

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

Overcoming Obstacles to Telephone ) DA 99-201  
Service for Indians on Reservations ) BO Docket No. 99-11

**COMMENTS OF THE NEW MEXICO ATTORNEY GENERAL**

The Attorney General of the State of New Mexico, through the undersigned counsel and pursuant to the notice of hearing filed on January 21, 1999, respectfully submits the following comments in the above-captioned docket. The Attorney General thanks the Commission for providing her the opportunity to submit comments regarding the highly important topic of telephone service on Indian reservations, and she also appreciates the opportunity provided to this office to testify and participate in a panel discussion at the January 29, 1999, hearing in Albuquerque.

**Authority of the Attorney General**

By statutory authority, the Attorney General can choose to be a party to adjudicatory and rulemaking proceedings before the New Mexico Public Regulation Commission (PRC)<sup>1</sup> and the courts when she considers it to be in the public interest to do so. NMSA 1978, § 8-5-2(J) (1998 Repl. Pam.). By further statutory authority, she is specifically responsible for representing residential and small-business ratepayers before the PRC. Section 8-5-17. Pursuant to this authority, the four-lawyer Ratepayer Advocacy Unit of the Attorney General's Office represents residential and small-business ratepayers in telecommunications matters and other utility matters before the PRC. The ratepayer advocacy of this office is not limited to specific categories of telecommunications matters. This office's representation can, and has, included matters of availability and quality of telephone services, both on and off the Indian reservations in New Mexico.

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<sup>1</sup> In these comments, "PRC" will refer to the Public Regulation Commission as well as its predecessor agency, the State Corporation Commission.

### Identifiable Causes of Low Subscriberhip Rates on Reservations

The federal Telecommunications Act of 1996 (FTA) requires policies that "advance and preserve universal service" and further requires "[q]uality services [to] be available at just, reasonable, and affordable rates." FTA, §§ 254(b), 254(b)(1). The implication of these statutory provisions is that telephone services should be universally available and affordable so that telephone subscribership rates can improve, particularly in the rural areas, where those rates tend to be much lower than elsewhere. We have been aware of the fact that telephone subscribership rates are, on average, much lower on the reservations than in other rural areas in the state. For example, according to data from the 1990 census, US West's Gallup East wire center had a 45% subscribership rate, and the service territory of Navajo Communications had a subscribership rate of 27%. A number of other wire centers that include high percentages of Native Americans had rates well under 80%. In contrast most of US West's rural wire centers had subscribership rates of more than 80%. While the subscribership rates on the reservations may have increased substantially since 1990, we suspect they are still much lower than rates in other rural areas and especially low in comparison to the approximate subscribership rates of 90% for the state of New Mexico and 95% for the nation.

While this office has not conducted a formal study to determine the causes of the low subscribership rates on Indian reservations, we have been able to identify some of the causes. During the course of litigation over US West's held orders and its numerous petitions for waivers of the PRC's zero-held-order standard, we learned that a fairly large percentage (probably in the range of 30% to 50%) of all held orders for which US West seeks waivers are for residential customers on Native American lands. According to the held-order standard, US West is not permitted to delay any orders for primary service longer than 30 days, except in cases where the company applies for and receives a waiver and in cases where the customer's premises is located more than 1,000 feet from the nearest existing telephone facilities.<sup>2</sup> The chief reasons for which

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<sup>2</sup> By PRC Order, if the premises of the customer requesting service is more than 1,000 feet from the nearest existing telephone facilities, US West must bear the cost of extending those facilities the first 1,000 feet and up to an

US West has sought waivers for service orders on Native American lands are (in order of frequency): 1) the need for the company to obtain rights of way (ROWs) prior to undertaking necessary construction; and 2) US West's claim that it is unreasonably costly to reinforce existing infrastructure that is necessary to provide the service.

The PRC has found in the past that large numbers of held orders are due to US West's failure to adequately anticipate growth which would allow it to plan the reinforcement of infrastructure before held orders occur. With respect to US West's petitions for waivers based on the need to obtain ROWs on Indian reservations, the company has told the PRC that it generally must go through a process that takes many months and sometimes even years before the ROW is granted.<sup>3</sup> According to US West, 18 months is a typical length of time needed to obtain a ROW for the purpose of reinforcing existing infrastructure due to a complex process involving the need for an archaeological review and approvals by both the tribe and the Bureau of Indian Affairs (BIA). We have argued that, to obtain a waiver based on the need for a ROW, the company should be required not only to demonstrate that it needs to obtain a ROW but also to demonstrate that circumstances outside its control prevented it from applying for the ROW sufficiently far in advance to prevent the held order in the first place. Shortly before the hearing in the case last summer, a US West witness provided testimony that tribal governments will never consider a ROW application until there is a service order in hand. If that is true, that would definitely be a circumstance beyond US West's control that necessarily results in held orders. However, we were unable to determine the truth or falsity of that contention before the hearing began.

Although service-order delays due to the need to obtain ROWs involve questions of timing, rather than the ultimate availability of service, the longer the delays are, the greater is the number of people who are waiting for telephone service at any given time, and the greater effect those delays have of reducing the subscribership rate. Furthermore, when people have to wait for many months or several years to obtain telephone service, a significant percentage of them are

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additional \$5,000 of the cost of the extension beyond the first 1,000 feet. The customer must bear the remainder of the expenses associated with that line extension.

likely to give up on trying to obtain service and find ways of living without telephones in their homes or move elsewhere.

In recent months, US West has requested an increasing number of waivers based on the cost of reinforcing existing infrastructure on Native American lands. In the past two months alone, US West has requested several dozen such waivers. These waivers are associated with service orders by customers who live within 1,000 feet of existing telephone facilities. Many such customers live across the street or down the block from neighbors who have telephone service, and a number of these customers live in homes that once had telephone service. The problem in these cases is that US West has allowed a section of feeder or distribution cables to become exhausted, thus requiring reinforcement, i.e., the placement of additional cables.

US West has contended that it should not have to bear the expense of such reinforcement unless it can recoup that expense within five years from the customers that would receive service as a result of the reinforcement. Our office has argued that this is tantamount to saying that choosing which customers the company will serve is a matter of a business decision. US West's contention flies squarely in the face of US West's obligation to serve as a monopoly provider of basic local exchange services. Last month, the PRC ruled in favor of the ratepayers on this issue, ordering the company to make the necessary expenses to serve such customers, because it did not show that doing so would threaten the financial integrity of the company. However, US West appealed the ruling to the state Supreme Court. Because the just-expired removal provision of the state constitution still applies to this case, only the Supreme Court can enforce the PRC's ruling.

#### **Unidentified but Potential Causes of Low Subscriber Rates**

We do not know how many people are without telephones because they live far from existing telephone facilities. We do know, however, that the company has, at least in some cases, provided or has intended to provide service to clusters of people who live remotely from existing facilities, if, on average, they live less than 1,000 feet from existing facilities or if a

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<sup>3</sup> Where the only construction necessary is a line extension of less than 600 feet to the customer's premises, only a

\$5,000 contribution from US West for each customer covers the total excess distance. This practice makes sense, because it is the per-residence expense of extending telephone facilities that should determine whether the customers qualify for telephone service, not the expense for the entire cluster of homes. If US West is not following this practice in all cases, it would not be living up to its obligation to serve as a carrier of last resort.

We do not know how many people on the reservations lack telephone service because they cannot afford the monthly cost of basic local exchange service or the initial installation charge. Perhaps some of these people do not know that they are eligible for Lifeline and Link-up programs, which would cover a significant portion of the monthly charges and the installation charge. We do not know how many people lack telephone service because they ran up long-distance charges they could not afford to pay and did not know to ask for toll-blocking in exchange for a restoration of their basic local exchange service. We do not know how many people lack telephone service because they do not know how to apply for the service or because they go to the US West office to apply for service and the office is generally closed. (One customer complained that the local office is always closed.) Finally, we do not know how many people lack telephone service because they simply are uninterested in having such service. Our office does not have the resources to conduct a study that would help to determine answers to these questions, but such a study would be worthwhile in identifying the causes of low subscribership rates on Indian reservations.

#### **Complaints Received from Native American Consumers**

In the past several years, this office has received only a small handful of unsolicited complaints from people living on Indian reservations. Last year, in an attempt to determine the accuracy of US West's reporting of held orders, our office conducted a survey of approximately 120 held-order customers in US West's service territory. Approximately half of the 40 or so people who responded were people living on Indian reservations, and the vast majority of those people live on the Navajo reservation. As a result of the survey responses, an investigator from

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service line agreement (SLA) is required, and process for obtaining a SLA is much shorter than for a ROW.

our office set up a table in the Gallup City Hall for an entire day in May 1998, after placing an advertisement in the local newspaper. Only 6 people approached her to describe their attempts to obtain telephone service. Perhaps there are more effective methods of reaching residents of the reservation than placing an advertisement in the local newspaper, and we would be interested in hearing from Indian leaders as to which methods are likely to achieve the best results.

Among the people who responded to the survey or spoke with our investigator, many complained that they are unable to obtain telephone service, even though their neighbors have telephones. Most respondents said that US West had told them that the delay in providing them with service was due to the need to obtain a ROW from the BIA. Some respondents had been waiting for three years or more to obtain telephone service. One respondent said that, even after the ROW had been granted, six months had passed and still she had no telephone service. Another respondent said that, although US West claimed that it was waiting for a ROW from the BIA, when she spoke to a BIA official, she learned that US West had never applied for the ROW. One respondent expressed the opinion that the tribe was at fault for not processing the ROW application quickly enough. Other complaints by respondents revolved around the lack of communication with US West: Respondents indicated that US West did not return their calls or respond to their letters or applications for service. Others stated that that US West did not give them straight answers to their questions or gave them the "run-around". One respondent said that the US West office in Gallup is always closed.

Another problem for residents of Indian reservations, according to survey responses, is that US West told very few people that they were entitled to cellular service or other service alternatives while waiting for regular telephone service, despite the company's obligation to do so.<sup>4</sup> Perhaps that has changed since the PRC ruled that, once the PRC Telecommunications Department Staff rejects a waiver request, the customer whose service order is associated with

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<sup>4</sup> Pursuant to PRC orders, US West must inform a customer of the availability of service alternatives and the method of obtaining those services once that customer's service is delayed 5 days.

the waiver request must be provided with service alternatives.<sup>5</sup> Cellular service, however, is generally a poor alternative in the more rural areas, including most of the reservations, because cellular reception is at best erratic and at worst nonexistent. Furthermore, US West is only obligated to provide vouchers for up to \$190 for the first month of cellular service and for \$140 for each additional month. According to people around the state with whom we have spoken, those amounts are generally insufficient to cover even the cost of normal local-call usage.

#### **Efforts by the Attorney General's Office and Pending Dockets**

In addition to the above-mentioned litigation regarding US West's held-order waiver requests, the Attorney General's Office has actively participated in a consumer-industry task force to develop rules for the development and administration of a state universal service fund. In the fall of 1997, the task force submitted a report to the PRC outlining the areas of agreement and the areas of controversy regarding the anticipated universal service rules. It is expected that the PRC will open a universal service rulemaking docket some time this year. In addition, our office has provided comments before the Federal Communications Commission (FCC) regarding the structuring of the federal universal service fund. The manner in which both the state and federal universal service funds are structured will have a significant impact on the availability and affordability of telephone service in rural areas of New Mexico, including the Indian reservations.

This office has received very few complaints from residents of Indian reservations about service quality other than the absence of service. There is a rulemaking docket on service quality pending before the PRC. We provided comments and testimony in that docket during the summer of 1996, but due to emerging issues involving wholesale service quality, we were told that the PRC wants to reopen the docket for comments and testimony. Because of time constraints, the PRC has not yet reopened the docket. We expect to participate in the docket

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<sup>5</sup> In theory, US West can suspend service alternatives when it applies for a waiver. However, once Staff denies a waiver request (which can be appealed to the PRC), US West is once again obligated to furnish service alternatives. Because Staff must make the decision to approve or deny a waiver request within 10 days, in practice, US West must provide service alternatives to the customer until the waiver request is approved or regular telephone service is provided.

when it is reopened, and, in our comments and testimony, we will take into consideration any information we receive with regard to service-quality problems on Indian reservations.

Our office has not yet developed any programs or plans that are specifically geared to address issues involving the availability and quality of telephone service on Indian reservations. We have, as mentioned above, participated, and continue to participate, in a number of adjudicatory and rulemaking cases, the outcome of which will hopefully solve generic problems that consumers have concerning the availability and quality of telephone service, including problems that are faced by consumers who live on reservations. We are particularly interested in hearing from Indian leaders and other residents of the Indian reservations about problems concerning telephone service and any ideas they may have of what our office might do to help solve those problems. We acknowledge and respect the sovereignty of Indian tribes in New Mexico. Where both the tribe and its residents wish to have telephone service and are having problems obtaining it, this office, within the confines of its limited resources, is committed to help resolve those problems.

#### **Recommendations**

The Attorney General's Office recommends that the FCC, in conjunction with the PRC and the New Mexico tribes, conduct a study to determine the primary causes of low subscribership on the Indian reservations, subject to tribal endorsement of such a study. The current hearing cycle associated with the above-captioned docket is a good first step in making that determination.

This office also reiterates its recommendation made in comments in the FCC's universal-service docket that the FCC revise the universal service rules that place 75% of the burden for universal-service funding of high-cost areas on the states. Under that 75% burden, small, rural, relatively poor states, such as New Mexico, will have great difficulty in establishing a universal service fund of sufficient size to preserve, much less advance, universal service in rural New Mexico. The areas where subscribership rates are lowest, such as the Indian reservations, will be impacted the most by the eventual structure of the federal universal service fund.

In addition, we recommend that the telecommunications companies (particularly US West) live up to their obligation to serve and to cease claiming that their obligation should be diminished because of the alleged existence of actual or potential competition. This recommendation is especially pertinent as it applies to the Indian reservations in New Mexico. Serious competition for basic local exchange service for residential customers, particularly in rural areas, and even more particularly on Indian reservations, is not likely to occur for many years, if not decades. Until such time as there is effective competition for residential basic local exchange service, and as long as the local exchange companies are not in financial jeopardy, their obligation to serve should remain undiminished. Furthermore, these companies should devote sufficient resources to adequately forecasting growth in housing and timely reinforcing infrastructure (as well as timely filing applications for permits and ROWs) so as to keep held orders to a bare minimum.

Once again, this office appreciates the opportunity to submit these comments and remains committed to help remove the obstacles to telephone service on the Indian reservations.

Respectfully submitted,

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