

IV. CONCLUSION

In light of the above, one has to ask: Why would the Commission extend any further its CPNI information policies/practices when those policies are, for the most part, without precedent in the area of commercial regulation? It is impossible to come up with a good answer. And the commentators which demand such an extension provide no credible evidence to support one. If anything, their lack of demonstrable evidence regarding compromised consumer expectations or market harm, after all this time under the CPNI Rule "regime," argues more for the proposition that the time for the Commission's CPNI Rules has come and gone.

The Commission's foray into the matter of information sharing as between businesses with incumbent relationships and those without such relationships should come to an end. Any action the Commission might take, beyond that which it has already taken (i.e., action damaging the incumbent while not generally aiding the competitor), is contrary to market operations for businesses and customer relationships across the range of customer/business relationships. Like it or not, the Commission cannot -- by fiat -- cause customers to think of their relationships with their telephony suppliers differently than they think of other business relationships.⁵²

⁵²Compare NYNEX at 7-8 (customers think of telephone company as one company offering a broad range of telecommunications services).

The Commission need do nothing to modify its current CPNI Rules -- beyond abandoning any prior authorization or mechanical restriction requirements⁵³ -- to finally, once and for all, allow the market to respond as markets do, for better or for worse.

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⁵³See U S WEST at 3, 31-32.

Attachment A

are based have changed radically,¹⁸⁰ the proponent of such a relitigation bears a heavy burden. In this case, opposing commentors rely almost entirely on the very arguments which the Commission rejected in adopting the Part X rules in the first place. No logical or valid reason appears as to why the key Part X rulings, which now represent the established law, ought to be altered at all.

C. Even If Opposing Commentors' Criticisms That The Part X Rules Are Not Totally Effective Had Any Merit, There Would Still Be No Cross-Subsidy

Opposing commentors marshal a bevy of theoretical, and some anecdotal, evidence to the effect that Part X cost accounting rules (or any other cost accounting rules) cannot be certain to allocate properly every penny which ought to be appropriately assigned to deregulated accounts.¹⁸¹ Based upon the fact that no accounting system can be perfect, which USWC does not contest, these commentors then conclude that the Part X rules permit the BOCs to engage in material "cross-subsidization," to the

¹⁸⁰The Commission itself has observed that it follows "the maxim that 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd. 143, 172 n.245 (1987) ("BOC CPE Relief Order") (quoting Home Box Office v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977), quoting City of Chicago v. F.P.C., 458 F.2d 731, 742 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972)).

¹⁸¹See, e.g., Comments of MCI at 48-50; Comments of INS at 12-13; Comments of IDCMA at 10-11; Comments of ANPA at 15-16; Comments of CompuServe at 18-19; Comments of Ad Hoc at 22-25.

significant detriment of competition in the enhanced services field and ratepayers.¹⁸²

While USWC remains of the opinion that unsubstantiated suspicions, even when supported by hypothetical academic constructs,¹⁸³ are poor substitutes for evidence, opposing commentors' efforts to sustain their arguments with regard to cross-subsidization fail for another reason. The Part X rules were constructed with a huge margin for error. Thus, even if there were significant BOC cost misallocations -- whether intentional or inadvertent -- there still would be no cross-subsidization, in the sense that opposing commentors use the term.¹⁸⁴

Opposing commentors can claim that there is a potential for cross-subsidization of enhanced services in the context of an integrated BOC operation only by ignoring the clear definition of the term "cross-subsidization"¹⁸⁵ and substituting another definition, something akin to their allegations of "unfair

¹⁸² See, e.g., Comments of MCI at 57; Comments of INS at 38; Comments of IDCMA at 13; Comments of ANPA at 16; Comments of CompuServe at 18-19.

¹⁸³ See, e.g., Comments of ANPA at 13 (Statement of Glen O. Robinson, Professor of Law at the University of Virginia); Comments of Ad Hoc, Attachment.

¹⁸⁴ We do not mean to imply that USWC does not take most seriously its responsibilities to account for all operations and transactions properly. We do. Proper accounting, including compliance with the Part X rules, is mandated by statute (47 U.S.C. §§ 154(i), 201(b), 218-19, 220(a)) and is a vital part of all telephone company and USWC operations.

¹⁸⁵ Compare Comments of UTC at 3-4.

competition."¹⁸⁶ Yet, the concept of "cross-subsidization" derives from the antitrust laws, is fully well-defined, and is predicated on the notion that an antitrust defendant is compensated by predatorily low prices in one market through extraordinarily high prices in another market (or in the same market, after competition has been destroyed).¹⁸⁷

The theory of predatory pricing has been generally discredited.¹⁸⁸ The only place where it retains any vitality at all is in the area of rate base regulated monopolies, where by misallocating costs to regulated activities a regulated monopolist can avoid income losses during the period of predation.¹⁸⁹ In other words, at least in theory, a rate base regulated monopolist can increase total income by shifting costs to regulated accounts -- the "predatory" aspect of the cross-subsidization becoming almost incidental.

However, a fundamental premise of cross-subsidization is that a service must be priced below some variant of marginal cost. Fully distributed costs are irrelevant in evaluating whether cross-subsidization occurred. This basic proposition was

¹⁸⁶ See text at 4-6, *SUPRA*.

¹⁸⁷ See P. Areeda and H. Hovorkamp Antitrust Law (1989 Supp.) at 589, § 714.6d, n.49. See also Comments of Integrated Communications Systems, Inc. ("ICS") at 5-6 n.10.

¹⁸⁸ See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 588-91 (1986).

¹⁸⁹ See Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370, 374 (7th Cir. 1986), reh'g denied, 802 F.2d 217 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987).

summarized by the Second Circuit as follows:

Northeastern seems to believe that whenever a product's price fails to cover fully distributed costs, the enterprise must subsidize that product's revenues with revenues earned elsewhere. But when the price of an item exceeds the costs directly attributable to its production, that is, when price exceeds marginal or average variable cost, no subsidy is necessary. On the contrary, any surplus can be used to defray the firm's non-allocable expenses.¹⁹⁰

The Seventh Circuit expressed the same concept:

AT&T's unattributable overhead costs do not increase when AT&T offers a new service, nor do they decrease when such a service is discontinued. When a multiproduct firm prices a competitive service above its long-run incremental cost, no cross-subsidy can occur because the additional revenues produced exceed all additional costs associated with the competitive service and provide a contribution to the unallocable common costs otherwise borne by the firm's existing customers.¹⁹¹

The concept of cross-subsidization within an accounting structure operating upon fully distributed costs is simply not meaningful.¹⁹² And it is clear that the Part X rules

¹⁹⁰Northeastern Tel. Co. v. AM. Tel. & Tel. Co., 651 F.2d 76, 90 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

¹⁹¹MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1123-24 (7th Cir.), cert. denied, 464 U.S. 891 (1983). Given MCI's participation in this proceeding, it is disturbing to witness how cavalierly it uses the term "cross-subsidy." See, e.g., Comments of MCI at 9-10, 18, 23, 50, 59. See also William Inglis et al. v. ITT Continental Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982), (for prices below average total cost but above average variable cost, plaintiff must prove that "the anticipated benefits of defendant's price depended its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power.").

¹⁹²See Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-36 (1st Cir. 1983); Henry v. Chloride, Inc., 809 F.2d 1334, 1346 (8th Cir. 1987); McGhee v. Northern Propane Gas Co., 858 F.2d 1487, 1494 (11th Cir. 1988), cert. denied, 490 U.S. 1084 (1989).

intentionally and with forethought were structured that way. In the Part X NPRM, the Commission proposed that "nonregulated activities bear their fully distributed costs."¹⁹³ Most BOCs responded by arguing that the use of a fully distributed costing methodology was inefficient and overly harsh, since new nonregulated activities would need to bear loaded costs above incremental costs, costs which would be borne by the enterprise (and ratepayers) whether or not the nonregulated services or products were offered.¹⁹⁴ Various methods for sharing the cost benefits of integration short of fully distributed costing were suggested by the BOCs.¹⁹⁵

The Commission, nevertheless, decided to rely on fully distributed costing as a regulatory device to promote fairness to ratepayers -- while finding that cross-subsidies could be avoided by less stringent incremental costing methodologies:

We affirm our intention stated in the NPRM to build our cost allocation scheme upon the premise of full allocation of costs. The reason for this is not that we deem full allocation to be synonymous with prevention of cross-subsidy. In fact, we do not entirely disagree with the parties who observe that crosssubsidy could, in theory, be avoided when all of the longrun incremental costs of an activity are borne by that activity.¹⁹⁶ However, we also

¹⁹³Joint Cost NPRM, 104 F.C.C.2d 59, 87 ¶ 62 (1986).

¹⁹⁴Joint Cost Order, 2 FCC Rcd. at 1311 ¶¶ 97-98.

¹⁹⁵See id. at ¶¶ 99-100.

¹⁹⁶At this point, the Commission included a footnote, which read as follows: "More precisely, avoidance of cross subsidy requires that all activities and all combinations of activities earn revenues at least as high as the incremental cost of that activity or that combination of activities." Id. at 1351 n.214 (emphasis added).

agree with DOJ and others who argue that our purposes should transcend prevention of cross-subsidy. Our goal of just and reasonable treatment of ratepayers requires that ratepayers participate in the economies of scale and scope which we believe can be achieved through integration of nonregulated enhanced services within the basic service network. It would not be just and reasonable to allow all of those economies to belong to the nonregulated activities.¹⁹⁷

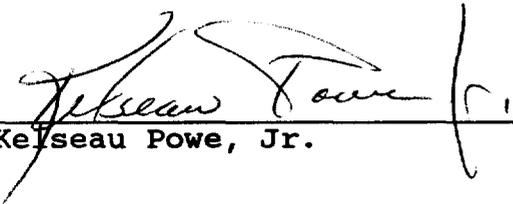
In this context, arguments that imperfections in the Part X Orders or the CAMs which implemented those orders might cause a cross-subsidization of competitive services to the detriment of regulated ratepayers are simply wrong. While such an error or imperfection might reduce the total benefit which inures to ratepayers as a result of shared efficiencies, a problem which USWC would not take lightly, such a problem would be a far cry from an actual cross-subsidization.

In other words, in equating Part X problems with cross-subsidy problems, opposing commentors have again simply ignored the antitrust principles associated with such allegations and crafted the term to suit their own interests. While USWC takes its Part X responsibilities very seriously and is confident that its accounting practices are well within the letter and spirit of the rules, even if every innuendo and suspicion thrown out by opposing commentors were to be proven true, opposing commentors still would not have made a case for cross-subsidization.

¹⁹⁷Id. at 1312 § 109 and n.214 (emphasis added).

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 19th day of May, 1994, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.**, to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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