intrastate and interstate CPNI. Moreover, USWC argues, the FCC has issued an additional order, *In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, FCC Order 99-223 (adopted August 16, 1999, released September 3, 1999)(the FCC Reconsideration Order) that permits the use of CPNI which the Commission prohibited in Order No. 00-003. It notes the following language in Paragraph 17 of that order:

After considering the record, statutory language, history and structure of section 222, we concluded that Congress intended that a carrier's use of CPNI without customer approval should depend on the service subscribed to by the customer. Accordingly, the Commission adopted the "total service approach" which allows carriers to use a customer's entire record, derived from complete service subscribed to from that carrier, to market improved services within the parameters of the existing customer-carrier relationship. The total service approach permits carriers to use CPNI to market offerings related to the customer's existing service to which the customer presently subscribes.

USWC also argues that the FCC has liberalized the ways carriers can use CPNI. In the reconsideration order noted above, the FCC granted carriers authority to use CPNI to market pure information services, such as call answering, voice mail or messaging, voice storage and retrieval services, and fax storage and retrieval services.¹ It has also, according to USWC, expanded the use of CPNI to include the marketing of protocol conversion services.² Under these rulings, USWC should be allowed to use all of its "local service" CPNI to market its DS3 service.

USWC concludes from the above that the restrictions in Order No. 00-003 would prevent USWC from using CPNI "in marketing DS3 service to U S WEST customers currently purchasing service within the same category of service." This limitation of CPNI use is, in USWC's view, more restrictive than that allowed by the FCC. USWC notes that the FCC has stated that state regulations involving CPNI that "likely would be vulnerable to preemption would include those . . .that sought to impose more limitations on carriers' use."³ In the FCC Reconsideration Order, the FCC stated that "state rules that are vulnerable to preemption are those that . . . (2) seek to impose additional limitations on carriers' use of CPNI."⁴

USWC asserts that the above FCC rulings constitute a basis for reconsideration of Order No. 00-003. First, if given appropriate deference by the Commission, they constitute a "change in agency policy." Second, failure by the

¹ FCC CPNI Reconsideration Order at Paragraph 45.

² *Id.* at Paragraph 47.

³ FCC CPNI Order at Paragraph 18.

⁴ FCC CPNI Reconsideration Order at Paragraph 112.

Commission to take the FCC policies into account would constitute “an error in law.” OAR 860-014-0095, the Commission’s rule on reconsideration, makes both a “change in policy relating to a matter essential to the decision” and “an error of law or fact . . . essential to the decision” bases for reconsideration.

Disposition

The Commission concludes that USWC's argument is persuasive in part. Nevertheless, its request that we simply remove the two conditions in question is too broad. Instead, we will remove those conditions and substitute a condition that will require USWC to act in a manner consistent with the FCC’s current CPNI rules.

ORDER

IT IS ORDERED that U S WEST’s application for reconsideration of Order No. 00-003 is granted and the order amended by the deletion of paragraphs (2) and (3) of the Order section and by the addition of the following paragraph to the Order section:

(2) U S WEST Communications, Inc., shall not provide to its unregulated DS3 operations any customer lists or information except in a manner that comports with the rules, policies and orders of the Federal Communications Commission regarding telecommunications carriers’ use of customer proprietary network information (CPNI). *See* 47 C. F. R. sections 64.2001 *et seq.*; *In the Matter of Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, FCC Order 99-223 (August 16, 1999), which reconsidered FCC Order 98-027 (February 26, 1998).

Made, entered, and effective _____.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

ORDER NO. 00-222

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements of OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070. A party may appeal this order to a court pursuant to ORS 756.580.

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