IN THE MATTER OF U S WEST COMMUNICATIONS, INC. V. JAMES A. BURG, PAM NELSON, LASNA SCHOENFELDER, COMMISSIONERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, AT&T COMMUNICATIONS OF THE MIDWEST, INC.

Public Utilities Commission of the State of South Dakota

DATE	MEMORANDA
1/26	99 Summons;
1/26	99 Complaint;
1/26	99 Affidavits of Service;
1/28	99 State Defendants' Motion to Dismiss Complaint;
1/28	99 Brief in Support of State Defendants' Motion to Dismiss Complaint;
2/5	99 AT&T's Petition for Intervention, Request for Hearing and Separation;
2/5	99 AT&T's Answer to US West's Complaint for Declaratory and Injunctive Relief;
2/17	99 US West's Brief in Opposition to State Defendants' Motion to Dismiss Complaint;
2/18	99 AT&T's Opposition to the State Defendants' Motion to Dismiss Complaint;
2/24	99 AT&T's Compendium of Unreported Decisions Regarding Eleventh Amendment Immunity;
3/4	99 Reply Brief;
3/	99 USA's Acknowledgment of Receipt of State Defendants' Motion to Dismiss;
3/12	99 Joint Motion to Exceed Page Limitation;
3/12	99 Joint Case Management Statement;
3/19	99 Motion for Admission Pro Hac Vice and Order (Stephen B. Kinnaird);
3/12	99 Motion for Admission Pro Hac Vice and Order (Michael D. Hazlett);
3/25	99 USA's Motion to Intervene;
3/25	99 Intervenor USA's Brief in Opposition to Defendants' Motion to Dismiss;
4/8	99 Order Denying Motions to Dismiss;
4/	99 Commissioners' Answer to Complaint;
4/	99 US West's Response to USA's Motion to Intervene;
4/	99 Commissioners' Response to the USA's Motion to Intervene;
4/	99 Motion for Admission Pro Hac Vice and Order (Richard Thompson);
4/	99 Order Admitting Richard Thompson;

STATE PUBLISHING CO., PIERRE, SOUTH DAKOTA—SHEAD 97 SP14130

6/5/96	Order Granting Motion to Intervene;
6/6/96	U.S. + United States' Notice of Appearance of Counsel (David T. Zaslow);
12/19/96	Order Governing Stipulation;
1/6/97	US West's Opening Brief on the Merits of its Affirmative Claims;
1/8/97	Joint Stipulation to Extend Time for Filing of Briefs;
1/21/97	Order Approving Stipulation;
1/30/97	Commissions' Responsive Brief;
2/3/97	AT+T's Opposition to US West's Merits Brief;
2/6/97	US West's Motion for Extension of Time to File Reply Brief;
2/6/97	Proposed Order Granting US West's Motion for Extension of Time to File Reply Brief;
2/6/97	Motion for Admission Pro Hac Vice and Proposed Order (Kara M. Sacilotto);
2/6/97	Order to Admit Nonresident Attorney (Kara M. Sacilotto);
2/6/97	US West's Reply Brief on the Merits of its Affirmative Claims;
2/6/97	US West's Motion for Stay;
2/6/97	Order to Admit Nonresident Attorney (Philip L. Douglas);
2/7/97	Commissioners' Response to US West's Motion for Stay;
2/7/97	AT+T's Response to US West's Motion to Stay and Notice Regarding New Authorities;
2/7/97	US West's Reply to AT+T's Response to US West's Motion to Stay;
2/10/97	Order Scheduling Oral Argument;
2/19/97	Motion for Admission Pro Hac Vice and Order (Richard J. Hosseler);
2/21/97	AT+T's Notice Regarding New Authorities;
2/21/97	Order to Admit Nonresident Attorney (Richard J. Hosseler);
2/24/97	Order Dismissing Case;
2/25/97	Docket Closed
2/26/97	Stipulation and Notice of Dismissal.
2/26/97	Amended Order Dismissing Case;
2/26/97	Docket Closed.

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

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APR 06 1999

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

April 5, 1999

Rolayne Ailts Wiest, General Counsel
S.D. Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Rolayne:

Please find enclosed three copies of U S WEST Communications, Inc.'s Summons and Complaint, along with an Admission of Service for each of the Commissioners.

Please advise if the Commissioners are unwilling to admit service and I will make arrangements to have them served.

Thank you.

Sincerely yours,
BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosures

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Civ. No. 99- 5024 ~~4072~~

Plaintiff,

v.

SUMMONS

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon Boyce, Murphy, McDowell & Greenfield, Plaintiff's attorneys, whose address is 101 N. Phillips Avenue, Suite 600, P.O. Box 5015, Sioux Falls, South Dakota 57117-5015, an answer to the Complaint which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated at Sioux Falls, South Dakota, this 5th day of April, 1999.

Joseph A. Haas, Clerk of Court

By: Pamela S. Bock
Its Deputy

COPY
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APR 05 1999
JOSEPH HAAS
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

Civ. 99- 5009

COMPLAINT

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

U S WEST Communications, Inc. ("U S WEST") alleges for its Complaint as follows:

PARTIES

1. U S WEST is a common carrier, as defined by South Dakota law, SDCL 49-31-1(12), incorporated under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. U S WEST is authorized to provide local exchange telecommunications service, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

2. Defendants, James A. Burg, Pam Nelson, and Laska Schoenfelder, are, and at all relevant times have been the duly elected Commissioners of the Public Utilities Commission of the State of South Dakota ("the Commission"). These defendants are sued in their official capacity as Commissioners who issued the Findings of Fact Conclusions of Law and Order, which is the subject of this Complaint attached as Exhibit A (the "Decision"). They shall be referred to throughout this Complaint as "the Commissioners".

3. The Commissioners are citizens of the State of South Dakota and maintain their place of business in the State of South Dakota. The Commissioners regulate, among other things, intrastate telecommunications services in the State of South Dakota. The Commission is a "State commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

4. Defendant, AT&T Communications of the Midwest, Inc. ("AT&T"), is a corporation incorporated under the laws of the State of Iowa. AT&T is certified to provide local, long distance, and other telecommunications services in the State of South Dakota. Because AT&T was a party to proceedings which are the subject of this Complaint, AT&T is an indispensable party to this civil action pursuant to Rule 19 of the Federal Rules of Civil Procedure.

JURISDICTION AND VENUE

5. This action arises under the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 153 et seq., the United States Constitution, and 42 U.S.C. §1983. This Court has jurisdiction over U S WEST's claims under the Act pursuant to 47 U.S.C. §252(e)(6), 28 U.S.C. 1331 and 28 U.S.C. §§ 2201-01. This Court has jurisdiction over U S WEST's constitutional claims pursuant to 28 U.S.C. § 1331.

6. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) and (c) because the individual defendants reside in this district, the corporate defendants conduct business in this district and the events giving rise to U S WEST's claims occurred in this district.

FACTUAL ALLEGATIONS

A. The Telecommunications Act of 1996

1. Obligations Under the Act

7. In February, 1996, Congress enacted the Telecommunications Act of 1996, Pub. No. 104-104, 110 Stat. 56, which amended the Communications Act of 1934. The Act is a dramatic departure from prior approaches to regulation of local telephone service. The Act encourages competition in the local telephone market and, among other things, sets forth a

comprehensive scheme for removing barriers to entry into the local telephone market and introducing competition into that market.

8. Section 251(a) of the Act, 47 U.S.C. § 251, sets forth the obligations for three categories of telecommunications service providers, *viz.*, telecommunications carriers, local exchange carriers ("LECs") and incumbent local exchange carriers ("incumbent LECs") Generally, the Act requires all telecommunications carriers to interconnect with all other telecommunications carriers, and all LECs to provide resale, number portability, dialing parity, access to rights of way and reciprocal compensation to other telecommunications callers. Finally, § 251(c) places on incumbent LECs (those who, as of the date of the Act, "provided telephone exchange service in [an] area," § 251 (h)(2)) the duty to negotiate in good faith to allow interconnection, provide unbundled network elements, and offer services for resale to other telecommunications carriers. These represent three separate and distinct mechanisms for telecommunications carriers to provide telecommunications services.

9. First, telecommunications carriers can provide service to their customers wholly on the carriers' own facilities and interconnect with the incumbent LEC so that the carriers' customers can make calls to and receive calls from the incumbent LEC's customer. Second, telecommunications carriers can purchase individual unbundled network elements,[1] such as an individual local loop from the incumbent LEC, which they can combine with their own facilities, such as a switch, to provide access to their customers. Third, telecommunications carriers can purchase an incumbent LEC's assembled services, such as business or residential telephone service, and resell those services to their customers without using any of their own facilities.

10. U S WEST is an incumbent LEC. AT&T is a LEC. Both are telecommunications carriers.

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[1] "Network elements" defined in Section 153(29), are facilities or equipment used in the provision of telecommunications, including features, functions and capabilities that are provided by means of those facilities or equipment. "Unbundling" refers to selling individual network elements, as opposed to an aggregation of network elements, for the exclusive use of the purchasing telecommunications carrier.

2. Agreements Under the Act

11. Section 252 of the Act allows incumbent LECs to reach agreements with other telecommunications carriers for interconnection, access to unbundled elements or resale of services. Under § 252(a), such agreements are to be reached through negotiation. If an agreement on all outstanding issues under the Act cannot be reached through negotiation, a party may seek arbitration under § 252(b).

12. The Act delegates to State commissions limited authority to conduct arbitrations under § 252(b). Specifically, the arbitration authority delegated to State commissions, as defined in 47 U.S.C. § 153(41) by the Act, is limited to the, following issues: (1) ensuring compliance with § 251 of the Act and regulations of the Federal Communications Commission; (b) establishing rates pursuant to § 252(d); and (c) establishing schedules for implementing the interconnection agreements. 47 U.S.C. § 252(c).

13. Moreover, § 252(e)(1) of the Act provides that any agreement reached through negotiation or arbitration must be submitted to the State commission for its approval. The Commissioners formally approved an interconnection agreement between U S WEST and AT&T by entry of an Order Approving Interconnection Agreement dated March 4, 1999, which is attached as Exhibit B ("the Order"). The Decision entered by the Commission, which is the subject of this Complaint, identifies and mandates specific provisions to be contained in the agreement which causes present, immediate and substantial harm to U S WEST. U S WEST is aggrieved by the Decision. With the entry of the Order, the case is, therefore, ripe for adjudication.

14. Finally, § 252(e)(4) provides that "No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this Section." This Court therefore has plenary authority to review the actions of the Commissioners complained of herein.

B. The FCC Rules and Subsequent Judicial Decisions

15. Section 251(d)(1) of the Act gives the Federal Communications Commission (the "FCC") the authority to "establish regulations to implement the requirements" of the section regarding interconnection, unbundling, and resale.

16. On August 8, 1996, the FCC issued a 700-page First Report and Order in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, 11 FCC Rcd 15499, 1996 FCC LEXIS 4312 (Aug. 8, 1996), that purported to dictate to state commissions rules for reviewing and arbitrating interconnection agreements and prices incumbent LECs would receive for interconnection, unbundling and resale. The FCC Order attempted to regulate virtually every aspect of local telecommunications competition. In an Order dated July 18, 1997, as amended on rehearing on October 14, 1997, the Eighth Circuit invalidated many of the rules including the obligation to recombine unbundled network elements ("UNEs"), the duty to provide superior quality UNEs and interconnection, and the FCC's pricing rules (which the Eighth Circuit found exceeded the FCC's jurisdiction). *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

17. The Supreme Court subsequently reversed in part and affirmed in part the Eighth Circuit's decision, concluding, among other things, that the FCC has jurisdiction to establish pricing standards. *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826, 1999 U.S. LEXIS 903 (U.S. Jan. 25, 1999).

18. The Court also vacated 47 C.F.R. § 51.319, holding that the FCC's approach to determining which network elements incumbent LECs must provide under 47 U.S.C. § 251(c)(3) was fundamentally flawed and provided competive local exchange carriers ("CLECs") with "blanket access" to incumbent LEC networks. *Id.*, 1999 U.S. LEXIS at *32-*40. First, the Court held that the FCC started with the unlawful presumption that incumbent LECs must provide any network element that it is technically feasible to unbundle, and that this erroneous presumption tainted the FCC's interpretation of § 251(d)(2). *Id.*, at *38-*39.[3]

[3] No party petitioned for review of the Eighth Circuit's determination that "technical feasibility" determines only where CLECs may obtain access to unbundled network elements, not which elements must be provided. Iowa

19. Second, the FCC wholly failed to consider the "necessary" and "impair" standards in § 251(d)(2) by failing to consider self-provisioning or the availability of elements outside the incumbent LEC's network. In particular, the Court rejected the FCC's interpretation of "necessary" that would require incumbent LECs to unbundle network elements, even if the CLEC could obtain the elements elsewhere. *AT&T Corp.*, 1999 U.S. LEXIS at *35-*36. The Court forcefully stated that the FCC "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." *Id.* at *35. The Court also rejected the FCC's interpretation that *any* increase in cost or decrease in quality means a CLEC is "impaired" in its ability to offer service. *Id.* At *36. The Court reasoned: "Since any new entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute 'impairment' under [the FCC's] standard." *Id.* at *35. The FCC's overly generous interpretation of the "necessary" and "impair" standards, the Court held, "is simply not in accord with the ordinary and fair meaning of those terms." *Id.* at *36.

20. Because no party petitioned for review of Rules 51.315(c)-(f), the Court left intact the Eighth Circuit decision to invalidate these rules, which had required incumbent LECs to combine network elements for CLECs.

21. The Court held that Rule 51.315(b)—which prohibited incumbents from separating currently combined network elements— was not unreasonable. *AT&T Corp.*, 1999 U.S. LEXIS 903 at *43.

22. The Court recognized, however, that its decision to vacate Rule 51.319 and uphold Rule 51.315(b) and the "all elements" rule are tied. Thus, the Court stated that its decision to vacate Rule 51.319 may render the incumbent LECs' objections to Rule 51.315(b) and sham unbundling "academic." *AT&T Corp.*, 1999 U.S. LEXIS 903 at *40-*42. The Court explained that if the FCC on remand "makes fewer network elements unconditionally available

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Utils. Bd. v. FCC, 120 F.3d at 810. However, the Court stated that the FCC's position was "undoubtedly wrong." AT&T Corp., 1999 U.S. LEXIS at *38.

through the unbundling requirement, an entrant will not longer be able to lease every component of the network." *Id.* at *40-*41.

C. The Arbitration

23. On or about June 20, 1996, U S WEST received a request from AT&T to negotiate the prices, terms and conditions for interconnection services and network elements in South Dakota. The parties subsequently entered into negotiations under § 252(a) to reach agreement on interconnection, access to unbundled network elements, and resale of services. While the parties did successfully negotiate many issues, the parties were unable to reach agreement on all issues.

24. On November 20, 1996, AT&T filed a Petition for Arbitration with the Commission for arbitration with U S WEST pursuant to § 252(b) of the Act to address the unresolved issues between the parties.

25. The petition of AT&T was heard by the Commissioners as a contested case proceeding modeled after SDCL Chapter 1-26. A hearing was held February 3, 1997 through February 7, 1997 in South Dakota. The Commissioners permitted the parties to submit pre-filed testimony, and there was extensive cross-examination of numerous witnesses. On March 20, 1997, the Commissioners issued the Decision.

26. Subsequently, on or about August 13, 1997, the Commissioners issued their Order on Reconsideration; Notice of Entry of Order ("Reconsideration Order"), which is attached as Exhibit C. Thereafter, on December 30, 1998, the Commissioners issued Second Arbitration Order; Notice of Entry of Order ("Second Arbitration Order"), which is attached as Exhibit D.

27. Finally, on March 4, 1999, in the Order the Commissioners approved the Interconnection Agreement that the parties had previously filed. The Interconnection Agreement ("the Agreement") is attached as Exhibit E.

B. U S WEST's Objections to the Commissioners' Decisions

1. General Objections

28. In their decisions, over U S WEST's objection, the Commissioners imposed numerous onerous requirements on U S WEST which were in excess of the authority granted to the Commission under the Act.

29. As a result of each of the actions of the Commissioners, U S WEST is aggrieved within the meaning of § 252(e)(6) of the Act and will suffer immediate and irreparable harm, including loss of its customer base, harm to its good will and reputation, loss of revenues, the inability to negotiate with other competitors on a fair and equal basis, and damage to its substantial investment in its telecommunications network. As a result, the public interest and competition in the market for local telephone service will suffer.

2. Specific Objections

30. Over U S WEST's objection, the Commissioners in Finding of Fact 21 of the Decision, ordered that the interconnection agreement between U S WEST and AT&T include a "pick and choose" (sometimes referred to as a "most favored nation" or "MFN") provision that would allow AT&T to select any terms and conditions contained in any other agreement entered into by U S WEST with a party in South Dakota, apparently, without accepting all of the terms and conditions related to a particular interconnection, service, or network element arrangement.

31. Over U S WEST's objection, the Commissioners ordered in Finding of Fact 83 of the Decision U S WEST to combine network elements for AT&T.

32. Over U S WEST's objection, the Commissioners in Finding of Fact 17 of the Decision, required U S WEST to provide interconnection in a manner that exceeds the "equal in quality" standard required by the Act.

33. Over U S WEST's objection, the Commissioners in Findings of Fact 4-5 of the Second Arbitration Order, required U S WEST to provide access to unbundled network elements in a manner that exceeds the "nondiscriminatory" access standard required by the Act.

34. Over U S WEST's objection, the Commissioners in Finding of Fact 55 of the Decision, ordered that AT&T may collocate remote switching units ("RSUs") on U S WEST's premises. The collocation of RSUs is not necessary for interconnection or access to unbundled elements. Collocation of RSUs exacerbates problems of space limitations in U S WEST's offices and creates a significant risk that AT&T will bypass U S WEST's switched access services. The collocation of AT&T's RSUs is not mandated by the Act, would act to the detriment of U S WEST and would defeat the purpose of the Act.

35. Over U S WEST's objections, the Commissioners, in Finding of Fact 78 and 122 of the Decision, required that U S WEST to provide vertical features as part of the switching element and denied U S WEST's request to recover the cost of providing such features.

36. Over U S WEST's objection, the Commissioners, in Finding of Fact 72 of the Decision, required U S WEST to provide dark fiber to AT&T.

37. Over U S WEST's objection, in Finding of Fact 38 of the Decision, the Commissioners failed to require AT&T to interconnect in each local calling area in which it intends to offer service.

38. Over U S WEST's objection, the Commissioners in Finding of Fact 178 of the Decision, in regard to construction charges necessitated by the construction of facilities for AT&T, required that AT&T pay only those nonrecurring charges of construction that U S WEST charges to an end user pursuant to State tariffs. Under the Act, U S WEST is entitled to up-front payment of construction costs performed for AT&T's benefit.

39. Over U S WEST's objection, the Commissioners in Finding of Fact 195 of the Decision, found that the avoided cost discount shall be applied on an aggregate basis to all resold services. This discount was established as 15.55% in Finding of Fact 196. U S WEST proposed disaggregated discounts depending upon the particular services offered. Under U S WEST's proposal, the discount would vary depending on the service offered (e.g. residential service, business service).

40. The Commissioners in Finding of Fact 16 of the Decision, ordered that the interconnection agreement between U S WEST and AT&T include a contractual provision limiting liability between the parties during a contract year including consequential damages. It further provided, however, for liability for lost profits. Consequential damages include lost profits. Thus, Finding of Fact 16 is inconsistent.

41. Over U S WEST's objection, the Commissioners in Finding of Fact 18 of the Decision, ordered that the interconnection agreement between U S WEST and AT&T include a provision that all remedies in the agreement are cumulative and not exclusive. The Act does not provide authority to the Commission to limit judicial remedies. U S WEST's position is that all remedies should be exclusive to those remedies contained in the agreement. The Commissioners also determined, at page 5 of the Reconsideration Order, that AT&T could seek punitive damages for a violation of the Agreement.

42. Over U S WEST's objection, the Commissioners ordered, in Findings of Fact 7-9 of the Second Arbitration Order, that AT&T may require U S WEST to negotiate third party intellectual property licenses on AT&T's behalf.

43. Over U S WEST's objection, the Commissioners in Finding of Fact 225 of the Decision, ordered that U S WEST shall, to the extent permitted by South Dakota law, exercise its eminent domain powers to expand an existing right-of-way to accommodate a request for access by AT&T. The Act does not require U S WEST to utilize state eminent domain powers for the benefit of AT&T. The Commissioners also denied, in Finding of Fact 222, U S WEST's ability to reserve space on its own poles, ducts, conduits, and rights-of-way.

FIRST CLAIM FOR RELIEF: ORDERING OF "MOST FAVORED NATION" PROVISIONS IN VIOLATION OF 47 U.S.C. § 252(i)

44. U S WEST incorporates by reference paragraphs 1 to 43 as if fully set forth herein.

45. The Act provides that a LEC "shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party

to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

46. The MFN provision of the Agreement, however, apparently allows AT&T to select individual terms and conditions of other interconnection agreements without requiring AT&T to accept all of the terms and conditions associated with a given interconnection, service, or network element arrangement.

47. The MFN provision approved by the Commissioners is inconsistent with the Act and the FCC rules.

SECOND CLAIM FOR RELIEF: UNLAWFUL COMBINATIONS REQUIREMENTS IN VIOLATION 47 U.S.C. § 251

48. U S WEST incorporates by reference paragraphs 1 to 47 as if fully set forth herein.

49. Pursuant to Section 251(c), incumbent LECs, such as USWC, must provide access to unbundled network elements to telecommunications carriers. The Act further provides, that the requesting carrier (and not the incumbent) will actually perform the recombining.

50. The Agreement, however, requires USWC, and not AT&T, to combine network elements in any manner requested by AT&T. This requirement violates the Act.

51. Moreover, because there is no current, valid unbundling standard against which to judge a request to provide a currently-connected-combination-of-elements, any requirement to currently-connected network elements violates the Act as well.

THIRD CLAIM FOR RELIEF: UNLAWFUL PERFORMANCE STANDARDS IN VIOLATION OF 47 U.S.C. § 251 (c)

52. U S WEST incorporates by reference paragraphs 1 to 51 as if fully set forth herein.

53. The Agreement unlawfully requires U S WEST to provide interconnection that exceeds the "equal in quality" standard in violation of § 251(c)(2) of the Act.

54. The Agreement also unlawfully requires U S WEST to provide access to unbundled network elements that exceeds the "nondiscriminatory" access standard in violation of § 251(c)(3) of the Act.

55. These provisions are contrary to the Act.

FOURTH CLAIM FOR RELIEF: REQUIRING UNRESTRICTED COLLOCATION AND COLLOCATION OF REMOTE SWITCHING UNITS IN VIOLATION OF 47 U.S.C § 251(b)(4) and (c)(6)

56. U S WEST incorporates by reference paragraphs 1 to 55 as if fully set forth herein.

57. Section 251(c)(6) of the Act requires that U S WEST permit collocation at locations on U S WEST's premises, of the facilities of competing telecommunications carriers where such collocation is necessary for interconnection or access to unbundled elements.

58. Collocation at U S WEST's central offices will enable AT&T to interconnect with U S WEST and to obtain access to unbundled elements of the network. Collocation at any other point is not necessary for interconnection or access to unbundled elements. In addition, the collocation of a LEC's remote switching units ("RSUs"), is not "necessary" for interconnection or access to unbundled elements.

59. Nevertheless, the Agreement requires U S WEST to permit collocation of AT&T's facilities at any U S WEST "premises," whether or not collocation at that point is necessary to permit AT&T to interconnect or to obtain access to unbundled elements. The Agreement also requires U S WEST to permit the collocation of RSUs on its premises, even though collocation of such equipment is not necessary.

60. These requirements violate the Act.

FIFTH CLAIM FOR RELIEF: UNLAWFUL UNBUNDLING REQUIREMENTS IN VIOLATION OF 47 U.S.C. §§ 251(c)(3), 251(d)(2))

61. U S WEST incorporates by reference paragraphs 1-60 as if fully set forth herein.

62. Pursuant to § 251(c)(3), incumbent LECs, such as U S WEST, must provide access to unbundled elements of their networks. The Act requires incumbent LECs to unbundle only those network elements identified in § 153(29). In addition, a network element must be unbundled only if it meets the requirements of § 251(d)(2).

63. The Agreement requires U S WEST to unbundle "dark fiber" even though the Commission failed to find that dark fiber was a network element, or that it otherwise met the statutory unbundling standards. Accordingly, the Commissioners have violated § 251(c)(2) of the Act by requiring U S WEST to unbundle dark fiber.

64. The Commissioners also violated the Act by requiring U S WEST to offer vertical features as part of the switching element and without cost recovery therefor.

SIXTH CLAIM FOR RELIEF: UNLAWFUL DENIAL OF RECOVERY OF CONSTRUCTION COSTS [47 U.S.C. §§ 251(c)(2) and 252(d)]

65. U S WEST incorporates by reference paragraphs 1 to 63 as if fully set forth herein.

66. Pursuant to § 251(c)(2) and 252(d) of the Act, U S WEST in entitled to recover the full costs of providing interconnection to requesting telecommunications carriers.

67. The Agreement requires AT&T to bear the costs of facilities to be constructed by U S WEST for AT&T's benefit only if U S WEST could recover such costs from an end user pursuant to U S WEST's tariffs.

68. Under the Act, U S WEST is entitled to up-front recovery of costs when it performs construction for AT&T's benefit.

69. Accordingly, the Agreement violates the Act and the Commissioners have exceeded their authority under the Act.

SEVENTH CLAIM FOR RELIEF: UNLAWFUL RIGHTS-OF-WAY REQUIREMENTS

70. U S WEST incorporates by reference paragraphs 1-69 as if fully set forth herein.

71. Section 251(b)(4) requires all LECs to provide access to poles, ducts, conduits, and rights-of-way on rates, terms and conditions that are consistent with § 224 of the Act.

72. The Agreement requires U S WEST to exercise its eminent domain powers to expand an existing right-of-way to accommodate a request for access by AT&T. The Act does not require U S WEST to exercise its state eminent domain powers for AT&T's benefit.

73. The Agreement also unlawfully denies U S WEST the right to reserve space on its own poles, ducts, conduits, and rights-of-way.

EIGHTH CLAIM FOR RELIEF: POINTS OF INTERCONNECTION

74. U S WEST incorporates by reference paragraphs 1-73 as if fully set forth herein.

75. As set forth above, the Agreement fails to require AT&T to interconnect in each local calling area in which it intends to offer service, despite the increased cost and burden to U S WEST and network inefficiencies that a single point of interconnection imposes. Moreover, the Agreement fails to compensate U S WEST for the increased cost it assumes when AT&T identifies only one point of interconnection per LATA.

76. The provisions allowing AT&T to establish only one point of interconnection per LATA violates the Act, subjects U S WEST to significant additional expenditures to expand and reinforce its network for its competitors, and substantially increases the risks of service degradation, blockages and outages.

77. The provisions of the Agreement that permit a single point of interconnection are arbitrary and capricious, not supported by the evidence, and are not the result of reasoned decisionmaking.

NINTH CLAIM FOR RELIEF: MISCELLANEOUS PROVISIONS

78. U S WEST incorporates by reference paragraphs 1 to 77 as if fully set forth herein.

79. The Agreement includes matters not otherwise pleaded in this Complaint which U S WEST objects to as being inconsistent with the Act and/or exceeds the Commissioners' authority under the Act:

A. The Commissioners ordered the interconnection agreement between U S WEST and AT&T to include a contractual provision limiting liability between the parties during a contract year including consequential damages. It nonetheless provided for liability for lost profits. See Finding of Fact 16 and Conclusion of Law 12. Consequential damages include, among other damages, lost profits. Furthermore, the Act does not allow the Commission to limit judicial remedies of the parties to an interconnection agreement. Finally, the Commissioners inappropriately allowed the recovery of punitive damages.

B. Over U S WEST's objection, the Commissioners in Finding of Fact 195, found that the avoided cost discount shall be applied on an aggregate basis to all resold services. This discount was established as 15.55% in Finding of Fact 196. U S WEST proposed disaggregated discounts depending upon the particular services offered for six categories of service. Under U S WEST's proposal, the discount would have varied depending on the service offered.

C. Over U S WEST's objection, the Commissioners in Finding of Fact 18, ordered that the interconnection agreement between U S WEST and AT&T include a provision that all remedies in the agreement are cumulative and not exclusive. The Act does not provide authority to the Commission to limit judicial remedies. U S WEST's position is that all remedies should be exclusive to those remedies contained in the agreement.

D. Over U S WEST's objection, the Commissioners ordered, in Findings of Fact 7-9 of the Second Arbitration Order, that AT&T may require U S WEST to negotiate third party intellectual property licenses on AT&T's behalf.

E. Over U S WEST's objection, the Commissioners ordered, in Finding of Fact 182, that U S WEST only be allowed to recover $5 for transferring customers to AT&T.

TENTH CLAIM FOR RELIEF: UNCONSTITUTIONAL TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

80. U S WEST incorporates by reference paragraphs 1 to 79 as if fully set forth herein.

81. The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The Takings Clause applies to the states through the Fourteenth Amendment of the United States.

82. The Commissioners, as state actors, imposed contractual provisions on U S WEST, as set forth above, which constitute a taking of U S WEST's property for public use without just compensation.

83. Specifically, the discounted resale of below-cost and already-discounted services, the requirement of providing combinations, the rejection of a rebundling charge, the requirement of unrestricted collocation and the required collocation of RSUS, the requirement that U S WEST make vertical features available through unbundling without cost recovery, and provide that facilities be constructed for the benefit of AT&T without the payment of the full costs of such construction by AT&T, all result in the taking for public use of U S WEST's enormous investment in its network without just compensation.

84. By adopting a decision relating to an interconnection agreement that does not provide just compensation to U S WEST for the taking of its property for public use, the Commissioners have violated the Fifth and Fourteenth Amendments to the U.S. Constitution, and U S WEST is entitled to injunctive and declaratory relief under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff U S WEST seeks:

A. Pursuant to 252(e)(6) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, a judgment:

1. Declaring that the "most favored nation" clause of the Agreement violates the Act, and is beyond the scope of the Commissioners' authority;

2. Declaring that the combinations provisions of the Agreement violate the Act, and is beyond the scope of the Commissioners' authority;

3. Declaring that the requirement that U S WEST to provide interconnection that exceeds the "equal in quality" standard violates the Act, and is beyond the scope of the Commissioners' authority;

4. Declaring that the requirement that U S WEST provide access to unbundled network elements that exceeds the "nondiscriminatory" access standard violates the Act, and is beyond the scope of the Commissioners' authority;

5. Declaring that the requirement that U S WEST provide collocation in any U S WEST premises and allow the collocation of RSUs violates the Act, and is beyond the scope of the Commissioners' authority;

6. Declaring that the requirement that U S WEST make available vertical features as unbundled elements without any cost recovery violates the Act, and is beyond the scope of the Commissioners' authority;

7. Declaring that the provision that AT&T pay to U S WEST only the end user charges allowed by State tariffs for the construction of facilities constructed for AT&T's benefit violates the Act, and is beyond the scope of the Commissioners' authority;

8. Declaring that the provisions of the Agreement providing for: (i) limitation of judicial remedies of the parties; (ii) a single aggregate discount for resold services; (iii) a contractual provision for limitation of liability; (iv) requiring U S WEST to exercise its eminent domain authority under South Dakota law for the benefit of AT&T, and denying U S WEST the right to reserve capacity; (v) allowing for only a $5 customer transfer charge, violates the Act and is beyond the scope of the Commissioners' authority;

9. Declaring that the requirement that U S WEST provide dark fiber violates the Act and is beyond the scope of the Commissioners' authority;

10. Declaring that the provision allowing AT&T to a single point of interconnection violates the Act, and is beyond the scope of the Commissioners' authority;

11. Declaring that those portions of the Agreement, which violate the Act, are unlawful and without legal effect;

12. Declaring that the requirements that U S WEST provide combinations, resell below-cost and already discount services at a discounted price,

allow unrestricted collocation, or imposes an obligation to make vertical features available through unbundling, and allows AT&T to pay only end user state tariff changes for facilities construction for AT&T's benefit, result in the taking for public use of U S WEST's property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

B. Injunctive relief prohibiting the Commissioners from approving interconnection agreements inconsistent with the declaratory relief prayed for above and prohibiting the Commissioners from enforcing the provisions of the Agreement which violate the Act.

C. An award of U S WEST's costs, including reasonable attorneys' fee under 42 U S C § 1988, and such other relief as the Court deems just and reasonable.

DATED: April 5, 1999

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MAR 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	))))))	FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER AND NOTICE OF ENTRY OF ORDER TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule, Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a Matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket.

The Commission having reviewed the evidence of record and being fully informed in the matter, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 (federal Act) provides for the development of competition in the telecommunications industry. The federal Act opens up local markets by imposing new obligations on incumbent local exchange carriers (LECs). Under the federal Act, an incumbent LEC has the duty to interconnect with other telecommunications carriers, must provide other carriers access to the incumbent LEC's network elements on an unbundled basis, and must provide its retail services to other carriers at wholesale rates. 47 U.S.C. § 251(c). The federal Act requires an incumbent LEC to negotiate terms and conditions of service with the requesting carrier. 47 U.S.C. § 251(c)(1). If the parties are unable to reach a negotiated agreement on all areas, the federal Act provides for state Commissions to resolve any disputed issues. 47 U.S.C. § 252(b)

2. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (hereafter referred to as First Report and Order). The FCC also issued its Second Report and Order concerning these two dockets on August 8, 1996. These Orders seek to implement certain provisions of the federal Act through rules.

3. On October 15, 1996, the Eighth Circuit Court of Appeals stayed the following FCC rules: 47 C.F.R. §§ 51.501 to 51.515, inclusive, §§ 51.601 to 51.611, inclusive, §§ 51.701 to 51.717, inclusive, and § 51.809. Exhibit 53. On November 1, 1996, the Eighth Circuit lifted the stay for the following rules: 47 C.F.R. §§ 51.701, 51.703, and 51.717. Exhibit 53. The stayed rules involve the pricing of interconnection and unbundled elements, wholesale pricing standards to determine avoided retail costs, reciprocal compensation for transport and termination of local telecommunications traffic, and the so-called "pick and choose" rule.

4. On November 20, 1996, AT&T filed a petition with the Commission asking it to resolve open issues in its interconnection negotiations with U S WEST. Pursuant to 47 U.S.C. § 252(d)(4), the Commission must resolve each issue set forth in the petition no later than nine months after the date on which the local exchange carrier receives the request to negotiate an interconnection agreement. AT&T requested negotiations with U S WEST on June 20, 1996. The Commission must issue its arbitration decision on or before March 20, 1997.

5. AT&T included in its November 20, 1996, filing a 32 page arbitration matrix stating the unresolved issues and each party's position on each unresolved issue. Exhibit 7. The heading of the matrix noted that the issues were subject to continuing negotiations of the parties.

6. A prehearing conference was held on January 13, 1997. The parties filed prefiled testimony prior to the hearing which was held on February 3 through 7, 1997. At the end of the hearing the Commission directed the parties to file a joint updated matrix listing the unresolved issues. Tr. at 1459, lines 17-21.

7. AT&T and U S WEST each filed a post-hearing brief and separate matrixes on February 26, 1997. U S WEST submitted a 32 page matrix delineating its view of both AT&T's and U S WEST's current position for each unresolved issue. AT&T submitted an amended issue matrix that was 320 pages long. The use of separate matrixes is confusing and fails to comply with the Commission's directive. In fact, the parties apparently are uncertain as to whether some issues are unresolved. See Finding of Fact 41; AT&T's proposed Finding of Fact at 59 (access to customer addresses and numbers).

8. In addition, AT&T's matrix has the following deficiencies: (a) except for a nine page cost price addendum (which is incorrectly dated February 16, 1996), the matrix does not appear to be updated to reflect AT&T's and U S WEST's current negotiating position since the latest date listed in the matrix is July 10, 1996; (b) the matrix is not limited to unresolved issues but also includes resolved issues; (c) AT&T did not present evidence on many of the issues listed in the 320 page matrix; and (d) the matrix is confusing, inconsistent, and fails to inform the Commission of exactly what the unresolved issues are.

9. Due to the failure of the parties to submit a joint matrix listing only unresolved issues and the position of each party on each of those unresolved issues, the Commission has attempted to discern the unresolved issues from the record. However, the Commission notes that if the parties

themselves are not certain as to what issues they agree or disagree on, it is difficult to understand why the parties apparently believe that the Commission can determine this for them.

GENERAL TERMS AND CONDITIONS

10. AT&T's Petition at 52 raises the issue of what General Terms and Conditions are to be addressed in this arbitration. Exhibit 1. AT&T's proposed General Terms and Conditions are contained in AT&T's Proposed Interconnection Agreement. Exhibit 8, Part 1, Sections 1 to 33, at 8 to 33 and Attachment 1 to the Agreement. U S WEST's Proposed Interconnection Agreement contains its proposed General Terms and Conditions. Exhibit 4. Appendix B to U S WEST's post hearing brief indicates issues where probable accord has been reached. Based upon these sources in the record, the issues to be resolved with respect to general terms and conditions are as follows:

(a) What shall be the term of the Agreement;
(b) How shall payments be made under the Agreement;
(c) Shall audits and inspections be allowed by AT&T of U S WEST records and under what circumstances;
(d) Should the parties provide for indemnification;
(e) Should there be limits on liability of the parties;
(f) Should U S WEST provide a warranty as to its performance;
(g) Should remedies be provided to the respective parties;
(h) In what manner should disputes be resolved;
(i) In what manner should information be treated as confidential when provided from one party to the other;
(j) Should AT&T have the option to obtain local service or network elements which U S WEST may offer under other agreements;
(k) Should there be a mutual obligation to make customer payment history available to the other party;
(l) How shall patents and trademarks be treated;
(m) Should the Agreement have a force majeure clause;
(n) Which state's law governs the Agreement;
(o) Should the Agreement intend to benefit third party beneficiaries;
(p) How shall assignment and subcontracting be handled;
(q) Should the Agreement address severability;
(r) How shall contractual notices to the other party be handled;
(s) Should the Agreement address successors and assigns;
(t) Should AT&T be required to furnish a letter of authorization to U S WEST for disconnection and furnishing of certain services;
(u) Should reciprocal services be the subject of this Agreement; and
(v) Should this Agreement be considered a joint work product.

11. The Commission finds that the General Terms and Conditions present mixed issues of fact and law and it will address them in that context.

12. The Commission finds that an initial term of five years for the Agreement is reasonable for an Agreement of this length and complexity. The Commission further finds that the following concepts of mutual responsibility shall be agreed to by the parties: (1) provide sixty days notice to the other party for termination; (2) termination for breach with thirty days to cure the breach if the cause is nonpayment; (3) termination for breach if the cause is failure to perform and the breach affects the non-breaching party's subscribers, with ten days to cure the breach; and (4) optional termination of Agreement or any of its parts for other breach due to failure to perform if not cured within forty-five days.

13. The Commission finds affirmatively for the concept of payment of amounts due U S WEST from AT&T within thirty days of receiving U S WEST's invoice with a late charge, not to exceed an annual 12% rate, applied to past due amounts.

14. The Commission finds affirmatively for the concept that AT&T may audit records of U S WEST up to four times per year to ensure accuracy of U S WEST billings and invoices and for purposes of evaluating compliance with the Agreement. The Commission further finds that in order to implement this provision, it is reasonable to expect that such work may be done by auditors under contract with AT&T, that U S WEST will promptly correct billing errors, that U S WEST will cooperate in providing access to employees, facilities, books and records, that the frequency of audits may be accelerated if variances are over one percent of amounts payable by AT&T during the audit period, that audits are at AT&T's expense unless amounts in variance in the audit are over one percent of the aggregate charges payable to U S WEST during the audit period, that AT&T is to bear the cost of special data extractions it requests, that overpayments by AT&T to U S WEST are to be reimbursed, and that this provision survive the term of the Agreement by two years.

15. The Commission finds that indemnification as proposed by the parties has merit with the added finding that the indemnifying party shall have sole authority to defend an action with counsel of its choosing.

16. Regarding limits on liability, the Commission agrees with the concepts that the liability of AT&T shall not exceed amounts due from AT&T to U S WEST during a contract year; that U S WEST's liability should not exceed amounts due and owing AT&T plus amounts owed to U S WEST during a contract year; that there is no liability for either party for indirect, incidental, special, or consequential damages; and that the limitations do not apply to willful or intentional conduct. Parties shall be liable for lost profits.

17. The Commission finds that U S WEST shall perform its obligations under the Agreement at no less a level than the highest level which U S WEST uses for its own operations or those of its affiliates. U S WEST shall warrant that it shall perform under this standard, in a competitively neutral fashion at technically feasible points, for all rights, products, and services AT&T purchases from U S WEST pursuant to this Agreement.

18. The Commission finds that remedies in the Agreement shall be cumulative and not exclusive. In those remedies, the parties shall provide that the failure of U S WEST to switch a subscriber shall be deemed an illegal change in subscriber change selection which merits the reimbursement by U S WEST to AT&T for charges paid by the subscriber during the time that the subscriber remains a U S WEST customer.

19. The Commission finds that informal dispute resolution under the standards of the American Arbitration Association shall be followed. An arbitrator shall not have authority to award punitive damages. Arbitrator fees shall be paid by the losing party and, at the determination of the arbitrator, if neither party has completely won or lost at arbitration, then the arbitrator shall apportion the costs. The laws of South Dakota shall govern the Agreement and the arbitration process.

20. The Commission finds that information transmitted from one party to the other party under the Agreement shall automatically be considered proprietary. Copies of proprietary information may be made by either party but it shall bear copyright or proprietary notices; proprietary status shall continue for a period of five years from the time of receipt of the proprietary information. Exclusions to the obligations of this provision as delineated in AT&T's proposed agreement, Section 12.4, shall be followed.

21. Consistent with 47 U.S.C. § 252(i), the Commission finds that if U S WEST enters into an agreement with a party other than AT&T during the course of this Agreement which contains terms and conditions different from those available under this Agreement, AT&T may substitute terms and conditions of that agreement for terms and conditions contained in this Agreement.

22. The Commission finds that each party shall have an obligation to provide any customer's payment history to the other party upon request.

23. The Commission finds that nothing in the Agreement creates a license for a patent, trademark, or logo except that a limited license is created to use patents and copyrights necessary for the parties to use any facilities or equipment or to receive any service solely under this Agreement. Neither party shall have a right, unless otherwise agreed, to use the other party's logo, trademark, service mark, name, language, pictures or symbols, or words from which the other party's name may be inferred or implied in any product, service, advertisement, promotion, or any other publicity matter. The Commission further finds that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims.

24. The Commission finds that the Agreement shall contain a force majeure provision.

25. The Commission finds that no waiver of any provision of the Agreement or consent to default under the Agreement shall be effective unless it is in writing.

26. The Commission finds that the laws of the state of South Dakota shall govern this Agreement and U S WEST shall be responsible for maintaining such regulatory approvals as are necessary for it to perform under this Agreement. AT&T shall have a similar obligation with regard to approvals necessary for it to perform under this Agreement. Each party shall have an obligation to cooperate with the other in obtaining and maintaining necessary regulatory approvals.

27. The Commission finds that the Agreement shall not be intended to confer any rights on third party beneficiaries.

28. The Commission finds that neither party may assign the Agreement without the prior written consent of the other party. U S WEST may assign the Agreement to one of its affiliates which is wholly owned by U S WEST. U S WEST shall not subcontract for the performance of the Agreement or any part thereof without prior written consent of AT&T. In the event such subcontracting occurs, U S WEST shall retain full responsibility for performance under the Agreement.

29. The Commission finds that the Agreement shall contain a severability provision which allows the Agreement to function in the event parts of it are found to be invalid or unenforceable. In the event part of the Agreement is found to be invalid or unenforceable, the parties shall negotiate replacement language.

30. The Commission finds that the Agreement shall contain a provision for notices and who within each party's organization shall be notified of specific contractual events. Parties may change their designated representative by giving seven days' written notice to the other party. Notices are to be deemed effective when received.

31. The Commission finds that the Agreement shall be binding on and to the benefit of all successors and permitted assigns.

32. The Commission finds that AT&T shall be responsible to have a letter of authorization from an end user for handling disconnection of end user's service with U S WEST, for the providing of service by AT&T, and the providing of ancillary services. AT&T shall be responsible for providing written evidence of its authority to U S WEST.

33. The Commission finds that reciprocal services which U S WEST may wish to purchase from AT&T are not germane to nor the proper subject matter of this Agreement for interconnection.

34. The Commission finds that the Agreement is jointly produced by AT&T and U S WEST and that it shall not be deemed to be drafted by any one party thus dispelling with any presumptions or inferences which may be drawn against either party on the basis of who drafted the document.

INTERCONNECTION

POINTS OF INTERCONNECTION

35. The issues to be resolved with respect to points of interconnection are as follows:

(a) Whether U S WEST may require AT&T to have one point of interconnection for exchange of local traffic to be within the local calling area;

(b) Whether AT&T must go through a bona fide request process to obtain a particular type of interconnection that has previously been obtained at a different location by AT&T;

(c) Whether AT&T must bear all of the economic costs of a meet point arrangement used by AT&T for interconnection or to access unbundled network elements; and

(d) Whether U S WEST may impose a distance limitation for meet points used for interconnection.

36. Under the federal Act, an incumbent LEC's obligation with respect to interconnection is found at 47 U.S.C. § 251(c)(2) which provides as follows:

> (2) Interconnection. - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carriers network -
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

37. Pursuant to 47 C.F.R. § 51.305, the FCC has defined the following as technically feasible points that the incumbent LEC, at a minimum, must provide: (a) the line-side of a local switch; (b) the trunk-side of a local switch; (c) the trunk interconnection points for a tandem switch; (d) central office cross-connect points; (e) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (f) the points of access to unbundled network elements as described in 47 C.F.R. § 51.319.

U S WEST has agreed to provide interconnection at each of the above-listed points. Exhibit 23 at 19, lines 21-24. The parties have further agreed that U S WEST will provide, through a bona fide request process, interconnection at other technically feasible points. Exhibit 40 at 2, lines 5-6; Tr. at 270, lines 8-12.

38. AT&T may select for itself those points in U S WEST's network to which it wishes to interconnect. First Report and Order at ¶ 209. Therefore, the Commission finds that U S WEST may not require AT&T to have one point of interconnection for exchange of local traffic to be within the local calling area.

39. If, through the bona fide request process, a type of interconnection requested by AT&T is found to be technically feasible, AT&T shall not be required to request substantially similar interconnection through the bona fide request process. See 47 C.F.R. § 51.305(c) and (d).

40. Consistent with the federal Act, meet points for interconnection shall be made available upon request if technically feasible. 47 U.S.C. § 251(c)(2)(B). If the meet point arrangement is requested for purposes of interconnection pursuant to 47 U.S.C. § 251(c)(2), each party shall pay its portion of the cost to build out the facilities to the meet point. First Report and Order at ¶ 553. However, if the meet point arrangement is for access to network elements pursuant to 47 U.S.C. § 251(c)(3), then AT&T shall pay all of the economic costs of the meet point arrangement. Id.

41. The parties appear to disagree on whether there is disagreement on distance limitations for meet points requested for purposes of interconnection. In AT&T's brief, AT&T submits that the parties have agreed to no distance limitations. AT&T brief at 46, footnote 13. However, U S WEST's matrix lists this as an unresolved issue. Therefore, the Commission will make a finding on this issue. The Commission finds that a specific distance limitation for meet points for interconnection would be an arbitrary decision without knowing the facts of the particular meet point in dispute. However, since U S WEST must pay its portion of the cost to build out facilities for interconnection meet points, U S WEST may contest a particular meet point request by AT&T by showing the distance to AT&T's meet point is unreasonable. The Commission rejects U S WEST's request for a specific distance limitation.

SEPARATE TRUNKING

42. The issue with respect to separate trunking is whether U S WEST can require AT&T to have separate trunks for toll and local traffic.

43. AT&T requests the right to combine local and toll traffic on a single two way trunk group. Exhibit 3 at 8. U S WEST opposes this request contending that since toll and local traffic currently have different rate structures it should be allowed to require the use of separate trunk groups for toll and local traffic. Exhibit 23 at 129, lines 5-14.

44. The Commission finds that U S WEST may require separate trunks for toll and local traffic due to the different rate structures.

COLLOCATION

COLLOCATION OF EQUIPMENT

45. With respect to the issue involving collocation of equipment, the parties dispute the following issues:

(a) Whether AT&T must go through a bona fide request process in order to collocate at premises other than U S WEST's end offices or tandem offices; and

(b) Whether AT&T may collocate remote switching units.

46. Pursuant to 47 U.S.C. § 251(c)(6), U S WEST has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

47. The FCC has stated the term "premises" includes an incumbent LEC's central offices, serving wire centers and tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house network facilities, and any structures that house LEC network facilities on public rights-of-way. First Report and Order at ¶ 573.

48. U S WEST supports collocation at end offices and tandems (Tr. at 468, lines 2-5) but requests that collocation for other premises, such as environmental huts, should go through the bona fide request process. Tr. at 473, lines 3-9.

49. The Commission finds that AT&T is not required to go through a bona fide request process to collocate equipment in locations other than end offices or tandem offices. U S WEST may restrict collocation only if it can show that a particular location is not technically feasible.

50. AT&T requests that it be allowed to collocate remote switching units (RSUs). Tr. at 282, lines 18-21. U S WEST opposes this request. Tr. at 468, lines 11-16.

51. The FCC has interpreted the word "necessary for interconnection or access to unbundled elements" found in 47 U.S.C. § 251(c)(6) to require collocation of any equipment that is "used or useful" for interconnection or access to unbundled elements. First Report and Order at ¶ 579. The FCC declined to "impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements." First Report and Order at ¶ 581. However, the FCC recognized that "modern technology has tended to blur the line between switching equipment and multiplexing equipment...." And, therefore, the FCC concluded that the state Commissions will determine "whether the equipment at issue is actually used for interconnection or access to unbundled elements." Id.

52. U S WEST has the burden of proving that equipment is not necessary for interconnection or access to unbundled elements. First Report and Order at ¶ 580.

53. The evidence showed that collocation of RSUs is both used and useful for interconnection and for access to unbundled network elements. RSUs perform many of the same functions as transmission equipment. Tr. at 283, lines 3-17. In addition, RSUs may avoid quality problems associated with back to back placement of subscriber loop carriers and can complete certain 911 and E911 calls even if the facility is accidentally severed. Exhibit 12 at 52.

54. U S WEST failed to prove that the collocation of RSUs is not used or useful for interconnection or access to unbundled network elements.

55. The Commission finds that RSUs will be used by AT&T for interconnection or access to unbundled network elements. Therefore, the Commission will allow AT&T to collocate RSUs on U S WEST premises.

56. AT&T requests the right to select its own contractors for installation and engineering of both virtual and physically collocated equipment. Exhibit 47 at 16, lines 6-16.

57. The Commission finds that AT&T may select its own contractors subject to U S WEST's approval. If U S WEST objects to the contractor, it will have the burden of proof to show why the contractor is unacceptable. 47 C.F.R. § 51.323(j).

PRICING OF COLLOCATION

58. AT&T recommends the adoption of the physical collocation rates proposed by the Oregon Commission staff and the virtual collocation rates ordered by the Oregon Commission in Oregon Docket UT119. Tr. at 1347, lines 12-18. AT&T did not provide any supporting documentation for its proposal.

59. U S WEST's rates were based on a cost study with both recurring and nonrecurring charges. Exhibit 23 at 46, lines 19-20 and attached Exhibit R.

60. The Commission will accept U S WEST's proposed prices for collocation. However, the Commission finds that its entrance facility nonrecurring charge of over $3,000.00 and its quote preparation nonrecurring charge of over $2,100.00 may pose a barrier to entry. Therefore, the Commission shall require U S WEST to charge $1,000.00 as a nonrecurring charge for each of these services and U S WEST may recover the remainder of the charges in its recurring charge over a two year period.

PRICING FOR EXPANDED INTERCONNECTION CHANNEL TERMINATION

61. AT&T contends that U S WEST proposes to treat the expanded interconnection channel termination (EICT) jumper wire as a designed or special service/private line circuit. Exhibit 40 at 36, lines 15-16. AT&T objects to treating the EICT in this manner because AT&T asserts it causes additional nonrecurring charges and higher recurring charges than necessary by adding unnecessary investments. Id. at lines 18-19. In addition, AT&T maintains it increases the standard provisioning interval and adds other unnecessary steps and components to the overall provisioning process. Id. at 18-22. Moreover, AT&T maintains that U S WEST does not provision its end-users' plain old telephone service and integrated services digital network circuits in this manner. Id. at lines 16-18.

62. The Commission finds that U S WEST has not shown that its proposed provisioning and pricing of the EICT is appropriate or necessary. Therefore, the Commission does not adopt U S WEST's pricing proposal. If the parties are unable to negotiate an agreement on this issue, the parties shall present additional evidence to the Commission to allow it to reach a decision on this issue.

UNBUNDLED NETWORK ELEMENTS

EXTENT OF UNBUNDLING

63. With respect to the extent of unbundling network elements, the unresolved issues are as follows:

(a) Whether AT&T must go through a bona fide request process to obtain a particular subloop element that has previously been obtained by AT&T;

(b) Whether dark fiber must be provided as an unbundled network element; and

(c) Whether U S WEST must offer direct transport to the tandem switch.

64. Pursuant to 47 U.S.C. § 251(c)(3), U S WEST has the duty to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Pursuant to 47 U.S.C. § 251(d)(2), the FCC shall determine what network elements, at a minimum, should be made available.

65. The FCC listed the minimum network elements that should be made available in 47 C.F.R. § 51.319. With respect to subloop unbundling, the FCC concluded that state Commissions should determine the technical feasibility of subloop unbundling. First Report and Order at ¶ 391.

66. U S WEST and AT&T agree that U S WEST will provide the unbundled network elements as listed in 47 C.F.R. § 51.319. Exhibit 23 at 19, lines 21-24. The parties further agree that AT&T will submit a bona fide request for access to subloop elements. Exhibit 40 at 2, lines 5-6, Tr. at 270, lines 11-12.

67. Although the parties have agreed to using a bona fide request process for subloop unbundled elements, AT&T and U S WEST disagree on whether a bona fide request process must be used for each subloop element request even if AT&T has already gone through the bona fide request process for a particular subloop element. Exhibit 40 at 17, lines 1-3.

68. The Commission finds that AT&T does not need to go through the bona fide request process if it has already requested and been granted access to a particular subloop element. It is up to U S WEST to show that the provision of the subloop element is substantially different from the previous provisioning. AT&T shall pay for the cost of redesigning and reconfiguring the loop facilities in the requested location to allow for such access to subloop elements.

69. Dark fiber is fiber that lacks the electronics necessary to make it functional. Exhibit 33 at 11A, lines 20-23. Dark fiber cannot be used until the electronics are placed on the fiber. Tr. at 383, lines 1-5.

70. AT&T and U S WEST disagree on whether dark fiber is a network element. U S WEST contends dark fiber is not a network element because it is not "used in the provision of a telecommunications service." See 47 U.S.C. § 153(29); Exhibit 23 at 87, lines 17-21; Tr. at 383, line 23 to 384, line 10.

71. The FCC did not decide whether dark fiber is a network element due to an insufficient record. First Report and Order at ¶ 450.

72. The Commission finds that dark fiber does not meet the definition of a network element because it is not used in the provision of telecommunications service. However the Commission also finds that U S WEST may not refuse a request for fiber based on lack of lit fiber if it has installed dark fiber that it can make functional in order to meet the capacity request. U S WEST will not be

required to light its installed dark fiber if it needs to retain the dark fiber to accommodate its customers in the future. The burden is on U S WEST to show that the dark fiber is needed for its own customers.

73. U S WEST proposes to offer only common transport as a transport option directly to the tandem switch. Tr. at 279, lines 12-16. The Commission finds that since direct transport, common transport, and tandem switching are all unbundled network elements, U S WEST cannot refuse to provide direct transport to the tandem switching. See First Report and Order at ¶ 440.

VERTICAL FEATURES

74. With respect to vertical features, the unresolved issue is whether the unbundled local switching element must contain all vertical features that the switch is capable of providing.

75. The federal Act defines a network element as including "features, functions, and capabilities that are provided by means of such facility or equipment including subscriber numbers, databases, signaling systems...." 47 U.S.C. § 153(29).

76. The FCC found that these features, functions, and capabilities provided through a switch include "all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions." First Report and Order at ¶ 412.

77. U S WEST states that it will make vertical features available only as retail services to be purchased through the resale provisions of the federal Act. Exhibit 23 at 84, lines 19-21.

78. Consistent with the FCC's First Report and Order, the Commission finds that the unbundled local switching element shall include all vertical features that the switch is capable of providing. First Report and Order at ¶ 412.

COMBINING UNBUNDLED ELEMENTS

79. With respect to combining unbundled elements, the unresolved issues are as follows:

(a) Whether U S WEST must combine unbundled network elements at the request of AT&T; and

(b) If U S WEST is required to combine unbundled elements, whether U S WEST may charge AT&T a "rebundling" charge.

80. Pursuant to 47 U.S.C. § 251(c)(3), an incumbent LEC must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.

81. The FCC concluded that this provision of the federal Act "bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated." First Report and Order at ¶ 293. The FCC further concluded that "incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined. Incumbent LECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or they are not ordinarily combined in the incumbent's network, provided that such combination is technically feasible, and such combination

would not undermine the ability of other carriers to access unbundled elements or interconnect with the incumbent LEC's network." First Report and Order at ¶ 296.

82. U S WEST opposes this FCC requirement and refers to this as "sham unbundling." U S WEST contends this creates significant opportunities for price arbitrage and allows AT&T to avoid paying switched access charges. Exhibit 23 at 45, line 21 to 46, line 2.

83. The Commission finds that, consistent with the FCC's First Report and Order, U S WEST must combine unbundled elements in any manner requested, unless it can prove to this Commission "that a request to combine particular elements in a particular manner is not technically feasible, or that the request would undermine the ability of other carriers to access unbundled elements and interconnect..." First Report and Order at ¶ 296.

84. In the alternative, U S WEST requests that if the Commission permits rebundling then the Commission should allow a "rebundling charge" that would apply to AT&T when it purchases the equivalent of basic exchange service solely through the purchase of unbundled elements. Exhibit 23 at 56 to 58 and Exhibit 5 attached thereto.

85. The Commission finds that U S WEST has failed to show that its rebundling charge is justified on the basis of cost as required by 47 U.S.C. § 252(d)(1). See Exhibit 23 at 44, lines 4-6.

GEOGRAPHIC DEAVERAGING

86. The FCC concluded that a state Commission must establish different rates for unbundled network elements in at least three defined geographic areas within the state to reflect geographic cost difference. 47 C.F.R. § 51.507(f). This rule has been stayed by the Eighth Circuit Court of Appeals. Exhibit 53.

87. U S WEST contends the Commission should not deaverage network element prices until U S WEST's retail offerings have been deaveraged. Exhibit 23 at 39, lines 2-5. U S WEST asserts that if retail and wholesale prices are not deaveraged at the same time there would be massive arbitrage. Id. at lines 5-7.

88. The Commission finds that it will not geographically deaverage prices for network element in this proceeding. The Commission concludes that unbundled network element prices should not be deaveraged unless retail prices are deaveraged.

PRICES FOR THE UNBUNDLED LOCAL LOOP

89. Pursuant to 47 U.S.C. § 252(d)(1), a just and reasonable rate for network elements "(A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit."

90. The FCC's pricing rules for unbundled elements found at 47 C.F.R. §§ 51.501 to 51.515, inclusive, have been stayed by the Eighth Circuit Court of Appeals. The FCC rules required prices for unbundled network elements to be based on forward-looking economic costs, defined by the FCC as total element long-run incremental costs (TELRIC).

91. AT&T submitted the Hatfield Model to develop the costs for unbundled network elements. Exhibit 14 at 6, lines 16-19. At the request of MCI Telecommunications Corporation and AT&T, the Hatfield Model was developed by Hatfield Associates, Inc., of Boulder, Colorado. Id. at

lines 16-18. The first Hatfield model was used to produce estimates of the total service long run incremental cost of basic local exchange service to examine the cost of universal service. Id. at 7, lines 14-16. The second version, Hatfield Model 2.2, Release 1, estimated costs for unbundled network elements only. Id. at lines 16-17. The third version, Hatfield Model 2.2, Release 2, the version used in this docket, considers both unbundled elements and basic local exchange service. Id. at 7, lines 18-19 to 8, line 1. The Hatfield Model is publicly available and uses nonproprietary data obtained from publicly available sources. Id. at 10, lines 19-21 to 11, lines 1-3.

92. Under AT&T's Hatfield Model, the local loop is priced at $15.62 per month. Exhibit 76. U S WEST priced its loop at $29.83. Exhibit 77.

93. U S WEST did a sensitivity analysis by running the Hatfield Model with revised inputs and assumptions. Exhibit 37 at 2, lines 10-16. U S WEST's sensitivity analysis of the Hatfield Model produced a per line price of over $36.00 which was higher than U S WEST's TELRIC cost study using its Regional Loop Cost Analysis Program (RLCAP) to price the loop. Exhibit 37.

94. The Commission finds the Hatfield Model's assumptions on structure sharing are erroneous. The Hatfield Model assumes U S WEST would be responsible for paying only 33% of the cost to place aerial, underground, and buried facilities because the placement of these facilities would be shared with other utilities. AT&T also assumes that all currently existing utility facilities are scorched. Tr. at 714, line 24 to 715, line 2. However, under the scorched node concept, only telecommunications facilities should be assumed to be scorched. Tr. at 856, lines 11-12. By assuming all utility facilities are scorched, AT&T is able to assume other utilities would pay the other approximately 66% of plant costs. The Commission finds that AT&T's assumption that U S WEST will pay only 33% of aerial placement costs, buried placement costs, and underground placement costs is unreasonable.

95. The Commission finds that AT&T's Hatfield Model overcounts the number of lines. The model counts digital special access lines on a per channel basis so one DS-1 is counted as 24 access lines and one DS-3 is counted as 672 access lines. Exhibit 37 at 7, lines 11-12. However, the cost of placing a DS-1 would be considerably less than the cost of placing 24 separate basic access lines. The Commission finds that each DS-1 and DS-3 should be counted as one line.

96. The Commission finds AT&T's Hatfield Model underestimates the drop investment per line. The Hatfield Model estimates an average of 73 feet for a typical drop length; the estimate is from a Bellcore study. Exhibit 42 at 24, line 3, and footnote 2. The model assumes a half hour installation time for the drop and 15 minutes to one half hour installation for the Network Interface Device (NID) (Exhibit 42 at 24, lines 12-13) with a total investment of $70.00 (Id. at line 8) for a two pair drop (Id., attached Exhibit DRF-1 at 21). The Commission finds it is unreasonable to assume a drop and a NID can be installed in a range of 45 to 60 minutes with a total investment of $70.00.

97. The Commission finds the Hatfield Model understates the required distribution cable. Both parties agreed that the Hatfield Model overstates the number of distribution cables for some distribution groups and understates it for others. Exhibit 42 at 31, lines 2-3; Exhibit 29 at 39, lines 1-3, and 39, lines 31-34. AT&T states that the new revised version, Hatfield Model 2.2, Release 3, will attempt to address this issue. Exhibit 42 at 31, lines 11-13. Hatfield Model, 2.2, Release 3, will feature many enhancements and changes from the version used in this docket in order to correct its current flaws. Exhibit 60.

98. The Commission finds AT&T failed to show whether the additional costs of unbundling are included in the Hatfield Model. Tr. at 596, lines 4-6.

99. The Commission finds AT&T's reduction of the estimated non-plant specific operating and maintenance expenses by 30% is unreasonable. AT&T based the 30% "in part on testimony by Pacific Bell in which they concluded that their forward-looking network operations expense would be something less than half of their embedded number." Tr. at 534, lines 1 to 5. The 30% assumed reduction was also based on AT&T's contention that new plant placement should lower maintenance costs. Tr. at 636, line 22 to 638, line 1. The Commission agrees that, on a forward-looking basis, network operating expenses will be lowered due to new technology, competitive pressures, and the elimination of the inherent inefficiencies of monopolies. However, the Commission finds it unreasonable to assume that these expenses will be lowered by 30%.

100. Although the Hatfield Model contains over 400 default inputs for state specific circumstances, AT&T changed only 15 of these inputs, all of which related to depreciation lives. Tr. at 556, lines 11-24.

101. The Commission finds AT&T's reduction of U S WEST's corporate overhead from 21% to 10% is unreasonable. AT&T explained that it ran a regression analysis and concluded that an independent LEC's overhead was a little more than 13%. Tr. at 586, lines 1 to 7. AT&T further reduced that 13% by an additional three percentage points to account for inefficiencies. Tr. at 586, lines 7-12. The Commission finds that the basis for AT&T's reduction of U S WEST corporate overhead from 21% to 10% is not adequately supported.

102. The Commission finds the Hatfield Model calculates the installation expense factors based on the historical cost of materials and placement but then applies these expense factors only to the investment in materials. Exhibit 37 at 11, lines 19-22.

103. The Commission finds AT&T improperly used the FCC's depreciation lives rather than the Commission approved depreciation lives which were approved in Docket TC94-121. Tr. at 533, lines 13-16. The Commission finds that the Commission approved depreciation lives are more appropriate than the FCC's depreciation lives since the Commission approved lives more accurately reflect South Dakota circumstances on a going forward basis.

104. The Commission finds, based on the current flaws in the Hatfield Model, that it must reject the use of the Hatfield Model in determining the prices for unbundled network elements.

105. U S WEST states its cost studies were based on TELRIC using its RLCAP to price the local loop. U S WEST states that its TELRIC studies were based on assumptions, methods, and procedures that were "designed to derive the forward-looking least cost of deploying a telecommunications network. This forward looking network is designed to serve all the company's current customer base plus five years growth." Exhibit 29 at 7, lines 19-22. U S WEST states that it used current market prices to determine costs for equipment and materials and placement costs were based on the amounts that the network currently incurs to perform those functions. Expenses were adjusted for known or anticipated changes and each assumption was designed to reflect the forward looking cost of placing the network. Id. at lines 22-27.

106. The Commission is also cognizant of deficiencies in U S WEST's TELRIC cost studies. A valid criticism leveled at the cost studies is the fact that they are difficult to use and contain what has been termed "black boxes." Tr. at 717, lines 14-15. However, since the Hatfield Model and U S WEST's TELRIC cost studies were the only models presented to the Commission it must choose one of the models and, based on specified flaws in the Hatfield Model, the Commission will rely on U S WEST's TELRIC cost studies in this docket.

107. However, due to the deficiencies in both models, the Commission may open a docket to evaluate whether it shall set prices based on a different model or on improved versions of the models presented in this case.

108. Although the Commission shall base the price for the unbundled local loop on U S WEST's TELRIC cost studies, it finds that U S WEST must make modifications to the inputs it used in its cost studies.

109. The first modification is to the network operations factors. In Finding of Fact 99, the Commission found that although AT&T's proposed reduction of 30% was too high, it is reasonable to assume that network operations expenses will be lowered in a more competitive environment. Therefore, the Commission finds that U S WEST shall reduce its network operations expenses by 10%.

110. Similarly, the Commission finds that U S WEST shall reduce its corporate overhead. Although, the Commission found in Finding of Fact 101 that AT&T's reduction of corporate overhead from 21% to 10% was unreasonable, it is reasonable to expect some reduction in corporate overhead. Therefore, the Commission finds that U S WEST shall reduce its 21% corporate overhead by 10% which would reduce it to 18.9%.

111. With respect to the issue of cost of capital, U S WEST requests an equity ratio of 72% with a cost of equity at 12.4%. Exhibit 29, attached Exhibit 4 at 15. AT&T recommends a 55% equity ratio and an 11.9% cost of equity. Exhibit 14, attached Exhibit JCK-2 at 1. In Docket TC94-121 the Commission accepted an equity ratio of 59% and a cost of equity of 11.5%.

112. The Commission finds that U S WEST's equity ratio shall be its actual ratio on the date of this Order or 60%, whichever is lower. The Commission further finds that the cost of equity requested by U S WEST is too high and U S WEST shall use AT&T's proposed cost of equity of 11.9%.

113. U S WEST proposes a loop conditioning charge of $555.68. Exhibit 23 at 74, line 18 to 75, line 4, and attached Exhibit F. AT&T claims this cost is unnecessary in a forward looking digital environment. Exhibit 40 at 38, lines 16-17.

114. The Commission finds it is reasonable to assume that loop conditioning costs will decrease in an increasingly digital environment. However, it is unreasonable to assume there will be no costs associated with conditioning loops. Therefore, the Commission finds it shall base loop conditioning costs on what U S WEST currently charges to condition loops to provide ISDN which is $58.60. U S WEST's Exchange and Network Services Catalog, Section 14, Page 18, Release 1; Exhibit 47 at 5, lines 16-20.

PRICING OF UNBUNDLED SWITCHING

115. U S WEST requests recovery of $101.15 for nonrecurring charges for the first end office port and a nonrecurring charge of $54.43 for each additional port. Exhibit 23 at 82, line 20 to 83, line 7 and attached Exhibit 6. AT&T believes these costs are included in its recurring charges as calculated by its Hatfield Model. Tr. at 1360, lines 5-12.

116. The Commission finds AT&T failed to show that these nonrecurring costs are included in its proposed recurring charges. Therefore, the Commission will accept U S WEST's nonrecurring charges of $101.15 for the first port and $54.43 for each additional port.

117. With respect to recurring charges, U S WEST proposes a fixed charge per month of $1.84 and a per minute of use charge of $.003734. Exhibit 23 at 82, line 20 to 83, line 7, and attached Exhibit 6. AT&T proposes a fixed charge per month of $1.45 and a per minute of use charge of $.003. Exhibit 76.

118. U S WEST requests a five year amortization of what it terms its depreciation reserve deficiency. U S WEST estimates its intrastate reserve deficiency in South Dakota to be $6.6 million. Exhibit 23 at 36, lines 16-17. U S WEST advocates that the depreciation reserve deficiency be allocated to "all users of the switched network, based on total local and tandem minutes of use. Thus, the reserve deficiency would be allocated to CLECs [competitive LECs] that purchase local interconnection or unbundled switching, interexchange carriers that purchase switched access, and U S WEST end user services." Exhibit 23 at 37, lines 4-8. U S WEST states that it would recover "the CLEC's allocation of the reserve deficiency via the prices for end office call termination, unbundled local switching, and tandem switching, with the recovery spread over five years." Exhibit 23 at 37, lines 10-13.

119. The Commission rejects U S WEST's proposal to recover its alleged depreciation reserve deficiency. First, the Commission finds that U S WEST failed to prove that this depreciation reserve deficiency exists. Second, U S WEST proposes to allocate this alleged reserve deficiency to not only CLECs, but interexchange carriers that purchase switched access and U S WEST end user services. The only parties to this proceeding are AT&T and U S WEST. Therefore, the Commission cannot allocate these costs to nonparties to this docket.

120. The Commission finds that it will accept U S WEST's recurring charges of $1.84 fixed per month and a per minute of use charge of $.003734, less the depreciation reserve deficiency, for a rate of $.003334.

121. U S WEST proposes an additional recurring charge that ranges from $1.03 per month to $5.31 per month for the inclusion of custom calling, CLASS features, and Centrex features in the provisioning of the unbundled switch. Exhibit 23 at 82, line 20 to 83, line 7, and attached Exhibit 6.

122. The Commission finds U S WEST has failed to prove that its proposed cost for features provided with local switching are actually based on any additional cost of providing those features with the unbundled local switching element. Therefore, the Commission denies U S WEST's request to recover this charge for vertical features provided with the unbundled local switching element.

123. U S WEST proposes that it be able to charge for custom routing on an individual case basis. Exhibit 23 at 83, lines 6-7.

124. The Commission finds that U S WEST has not shown its nonrecurring charges for the local switching element fail to recover costs associated with custom routing and denies U S WEST the ability to charge for custom routing on an individual case basis.

PRICES FOR DEDICATED TRANSPORT

125. U S WEST proposes offering dedicated transport on DS-1 and DS-3 lines, but provides no price for DS0 lines. Exhibit 23 at 166, lines 13-15. U S WEST is requesting a combination rate with both a fixed and per mile charge, with five mileage bands. Exhibit 23, attached Exhibit A, page 1.

125. AT&T proposes a dedicated transport rate of $4.12 per month per equivalent DS0 with no mileage charge. AT&T did not provide any rates for DS-1s or DS-3s. Exhibit 76.

127. The Commission finds that a mileage based rate for dedicated transport is a more appropriate costing methodology than a fixed charge with no mileage charges. Therefore, the Commission will accept U S WEST's proposed rates for dedicated transport for DS-1 and DS-3 lines.

128. U S WEST did not propose a dedicated transport rate for a DS0 line. Exhibit 23 at 166, lines 13-15. AT&T states that U S WEST provides DS0s to its own customers and therefore must provide it to AT&T. Exhibit 47 at 12, lines 9-10. U S WEST did not rebut this claim.

129. The Commission finds that U S WEST shall offer dedicated transport per equivalent DS0 line. U S WEST provided a rate for a DS0 line for signaling links. The Commission finds that this rate shall apply to dedicated transport as an unbundled network element. Exhibit 29, Appendix 1, Table 1.

PRICING FOR TANDEM SWITCHING

130. U S WEST proposes a tandem switching rate of $.002076. Exhibit 23, Attached Exhibit M. AT&T proposes a tandem switching rate of $.0029. Exhibit 76. U S WEST's tandem switching rate includes its requested depreciation reserve deficiency amortization of $.0004 per minute of use for five years. Exhibit 23, attached Exhibit M, note 3.

131. Consistent with the Commission's Findings of Fact 118-119, the Commission will not allow U S WEST to include its depreciation reserve deficiency amortization of $.0004 per minute of use. The Commission finds that U S WEST's tandem switching rate should be adopted minus the depreciation reserve deficiency amortization.

PRICING OF COMMON TRANSPORT

132. U S WEST proposes a $.00041 per minute fixed rate with a $.000012 per minute per mile charge, with mileage bands for common transport. Exhibit 23, attached Exhibit M. AT&T proposes a common transport charge of $.00168 per minute of use. Exhibit 76.

133. The Commission finds that a transport rate should be structured on the basis of mileage and therefore adopts U S WEST's proposed rate. Moreover, U S WEST's rate would appear to be less than AT&T's up to a significant mileage add on.

PRICING OF COMMON CHANNEL SIGNALING

134. Although the parties both state in their testimony that they are in agreement on signaling issues (Exhibit 23 at 91, lines 2-3, Exhibit 12 at 33), the parties appear to have differences with respect to the rates to be charged for common channel signaling (CCS).

135. U S WEST proposes a flat rate for the CCS link and the signal transfer point (STP). U S WEST states that the cost for the service control point (SCP) is included in the STP rate. Exhibit 23, attached Exhibit A at 2. AT&T proposes a flat rate for the CCS link and a per message rate for STP and SCP. Exhibit 76.

136. The Commission finds that since it has rejected the Hatfield Model it may not base these rates on AT&T's proposed rate. However, the Commission will not accept U S WEST's rate either because it is flat rated. The Commission finds that rates for signaling and database services should be usage sensitive because a usage sensitive rate most accurately reflects the underlying costs of the service. If the parties are unable to negotiate an agreement on this issue, the parties shall present additional evidence to the Commission to allow it to reach a decision on this issue.

137. U S WEST proposes a recurring and nonrecurring charge for multiplexing. Exhibit 23, attached Exhibit M. AT&T did not propose a charge for multiplexing probably because, under the Hatfield Model, multiplexing is not needed in a fully digital system. Exhibit 47 at 5, lines 11-12.

138. The Commission finds that U S WEST will need multiplexers to convert from analog to digital or vice versa. The Commission finds U S WEST's rate is reasonable and will accept U S WEST's multiplexing rate found in Exhibit 23, Attached as Exhibit A, at 2.

PRICING OF INTEGRATED SERVICES DIGITAL LOOP NETWORK EXTENSION

139. U S WEST proposes a monthly price for Integrated Services Digital Network (ISDN) loop extension for the provisioning of ISDN capability on an unbundled loop that is greater than 18,000 feet in distance. U S WEST bases the proposed monthly price of $28.28 on TELRIC plus an allocation of common cost. Exhibit 23 at 74, lines 10-13.

140. AT&T recommends that the price be set at zero until U S WEST provides a proper cost study that is modeled to reflect least cost, most efficient technology. Exhibit 47 at 14, lines 8-10.

141. The Commission finds that U S WEST's proposed price for ISDN extension is reasonable.

RESALE OF RETAIL SERVICES -

SERVICES TO BE MADE AVAILABLE

142. With respect to what services must be made available for resale, the unresolved issues are as follows:

(a) Whether the Commission shall restrict the resale of services available only to residential customers;
(b) Whether enhanced services must be made available for resale;
(c) Whether U S WEST must provide Lifeline and Link-Up services for resale;
(d) Whether wholesale services must be available for resale at a discount;
(e) Whether the Commission will extend the time frame for distinguishing between a promotional offering and a retail service beyond 90 days;
(f) Whether services priced below cost must be provided for resale at a discount;
(g) Whether services that are provided at a volume discount are already discounted; and
(h) Whether a retail service may be resold only for its intended or disclosed use, under the same terms and conditions applicable to U S WEST's end users, and only to the same class of customers that are eligible to purchase a service from U S WEST.

143. Pursuant to 47 U.S.C. § 251(c)(4)(A), an incumbent local exchange carrier has the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers...." In addition, the federal Act states that an incumbent LEC may not prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of those telecommunications services. 47 U.S.C. § 251(c)(4)(B). However, the Commission may, consistent with FCC regulations, "prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers." Id.

144. The FCC has promulgated rules which specifically allow for two types of restrictions on resale. First, the Commission "may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC." 47 C.F.R. § 51.613(a)(1). Second, with respect to short term promotions, the FCC stated that "[a]n incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if: (A) such promotions involve rates that will be in effect for no more than 90 days; and (B) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates." 47 C.F.R. § 51.613(a)(2). Any other restrictions on resale may be permitted only if the incumbent LEC "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

145. The Commission finds that it is reasonable and nondiscriminatory for U S WEST to prohibit AT&T from offering services that U S WEST makes available only to residential customers or to a limited class of residential customers from offering those services to classes of customers that are not eligible to subscribe to such services from U S WEST.

146. U S WEST contends it should not be required to make enhanced services available for resale because enhanced services are not telecommunications services as defined in the federal Act. Exhibit 23 at 102, lines 1-5.

147. Enhanced services are defined by the FCC as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

148. The FCC has concluded that all of the services that the FCC has previously considered to be enhanced services are information services. In the Matter of Implementation of the Nonaccounting Safeguards of §§ 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149 at ¶ 102.

149. The federal Act defines information services as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

150. In the FCC's First Report and Order, the FCC found that information service providers are not telecommunications carriers. First Report and Order ¶ 995. Thus, information services are, by definition, different than telecommunications services as defined by 47 U.S.C. § 153(43).

151. The Commission agrees that the federal definition of information services includes enhanced services and therefore enhanced services are not telecommunications services as defined by the federal Act. Thus, U S WEST is not required to make its enhanced services available for resale.

152. The Commission finds that U S WEST shall be required to provide Lifeline and Link-Up services for resale, however, these services may not be offered to end users not eligible to subscribe to such service offerings. First Report and Order at ¶ 962.

153. U S WEST states that it should not be required to provide wholesale services for resale at a discount, such as special access. Exhibit 23 at 105, lines 5-9.

154. The FCC concluded that "[e]xchange access services are not subject to the resale requirements of section 251(c)(4)." First Report and Order at ¶ 873. The FCC reasoned that exchange access services are "predominantly offered to, and taken by, IXCs, not end users." First Report and Order at ¶ 874. Even though the FCC acknowledged that a small number of end users do purchase some of these services, the FCC concluded that this did not "alter the essential nature of services." Id.

155. The Commission finds that special access services are services that are predominantly offered to telecommunications carriers, not end users, and therefore are not required to be offered for resale at a discount pursuant to 47 U.S.C. § 251(c)(4).

156. U S WEST requests that the Commission consider extending the time frame for distinguishing between a promotional offering and a retail service beyond the 90 days provided in 47 C.F.R. § 51.613(a)(2). Exhibit 23 at 103, lines 17-20.

157. The Commission declines to do so because U S WEST failed to show that a longer time frame would be reasonable and nondiscriminatory. U S WEST must comply with the 90 day time frame for its promotions.

158. U S WEST contends it should not be required to provide services for resale at a discount which it alleges are already priced below cost. Exhibit 29 at 34, lines 31-32.

159. However, the FCC found that below cost services are subject to the wholesale rate obligations under § 251(c)(4). First Report and Order at ¶ 956. Since the resale pricing standard is based on avoided costs, the revenues resulting from the resale of the below cost services should be accompanied by proportionate decreases in expenditures that are avoided because the service is being offered at wholesale. Id.

160. Consistent with the FCC's First Report and Order, the Commission finds that even if a retail service is offered below cost it must still be offered for resale at a wholesale discount.

161. U S WEST asserts that services that are provided at a volume discount are already discounted and therefore there should be no further wholesale discount. Exhibit 23 at 104, lines 14-21 and at 107, lines 15-16.

162. The FCC concluded that if a service is sold to end users it is a retail service "even if it is priced as a volume-based discount off the price of another retail service." First Report and Order at ¶ 951. The FCC concluded that restrictions on resale of volume discounts should be considered presumptively unreasonable. First Report and Order at ¶ 953.

163. The Commission finds that U S WEST has not shown that any specific discounted service should be excluded from the wholesale obligations of the federal Act, and therefore its volume discounts are subject to the wholesale discount.

164. U S WEST requests that the Commission rule that a telecommunications service should be resold only for its intended or disclosed use, under the same terms and conditions applicable to U S WEST's end users, and only to the same class of customers that are eligible to purchase the service from U S WEST. Exhibit 23 at 111, lines 11-15.

165. The Commission concludes that restrictions on the resale of services available only to residential customers and restrictions related to promotions of less than 90 days are reasonable and nondiscriminatory. However, pursuant to the FCC's rules, other resale restrictions, beyond promotional and residential restrictions must be proven to be reasonable and nondiscriminatory. 47 C.F.R. § 51.613(a). U S WEST failed to show that its proposed broad restriction would be reasonable and nondiscriminatory.

BRANDING

166. With respect to the issue of branding, the unresolved issues are as follows:

(a) Whether U S WEST's repair personnel must inform the customer that a service call is being made on behalf of AT&T; and

(b) Whether U S WEST's repair personnel must leave behind an information card with the repair call information relating to AT&T.

167. Branding means a service is offered to a customer in a manner that identifies to the customer the requesting carrier's brand name. Unbranding means a service is offered in such a manner that an incumbent LEC's brand name is not identified to the customer.

168. AT&T requests that U S WEST's personnel be required to identify themselves as representing AT&T. Exhibit 13 at 29, lines 16-20.

169. With respect to branding requirements for repair and maintenance, the Commission agrees with AT&T that U S WEST's personnel should identify themselves as representing AT&T when they make a service call on behalf of AT&T. The requirement that U S WEST's personnel state to the customer that they are there on behalf of AT&T is not an onerous requirement.

170. AT&T requests that U S WEST's personnel be required to leave AT&T informational material at the customer's premise. Tr. at 1057, lines 19-23.

171. Given that U S WEST may have numerous competitors requesting the same treatment, the Commission finds that requiring U S WEST's repair and maintenance personnel to carry informational material for all competing carriers is too burdensome. However, the Commission encourages the parties to agree to some form of neutral information that can be used by all competing LECs.

172. AT&T requests that it be allowed to review and approve the training of U S WEST's personnel. Tr. at 1062, line 24 to 1063, line 24.

173. The Commission rejects AT&T's request to review and approve the training of U S WEST personnel as an unnecessary intrusion into U S WEST's business.

DEPOSITS

174. With respect to deposits, U S WEST states that it should be allowed the option to require AT&T to make a deposit as a guarantee of the payment of charges. Exhibit 23, attached Exhibit B at 72, section 11.10.

175. As AT&T points out, U S WEST does not impose a deposit requirement on an end user customer who has a good credit history. See ARSD 20:10:08:05. In addition, AT&T has an excellent credit history with U S WEST. Exhibit 19 at 8.

176. The Commission finds that U S WEST's proposed deposit policy is unreasonable given AT&T's credit history. The Commission further notes that a deposit may not be unreasonable in the event U S WEST can prove that a particular carrier poses a risk of default on its obligations.

CONSTRUCTION CHARGES

177. With respect to construction charges, the issue is whether AT&T must pay all of the costs of constructing facilities needed to provide a resold service to a particular customer. AT&T agrees to pay any costs of construction that U S WEST currently charges to an end user, but states that any other payments would constitute a double recovery for U S WEST. Exhibit 19 at 8, lines 8-10.

178. The Commission finds that if AT&T is required to pay U S WEST for all construction charges up front, AT&T may be paying twice for a portion of those construction charges. Therefore, AT&T shall only pay those nonrecurring charges of construction that U S WEST charges to an end user.

CUSTOMER TRANSFER CHARGE

179. With respect to the customer transfer charge, the issue is the amount U S WEST may charge when it transfers a U S WEST customer account to a reseller or when it transfers a customer account from one reseller to another reseller.

180. U S WEST proposes a nonrecurring charge of $12.64 for a mechanized transfer and a charge of $22.20 for a manual transfer. Exhibit 23, attached Exhibit C at 2. U S WEST included in its charge both direct costs and overhead costs. Exhibit 48, Executive Summary of U S WEST Residence Customer Transfer Charge, 22.1a and 22.1b.

181. At the hearing, AT&T stated that the transfer charge should be $.45. AT&T bases this charge on a BellSouth study. Tr. at 1352, lines 6-22. AT&T also noted that a similar charge in the toll business is $5.00 for a transfer charge. Exhibit 19 at 25, lines 24-25.

182. The Commission finds that a reasonable charge for a customer transfer is a nonrecurring charge of $5.00. The Commission finds that a $5.00 charge will provide cost recovery to U S WEST. In addition, a $5.00 charge that is the same as the toll charge may alleviate customer confusion.

WHOLESALE DISCOUNT RATE

183. Pursuant to § 252(d)(3), the Commission "shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."

184. The FCC implemented rules on how to determine avoided retail costs. See 47 C.F.R. §§ 51.609 to 51.611. These rules were subsequently stayed by the Eighth Circuit and are currently still subject to that stay pending the Eighth Circuit's final decision. Exhibit 53.

185. AT&T submitted a cost model to establish the discount that it referred to as its simplified avoided cost model. The AT&T Model provides an aggregated 27.15% discount from the

price of any retail service. Tr. at 925, line 23 to 926, line 5. AT&T's inputs into its avoided cost study are U S WEST state specific financial and ARMIS data that is filed by U S WEST with the FCC. Exhibit 16 at 9, line 1 to 10, line 10. AT&T's cost model used ARMIS 43-03 total state data in its avoided cost model. Exhibit 44 at 18, lines 17-18.

186. AT&T's study presumed that the direct costs in the following Uniform System of Accounts (USOA) are 100% avoided: 6611 (product management); 6612 (sales); 6613 (product advertising); 6623 (customer services); 6621 (call completion services); and 6622 (number services/directory assistance) and that the direct costs in 6533 (testing) and 6534 (plant operations administration) are 20% avoided. AT&T's study further presumed that indirect costs in the following USOA accounts are avoided in proportion to the avoided direct expenses: 6121 to 6124 (general support expenses); 6560 (depreciation); and 6711, 6712, 6721 to 6728 (corporate operations expenses); and that the indirect costs in 5301 (uncollectibles) are 100% avoided. Exhibit 16, attached Exhibit DBS-2.

187. The Commission rejects AT&T's simplified avoided cost model due to the following flaws: (a) the AT&T Model does not properly match revenues and cost elements in its discount calculation which misstates and inflates its discount factor (Exhibit 35 at 9, lines 7-12); (b) AT&T's Model assumes that all product management expenses will be eliminated which is an unreasonable assumption since U S WEST will still incur product management costs associated with its current non-retail services (Id. 35 at 8, lines 10-17); (c) the AT&T Model assumes all marketing and billing costs will be avoided which is unreasonable since there will still be marketing and billing expense that will be incurred to provision non-resale services (Id. 35 at 6, lines 17-23); (d) the AT&T Model fails to incorporate property tax expense, interarea rent, equal access depreciation, and other operating expense (Id. 35 at 2, lines 22-25 and at 15, lines 1-12); and (e) the AT&T Model did not include any return on U S WEST's investment (Tr. at 983, lines 18-24).

188. U S WEST submitted two different cost studies to determine wholesale discounts: a cost study based on embedded costs and a TELRIC cost study. Exhibit 30 at 4, lines 21-28.

189. U S WEST's TELRIC study is based on forward-looking costs. Exhibit 30 at 4, lines 24-28. The Commission rejects the use of U S WEST's TELRIC cost study because a TELRIC cost study would only be appropriate if U S WEST's current retail rates were established using the TELRIC methodology. In South Dakota, the Commission sets U S WEST's retail rates using an embedded cost methodology.

190. U S WEST's embedded avoided cost study was based on 1995 operating results. Data was drawn from 1995 FCC ARMIS reports, certain TELRIC avoided cost study related assumptions, and U S WEST's embedded Cost Accounting Allocation System (CAAS). Exhibit 30 at 5, lines 8 -11. U S WEST's avoided cost study used ARMIS 43-04 data which is intrastate data. This eliminated all interstate access revenues and part 36/69 separated costs. Exhibit 30 at 7, line 14 to 8, line 4. U S WEST's study excluded intrastate access, intrastate billing and collection, public services, E911, operator services, directory assistance, and Centrex service. Tr. at 986, lines 11-19. It also excluded miscellaneous service revenues and costs because miscellaneous services primarily reflect contractual services for plant maintenance and other adjustments, and it excluded nonrecurring business office costs and revenues. Exhibit 30 at 15, line 18 to 16, line 3.

191. U S WEST applied direct avoided cost percentages to the following accounts: 6611 (product management); 6612 (sales); 6613 (product advertising); 6621 (call completion); 6622 (number services); and 6623 (customer services). U S WEST applied an indirect avoided cost percentage in proportion to the avoided direct expense for the following categories: general support,

depreciation; executive planning; other state and local taxes; other operating income expense; interarea rent compensation; and capital costs. Exhibit 30 attached as Exhibit 1.

192. The Commission finds that it will accept U S WEST's embedded cost study as a basis to determine avoided costs. However, the Commission further finds that it must make adjustments to U S WEST's embedded cost study because U S WEST improperly excluded certain costs and revenues and used an erroneous factor for uncollectibles.

193. U S WEST should not have excluded the costs and revenues associated with E911, semi-public pay phone, Public Access Line (PAL) pay phone, Centrex, and nonrecurring charges. These costs and revenues should be included because they will be avoided in a resale setting. If AT&T does not provide its own billing and collection, operator services, and directory assistance, those costs and revenues should also be included in the calculation of avoided costs.

194. In addition, the Commission finds that U S WEST will avoid 100% of its costs with respect to uncollectibles. No evidence was presented that, as the reseller, AT&T would not pay U S WEST for all charges incurred by AT&T. In fact, a U S WEST witness stated that she would expect that AT&T would pay its bills 100% of the time. Tr. at 1021, lines 3-11.

195. Further, the Commission finds that the avoided cost discount shall be applied on an aggregate basis to all resold services. The Commission rejects U S WEST's aggregated discounts for specific services because U S WEST failed to provide a discount for all services that are subject to resale. In addition, U S WEST has failed to show that its disaggregated discounts are based on individual data that is collected by product or service. Tr. at 972, lines 1-16.

196. The result is a discount of 15.55% which includes billing and collection, operator services, and directory assistance. If AT&T provides its own operator services and directory assistance, the discount must be reduced by 2.68 percentage points. If AT&T provides its own billing and collection the discount must be reduced by .06 percentage points.

OPERATIONAL SUPPORT SYSTEMS

INTERIM OPERATIONAL SUPPORT SYSTEM

197. AT&T and U S WEST have agreed in principle on a long term solution for operational support systems. The area of disagreement revolves around U S WEST's proposal for an interim solution.

198. Pursuant to 47 U.S.C. § 251(c)(3), U S WEST has the duty to provide to AT&T "nondiscriminatory access to network elements on an unbundled basis...." A network element "includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29).

199. The FCC found that operations support systems are included within the definition of network element. First Report and Order at ¶ 516, 47 C.F.R. § 51.319(f).

200. Operational support systems are those electronic ordering interfaces which include those systems and databases required for pre-ordering, ordering, provisioning, maintenance and

repair, and billing. 47 C.F.R. § 51.319(f)(1). The FCC required incumbent LECs to provide nondiscriminatory access to operations support systems functions no later than January 1, 1997. 47 C.F.R. § 51.319(f)(2).

201. U S WEST's interim solution is a web page interface for pre-ordering, ordering, provisioning, and maintenance and repair connections. Exhibit 27 at 8 through 10. According to U S WEST, its web page interface is currently available for plain old telephone service except for some maintenance and repair functions which will not be available until July 1, 1997. Exhibit 27, chart at page 10. The web page interface proposal will not be available for design services such as ISDN or Centrex until at least July 1, 1997, and several other maintenance and repair functions will not be available until November 1, 1997. Id.

202. U S WEST's web page interim solution is a human interface and therefore subject to error and delay. Tr. at 1040, line 5. Further, the web page interim proposal is inferior to the service U S WEST provides itself because U S WEST's service representatives will not be using the web page screen form for ordering. Tr. at 1120, line 25 to 1121, line 3.

203. The FCC concluded that an incumbent LEC must provide nondiscriminatory access to its operations support systems functions and such nondiscriminatory access includes "access to the functionality of any internal gateway systems the incumbent employs in performing [operations support systems] functions for its own customers." First Report and Order at ¶ 523. The FCC stated that "an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention...." Id.

204. The Commission finds that U S WEST's web page interface proposal does not comply with the federal Act or the FCC First Report and Order. U S WEST shall take the necessary steps to create electronic interfaces that will provide AT&T with ordering processes that are equal to the ordering processes U S WEST has available to itself.

PRICING OF OPERATIONAL SUPPORT SYSTEMS

205. The only issue with respect to pricing of operational support systems concerns how the cost to develop gateway systems used to access databases should be recovered. The gateways in question are not yet developed. Exhibit 27 at 10, line 7.

206. U S WEST proposes that gateway development costs be paid by the users of the gateway. Tr. at 1105, line 25 to 1106, line 6. AT&T proposes that each company pay for its own gateway. Tr. at 1364, lines 20-23.

207. Gateways allow outside parties to access another company's databases. Therefore, the cost causers are the parties who need the gateway to access the databases.

208. The Commission finds that it would not be fair to assess the first company that requires access to U S WEST's databases to pay the full cost for the development of that gateway since other companies will also use U S WEST's gateway. In addition, there will be ongoing, recurring costs associated with the continued use of that gateway. The Commission therefore finds that a company shall be allowed to assess the users of its gateway on a per transaction basis. The company may include the costs incurred for the development of the gateway in its costs used to derive the transaction charge.

INTERIM NUMBER PORTABILITY

209. With respect to interim number portability, the only issue in dispute is cost recovery.

210. Pursuant to 47 U.S.C. § 251(b)(2), U S WEST has "[t]he duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC]."

211. Until a long term database method for number portability is implemented, a LEC "shall provide transitional measures, which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier...." 47 C.F.R. § 52.27(a)

212. With respect to cost recovery for interim number portability, the FCC has stated that a cost recovery mechanism "that is adopted by a state commission must not: (1) give one telecommunications carrier an appreciable, incremental cost advantage over another telecommunications carrier, when competing for a specific subscriber (i.e., the recovery mechanism may not have a disparate effect on the incremental costs of competing carriers seeking to serve the same customer); or (2) have a disparate effect on the ability of competing telecommunications carriers to earn a normal return on their investment." 47 C.F.R. § 52.29(a).

213. AT&T advocates what is known as the "New York Method" for allocating the costs of interim number portability. Exhibit 19 at 22, line 16. As explained by the FCC, the New York Method "allocates the incremental costs of currently available number portability measures, through an annual surcharge assessed by the incumbent LEC from which the number is transferred. This surcharge is based on each carrier's number of ported telephone numbers relative to the total number of active telephone numbers in the local service area." First Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 95-116, In the Matter of Telephone Number Portability (Number Portability Order) at ¶ 136.

214. U S WEST disagrees with the cost recovery rules adopted by the FCC and states that all costs of interim number portability should be borne by new entrants. Exhibit 23 at 207, lines 1-2 and 208, lines 1-2. U S WEST submitted proposed charges for interim number portability. Exhibit 23 at 208, line 17 to 209, line 12, and Attached Exhibit A.

215. The Commission finds that, consistent with 47 U.S.C. § 251 and the FCC's Number Portability Order, it will adopt the New York Method to allocate the cost of interim number portability. The Commission rejects U S WEST's position and proposed rates as contrary to the FCC's Number Portability Order.

216. With respect to the treatment of terminating access charges, U S WEST states that it should be permitted to retain local switching and transport charges it receives when calls from an interexchange carrier are delivered to U S WEST, the forwarding carrier, and are forwarded to AT&T, the terminating carrier, as a result of interim number portability. U S WEST proposes that it would provide a credit to AT&T for carrier common line charges based on average minutes of use per number per month. Exhibit 23 at 207, lines 3-16.

217. The FCC concluded that the terminating and forwarding carrier should share in the access revenues received for a forwarded call. Number Portability Order at ¶ 140. The FCC directed "forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet point billing arrangements." Id.

218. Consistent with the FCC's Number Portability Order, the Commission finds that the terminating carrier shall receive the carrier common line and local switching charges. Transport charges shall be shared based on the meet point billing arrangement.

ACCESS TO POLES, CONDUITS, DUCTS, AND RIGHTS-OF-WAY

219. With respect to access to poles, conduits, ducts, and rights-of-way, the unresolved issues are as follows:

(a) Whether U S WEST may reserve space for itself;
(b) Whether AT&T has the duty to afford access to poles, conduits, ducts, and rights-of-way to U S WEST;
(c) Whether U S WEST must modify its facilities to increase capacity for AT&T;
(d) Whether U S WEST must exercise its eminent domain powers, if needed, to expand an existing right-of-way; and
(e) How costs are recovered.

220. Pursuant to 47 U.S.C. § 251(b)(4), U S WEST has "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."

221. The Commission finds that consistent with the federal Act and the FCC rules, U S WEST must provide nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. U S WEST may deny AT&T "access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." 47 C.F.R. § 1.1403(a).

222. With respect to the issue of reservation of space by U S WEST, the Commission finds, consistent with the FCC's First Report and Order, that U S WEST may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business. First Report and Order at ¶ 1170. U S WEST shall provide nondiscriminatory access on a first come, first served basis.

223. With respect to the issue of reciprocal access, the Commission finds that 47 U.S.C. § 251(b)(4) and § 224 impose the duty to afford access to poles, ducts, conduits, and rights-of-way on all local exchange carriers. Therefore, when AT&T becomes a local exchange carrier as defined by 47 U.S.C. § 153(26), then it also has the same duty as U S WEST to afford access to its poles, ducts, conduits, and rights-of-way.

224. On the issue of modifications to a facility to increase capacity, the Commission finds, consistent with the FCC's First Report and Order, that U S WEST must take all reasonable steps to accommodate requests for access. Before denying access based on lack of capacity, U S WEST must "explore potential accommodations in good faith with the party seeking access." First Report and Order at ¶ 1163.

225. The next issue with respect to access to a right-of-way concerns whether U S WEST must exercise its eminent domain powers to expand an existing right-of-way. U S WEST shall, to the extent permitted by state law, exercise its eminent domain powers to expand an existing right of way to accommodate a request for access. First Report and Order at ¶¶ 1179 and 1181.

PRICING OF POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

226. U S WEST proposes to charge three types of fees. U S WEST will charge an annual usage fee for the use of poles and conduits if any facility rearrangements are necessary. In addition, U S WEST would charge what it terms to be a "make ready charge." The third fee relates to charges for labor expenses incurred for inspection or supervision of facilities. Exhibit 23 at 257, lines 7-16.

227. Pursuant to 47 U.S.C. § 224(d)(1), "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, and right-of-way."

228. Pursuant to 47 U.S.C. § 224(h), "[w]henever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible."

229. Pursuant to 47 U.S.C. § 224(i), "[a]n entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such arrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."

230. The FCC found that if a LEC must modify a facility on behalf of a requesting carrier, the requesting carrier, along with all parties that obtain access to the facility as a result of the modification, shall pay the cost of modifying the facility. 47 C.F.R. § 1.1416(b).

231. The Commission finds that U S WEST's proposal for recovery of costs relating to poles, ducts, conduits, and rights-of-way is reasonable and consistent with the federal Act.

TRANSPORT AND TERMINATION

PRICING OF TRANSPORT AND TERMINATION

232. The issues with respect to transport and termination are as follows:

(a) Whether bill and keep should be used on an interim basis or should prices be established; and

(b) Whether AT&T may receive the tandem switched rate.

233. Pursuant to 47 U.S.C. § 251(b)(5), all LECs have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Pursuant to 47 U.S.C. § 252(d)(2), terms and conditions for reciprocal compensation are not just and reasonable "(i) unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such

calls." This language cannot be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements)...." 47 U.S.C. § 252(d)(2)(B)(i).

234. AT&T proposes to exchange local traffic on a bill and keep basis until procedures for measuring traffic are in place. AT&T contends that bill and keep should be used provided traffic is reasonably balanced and if not in balance TELRIC should be the basis for establishing prices. Exhibit 19 at 18, lines 1-7.

235. U S WEST proposes prices for three functions: call termination, call transport, and call transit. Exhibit 23 at 155, lines 4-5. U S WEST states that its proposed price for call termination is based on TELRIC plus an allocation of common costs and an allocation of U S WEST's alleged depreciation reserve deficiency. Id. at 157, lines 3-5. U S WEST's price for call termination is $0.003734 per minute of use. Exhibit 23, attached as Exhibit M. U S WEST proposes the waiving of reciprocal call termination charges in a given month if traffic between U S WEST and AT&T is reasonably balanced. Exhibit 23 at 159, lines 14-16. U S WEST defines reasonably balanced as within a 5% threshold. Id. at lines 16-20.

236. Call transport may include the use of a tandem switch, dedicated facilities or tandem transmission. Id. at 165, lines 6-7. For direct trunked transport, U S WEST proposes two charges: a fixed per month charge and a per mile charge. Id. at 168, lines 4-5. Different charges apply based on whether a DS-1 or a DS-3 is used. Id. at 168, lines 7-8. U S WEST proposes three rate elements for call transport. The first rate element consists of the direct trunked transport element. Id. at 168, lines 10-13. The second rate element is the tandem switching charge which is based on per minutes of use. Id. at 168, lines 13-15. The third rate element is the tandem transmission charge which consists of a fixed per minute charge and a per mile per minute charge, both of which are distance sensitive. Id. at 168, lines 15-21.

237. Call transit is the provisioning of the transport of traffic between two other local exchange carriers. Exhibit 23 at 159, lines 8-9. U S WEST proposes to apply tandem switched transport and tandem switching charges for each call originated by AT&T and delivered to a third party carrier in the local calling area. Id. at 179, lines 20-23.

238. The Commission finds that it will accept U S WEST's proposed prices, minus any costs related to its alleged depreciation reserve deficiency. Consistent with Findings of Fact 118-119, the Commission shall not allow U S WEST to attempt to recover its alleged depreciation reserve deficiency in these prices. Reciprocal call termination charges will be waived if, within a given month, the traffic is within a 5% threshold. The Commission rejects the use of bill and keep because it finds that it is not reasonable to assume that traffic will be in balance.

239. In an exhibit under the heading Exchange Access, U S WEST states the prices for call termination, call transport, and call transit are per its switched access tariff. Exhibit 23, attached Exhibit A at 1. This reference is confusing since U S WEST states in its testimony that the prices for call termination, call transport, and call transit are found in Exhibit M, attached to Exhibit 23. To avoid any confusion, the Commission wants to make it clear that it is accepting the prices listed in Exhibit M, minus any recovery of its alleged depreciation reserve deficiency. The Commission is not accepting the prices in U S WEST's switched access tariff for local exchange access.

240. U S WEST contends that AT&T should not be allowed to receive tandem switched rates because AT&T's switch does not cover a comparable geographic area that is served by U S WEST's tandem switch and does not perform the same functions. Exhibit 23 at 177, lines 16-21.

241. The Commission finds that AT&T has not shown in this docket whether its switch would cover a comparable geographic area and perform the same functions as the U S WEST's tandem switch. Therefore, AT&T will not be allowed to receive the tandem switched rates.

DIRECTORY LISTINGS

242. The issue with respect to directory listings is whether U S WEST must provide to AT&T anything beyond one white page listing at no cost.

243. Pursuant to 47 U.S.C. § 271(c)(2)(B)(viii), U S WEST shall provide "[w]hite pages directory listings for customers of the other carrier's telephone exchange service." This requirement applies to the provisioning of out-of-region interLATA services by a Bell Operating Company.

244. AT&T requests that it be provided a free white page and free yellow page listing; that it be provided the same amount of space as U S WEST in the consumer guide section of each U S WEST directory for the listing of AT&T service information under the same terms and conditions applicable to U S WEST; and that U S WEST share revenues it receives from publishers from the sale of the listings. Exhibit 12 at 70-71; Exhibit 23 at 234, lines 14-23; Tr. at 1435, lines 18-20.

245. U S WEST will provide to AT&T one white page listing at no charge. U S WEST contends that AT&T must negotiate with a subsidiary company, U S WEST Direct, because U S WEST Direct publishes the directories. Tr. at 1435, lines 18-20 and 23-25.

246. The Commission finds that AT&T shall be furnished one white page listing at no cost on the same terms and conditions that U S WEST receives a white page listing. Any other issues with respect to directory listings must be negotiated with U S WEST Direct.

QUALITY AND BUSINESS PROCESS STANDARDS

247. AT&T requests that the Commission require U S WEST to provide "all local services, network elements or a combination in accordance with service standards, measurements, performance requirements, and direct measures of quality (collectively referred to herein as ("DMOQs") that are expressly specified in this Agreement and Attachment 11 hereto." Exhibit 8 at page 15, Section 8, Subsection 8.1. AT&T also requests that the Commission adopt its business process standards. Exhibit 18, attached Exhibit JF-1.

248. The Commission finds that AT&T's proposed direct measurements of quality and business process standards are voluminous and comprehensive. The Commission further finds that the record was not sufficiently developed for it to consider the effect of these standards, their enforceability, and the propriety of liquidated damages which may be incurred. The Commission may open a separate docket or dockets on these issues to determine what quality or business process standards U S WEST will be required to meet.

MISCELLANEOUS ISSUES

NXX NUMBERS

249. AT&T requests its own NXX number at each central office. Exhibit 8, Attachment 2, at 12, ¶ 9.2.5. U S WEST contends that giving a code to each carrier will expire codes quickly and lead to more area codes. Exhibit 23 at 195, lines 4-19. In addition, U S WEST asserts that permanent number portability will be designed to allow many carriers to share NXX codes. Id.

250. The Commission agrees with U S WEST and will not require U S WEST to give AT&T its own NXX number at each central office.

NUMBER ADMINISTRATION

251. AT&T requests that an independent third party compile central office code forecasts instead of U S WEST because NXX usage forecasts are proprietary. Exhibit 12 at 62. U S WEST states that the FCC will assign numbering administration to an independent third party in the near future and, in the meantime, U S WEST will treat such information as proprietary. Exhibit 23 at 196, lines 2-11.

252. The Commission finds that since the FCC will soon assign numbering administration to an independent third party it would make no sense for this Commission to require U S WEST to assign this task to a third party prior to the FCC's decision on this issue. U S WEST shall continue to treat this information as proprietary.

UNIVERSAL SERVICE SUPPORT MECHANISM

253. U S WEST requests that the Agreement with AT&T include a statement that would recognize that U S WEST has a right to pursue a transitional charge that would apply to AT&T and other new entrants that would recover universal service support until rates are rebalanced. Exhibit 23 at 189, lines 18-23.

254. The Commission rejects U S WEST's request and finds that it is inappropriate to include such a statement in the U S WEST/AT&T Agreement.

REJECTION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission rejects the parties' proposed Findings of Fact and Conclusions of Law.

Based upon the foregoing Findings of Fact, the Commission enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-13, 49-31, and the federal Act.

2. The Federal Telecommunications Act of 1996 (federal Act) provides for the development of competition in the telecommunications industry. The federal Act opens up local markets by imposing new obligations on incumbent local exchange carriers (LECs). Under the federal Act, an incumbent LEC has the duty to interconnect with other telecommunications carriers, must provide other carriers access to the incumbent LEC's network elements on an unbundled basis, and must provide its retail services to other carriers at wholesale rates. 47 U.S.C. § 251(c). The federal Act requires an incumbent LEC to negotiate terms and conditions of service with the requesting carrier. 47 U.S.C. § 251(c)(1). If the parties are unable to reach a negotiated agreement on all areas, the federal Act provides for state Commissions to resolve any disputed issues. 47 U.S.C. § 252(b).

3. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers.

The FCC also issued its Second Report and Order concerning these two dockets on August 8, 1996. These Orders seek to implement certain provisions of the federal Act through rules.

4. On October 15, 1996, the Eighth Circuit Court of Appeals stayed the following FCC rules: 47 C.F.R. §§ 51.501 to 51.515, inclusive, §§ 51.601 to 51.611, inclusive, §§ 51.701 to 51.717, inclusive, and § 51.809. Exhibit 53. On November 1, 1996, the Eighth Circuit lifted the stay for the following rules: 47 C.F.R. §§ 51.701, 51.703, and 51.717. Id. The stayed rules involve the pricing of interconnection and unbundled elements, wholesale pricing standards to determine avoided retail costs, reciprocal compensation for transport and termination of local telecommunications traffic, and the so-called "pick and choose" rule.

5. The Commission concludes that due to the stay issued by the Eighth Circuit Court of Appeals, the Commission is not required to follow the FCC rules that have been stayed. The Commission has followed the FCC rules that are currently in effect.

6. On November 20, 1996, AT&T filed a petition with the Commission asking it to resolve open issues in its interconnection negotiations with U S WEST. Pursuant to 47 U.S.C. § 252(d)(4), the Commission must resolve each issue set forth in the petition no later than nine months after the date on which the local exchange carrier receives the request to negotiate an interconnection agreement. AT&T requested negotiations with U S WEST on June 20, 1996. The Commission must issue its arbitration decision on or before March 20, 1997.

7. The General Terms and Conditions present mixed issues of fact and law.

8. An initial term of five years for the Agreement is reasonable for an Agreement of this length and complexity. The following concepts of mutual responsibility shall be agreed to by the parties: (1) provide sixty days notice to the other party for termination; (2) termination for breach with thirty days to cure the breach if the cause is nonpayment; (3) termination for breach if the cause is failure to perform and the breach affects the non-breaching party's subscribers, with ten days to cure the breach; and (4) optional termination of Agreement or any of its parts for other breach due to failure to perform if not cured within forty-five days.

9. Payment of amounts due U S WEST from AT&T shall be made within thirty days of receiving U S WEST's invoice with a late charge, not to exceed an annual 12% rate, applied to past due amounts.

10. AT&T may audit records of U S WEST up to four times per year to ensure accuracy of U S WEST billings and invoices and for purposes of evaluating compliance with the Agreement. In order to implement this provision, it is reasonable to expect that such work may be done by auditors under contract with AT&T, that U S WEST will promptly correct billing errors, that U S WEST will cooperate in providing access to employees, facilities, books and records, that the frequency of audits may be accelerated if variances are over one percent of amounts payable by AT&T during the audit period, that audits are at AT&T's expense unless amounts in variance in the audit are over one percent of the aggregate charges payable to U S WEST during the audit period, AT&T is to bear the cost of special data extractions it requests, overpayments by AT&T to U S WEST are to be reimbursed, and that this provision survive the term of the Agreement by two years.

11. Indemnification as proposed by the parties has merit and the indemnifying party shall have sole authority to defend an action with counsel of its choosing .

12. Regarding limits on liability, the liability of AT&T shall not exceed amounts due from AT&T to U S WEST during a contract year, that U S WEST's liability should not exceed amounts due

and owing AT&T plus amounts owed to U S WEST during a contract year; that there is no liability for either party for indirect, incidental, special, or consequential damages; and that the limitations do not apply to willful or intentional conduct. Parties shall be liable for lost profits.

13. U S WEST shall perform its obligations under the Agreement at no less a level than the highest level which U S WEST uses for its own operations or those of its affiliates. U S WEST shall warrant that it shall perform under this standard, in a competitively neutral fashion at technically feasible points, for all rights, products, and services AT&T purchases from U S WEST pursuant to this Agreement.

14. Remedies in the Agreement shall be cumulative and not exclusive. In these remedies, the parties shall provide that the failure of U S WEST to switch a subscriber shall be deemed an illegal change in subscriber change selection which merits the reimbursement by U S WEST to AT&T for charges paid by the subscriber during the time that the subscriber remains a U S WEST customer.

15. Informal dispute resolution under the standards of the American Arbitration Association shall be followed. An arbitrator shall not have authority to award punitive damages. Arbitrator fees shall be paid by the losing party and, at the determination of the arbitrator, if neither party has completely won or lost at arbitration, then the arbitrator shall apportion the costs. The laws of South Dakota shall govern the Agreement and the arbitration process.

16. Information transmitted from one party to the other party under the Agreement shall automatically be considered proprietary. Copies of proprietary information may be made by either party but it shall bear copyright or proprietary notices; proprietary status shall continue for a period of five years from the time of receipt of the proprietary information. Exclusions to the obligations of this provision as delineated in AT&T's proposed agreement, Section 12.4, shall be followed.

17. Consistent with 47 U.S.C. § 252(i), if U S WEST enters into an agreement with a party other than AT&T during the course of this Agreement which contains terms and conditions different from those available under this Agreement, AT&T may substitute terms and conditions of that agreement for terms and conditions contained in this Agreement.

18. The Commission finds that each party shall have an obligation to provide any customer's payment history to the other party upon request.

19. Nothing in the Agreement creates a license for a patent, trademark, or logo except that a limited license is created to use patents and copyrights necessary for the parties to use any facilities or equipment or to receive any service solely under this Agreement. Neither party shall have a right, unless otherwise agreed, to use the other party's logo, trademark, service mark, name, language, pictures or symbols, or words from which the other party's name may be inferred or implied in any product, service, advertisement, promotion or any other publicity matter. Neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims.

20. The Agreement shall contain a force majeure provision.

21. No waiver of any provision of the Agreement or consent to default under the Agreement shall be effective unless it is in writing.

22. The laws of the state of South Dakota shall govern this Agreement and U S WEST shall be responsible for maintaining such regulatory approvals as are necessary for it to perform under

this Agreement. AT&T shall have a similar obligation with regard to approvals necessary for it to perform under this Agreement. Each party shall have an obligation to cooperate with the other in obtaining and maintaining necessary regulatory approvals.

23. The Agreement shall not be intended to confer any rights on third party beneficiaries.

24. Neither party may assign the Agreement without the prior written consent of the other party. U S WEST may assign the Agreement to one of its affiliates which is wholly owned by U S WEST. U S WEST shall not subcontract for the performance of the Agreement or any part thereof without prior written consent of AT&T. In the event such subcontracting occurs, U S WEST shall retain full responsibility for performance under the Agreement.

25. The Agreement shall contain a severability provision which allows the Agreement to function in the event parts of it are found to be invalid or unenforceable. In the event part of the Agreement is found to be invalid or unenforceable, the parties shall negotiate replacement language.

26. The Agreement shall contain a provision for notices and who within each party's organization shall be notified of specific contractual events. Parties may change their designated representative by giving seven days' written notice to the other party. Notices are to be deemed effective when received.

27. The Agreement shall be binding on and to the benefit of all successors and permitted assigns.

28. AT&T shall be responsible to have a letter of authorization from an end user for handling disconnection of end user's service with U S WEST, providing of service by AT&T, and ancillary services. AT&T shall be responsible for providing written evidence of its authority to U S WEST.

29. Reciprocal services which U S WEST may wish to purchase from AT&T are not germane to nor the proper subject matter of this Agreement for interconnection.

30. The Agreement is jointly produced by AT&T and U S WEST and that it shall not be deemed to be drafted by any one party thus dispelling with any presumptions or inferences which may be drawn against either party on the basis of who drafted the document.

31. Pursuant to 47 U.S.C. § 252(d)(1), the rates approved by the Commission for interconnection of facilities and equipment are just and reasonable, are based on the cost of providing the interconnection, are nondiscriminatory, and include a reasonable profit.

32. Pursuant to 47 U.S.C. § 252(d)(1), the rates approved by the Commission for network elements are just and reasonable, are based on the cost of providing the network elements, are nondiscriminatory, and include a reasonable profit.

33. Pursuant to 47 U.S.C. § 252(d)(2), the rates approved by the Commission for transport and termination of local traffic are just and reasonable and provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier and the costs are based on a reasonable approximation of the additional costs of terminating such calls.

34. Pursuant to 47 U.S.C. § 252(d)(3), the wholesale discount rates approved by the Commission are based on the retail rates charged to subscribers excluding the portion attributable

to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

35. Pursuant to 47 U.S.C. § 251(c)(4)(B), the retail restrictions approved by the Commission are consistent with the regulations prescribed by the FCC.

36. The terms and conditions approved by the Commission in this docket are consistent with the obligations of all local exchange carriers pursuant to 47 U.S.C. § 251(b) and the additional obligations of incumbent local exchange carriers pursuant to 47 U.S.C. § 251(c).

37. AT&T and U S WEST shall comply with the procedures set forth for arbitration and approval of arbitrated agreements found in Docket TC96-082, In the Matter of the Request for Comments Concerning Sections 252(a) and 252(b) of the Telecommunications Act of 1996. AT&T and U S WEST shall submit a complete Agreement to the Commission for approval within 30 days after the date of this Order.

38. The Commission rejects the parties' proposed Findings of Fact and Conclusions of Law.

It is therefore

ORDERED, that AT&T and U S WEST shall incorporate the Commission's Findings of Fact in its Agreement and shall submit the completed Agreement with both the negotiated and arbitrated provisions to the Commission for approval within 30 days from the date of this Order.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that these Findings of Fact and Conclusions of Law and Order in Docket TC96-184 were duly entered on the 20th of March, 1997.

Dated at Pierre, South Dakota, this 20th day of March, 1997.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Melanie Kalbo

Date: 3/20/97

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	ORDER APPROVING INTERCONNECTION AGREEMENT TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule; Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single interconnection agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

By order dated August 13, 1997, the Commission granted in part and denied in part AT&T's Motion for Reconsideration/Modification of Order. The Commission also ordered AT&T and U S WEST to submit a complete interconnection agreement within 30 days.

On September 12, 1997, an agreement for network interconnection and service resale between AT&T and U S WEST was filed with the Commission. The agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed. On October 20, 1997, U S WEST filed a Motion for Administrative Notice of the Eighth Circuit Court Order dated October 14, 1997.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues and also considered whether to grant U S WEST's Motion for Administrative Notice. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues. AT&T did not object to the Commission granting U S WEST's Motion for Administrative Notice. The Commission unanimously voted to grant the motion.

On September 4, 1998, U S WEST and AT&T filed another interconnection agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

At the prehearing conference held October 28, 1998, the parties informed the Commission that they had agreed to withdraw all of the disputed issues relating to SPOT frame, shared transport, and recombination. The Commission pointed out that even with those issues withdrawn, other remaining issues argued by the parties may involve facts that are not in the record. In its Order for and Notice of Hearing, dated November 6, 1998, the Commission once again gave notice to the parties that additional evidence may be necessary if the parties want the Commission to decide all of the issues. The Commission

also ordered the parties to resubmit their briefs with citations to the record. The Commission stated that if the parties do not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing. Unless both parties expressly waived their right to a hearing, the Commission ordered that a hearing would be held on November 17-19, 1998, beginning at 1:30 p.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre, South Dakota.

On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues. Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998. On December 30,1998, the Commission issued a Second Arbitration Order to resolve the open issues as presented by the parties.

On February 3, 1999, the Commission received a Joint Request for Approval of the Arbitrated Interconnection Agreement between AT&T Communications of the Midwest, Inc. and U S WEST Communications, Inc. On February 11, 1999, the Commission electronically transmitted notice of this filing to interested individuals and entities. The notice stated that any person wishing to comment on the parties' request for approval had until February 18, 1999, to do so. No comments were filed.

In a letter of transmittal presenting the Interconnection Agreement, the parties requested approval of the Interconnection Agreement as filed. Although the parties, in separate statements referred to modifications to the Interconnection Agreement, the parties agreed "that the Interconnection Agreement can be approved and become effective at this time without the requested modifications and further negotiation toward resolution of the parked issues." The parties acknowledged the issuance of the recent U.S. Supreme Court decision and AT&T stated that the parties will attempt to negotiate resolutions to the parked issues in light of that recent decision. *See* AT&T Corp. v. Iowa Utilities Board, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 1999 WL 24568 (January 25, 1999).

At its March 3, 1999, meeting, the Commission considered this matter. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 49-31, specifically 49-31-81, and the Federal Telecommunications Act of 1996, specifically 47 U.S.C. §§ 251 and 252. The Commission makes no findings on whether the Interconnection Agreement accurately reflects the Commission's arbitrated decisions since the parties were free to

further negotiate and decide upon mutually agreeable terms and conditions that differed from the Commission's arbitrated decisions. The Commission notes that its arbitrated decisions were made in accordance with the Eighth Circuit's decisions, that were in effect at the time, concerning the local competition provisions of the federal Act. The Commission further recognizes that the U.S. Supreme Court recently reversed a number of issues contained in the Eighth Circuit's decisions. Notwithstanding the issuance of that U.S. Supreme Court decision, the parties are requesting that the Interconnection Agreement be approved as filed. Moreover, it is also anticipated that the FCC will issue new orders to address the effects of the Supreme Court's decision on interconnection agreements and other issues are on remand to the Eighth Circuit. Pending those anticipated FCC orders and the Eighth Circuit remand decision and because the parties are not requesting that the Commission revisit issues affected by the Supreme Court's decision, the Commission will approve the Interconnection Agreement as requested by the parties without modifications. The Commission expects that the parties will comply with the anticipated orders of the FCC and court decisions and, if unable to negotiate revisions to comply with those orders, that the parties will return to the Commission for arbitration. Upon review of the agreement and in light of the parties' joint request for approval, the Commission finds that the Interconnection Agreement does not discriminate against a telecommunications carrier not a party to the agreement nor is the implementation of the agreement inconsistent with the public interest, convenience, and necessity. It is therefore

ORDERED, that pursuant to 47 U.S.C. § 252(e) and SDCL 49-31-81 the Interconnection Agreement is approved.

Dated at Pierre, South Dakota, this 4th day of March, 1999.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Debbie Kaebo

Date: 3/4/99

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg

JAMES A. BURG, Chairman

Pam Nelson

PAM NELSON, Commissioner

Laska Schoenfelder

LASKA SCHOENFELDER, Commissioner

AUG 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	ORDER ON RECONSIDERATION; NOTICE OF ENTRY OF ORDER TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule; Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

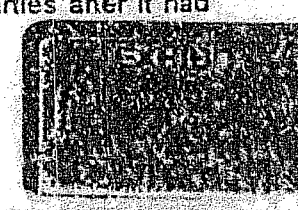
The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.



At its July 15, 1997, meeting, the Commission voted to grant in part and deny in part AT&T's Motion for Reconsideration/Modification of Order for the reasons set forth below.

The first issue presented by AT&T was that U S WEST's cost model was flawed and therefore should not have been used by the Commission. In the Commission's Order, the Commission recognized that both models presented by the parties were flawed. See Finding of Fact 106. Due to the significant flaws, as specified in the Commission's Order, concerning the Hatfield Model, the Commission adopted U S WEST's TELRIC cost studies with modifications. However, the Commission further found that "due to the deficiencies in both models, the Commission may open a docket to evaluate whether it shall set prices based on a different model or an improved version of the models presented in this case." Finding of Fact 107.

Upon reconsideration, the Commission finds that its decision to use U S WEST's TELRIC cost studies, with modifications, was reasonable. The Commission finds that, compared to AT&T's Hatfield model, U S WEST's cost studies, as modified, more accurately reflected the costs incurred by U S WEST. However, the Commission also finds that, given the flaws in both models and consistent with its Finding of Fact 107, that the prices, terms, and conditions as set forth in its March 20, 1997, Order shall be considered interim prices, terms, and conditions. The Commission shall open a new docket to set permanent prices, terms, and conditions for interconnection for U S WEST. This will allow the parties to present new cost models or improved versions of existing cost models to the Commission for evaluation.

AT&T's next issue is its contention that the Commission's Finding of Fact 98 was in error when it stated that AT&T had failed to show whether the additional costs of unbundling are included in the Hatfield model. The Commission finds that it properly concluded that AT&T had failed to show whether unbundling costs were included in the Hatfield Model since its witness testified that he "thought" that new state-of-the-art concentration equipment would have unbundling capabilities and did not provide any citation to material in the record that would show that new concentration equipment would in fact have unbundling capabilities.

AT&T objects to the Commission's finding that AT&T's reduction of estimated non-plant specific operating and maintenance expenses of 30% is unreasonable. U S WEST's cost studies assumed that non-plant specific operating and maintenance expenses would not drop at all. The Commission found that U S WEST must reduce its network operating expenses by 10%. The Commission affirms its finding that the 30% as advocated by AT&T was unreasonable. The Commission properly rejected the testimony of AT&T to support the 30% reduction since that testimony was based in part on testimony by Pacific Bell, not U S WEST, in a different proceeding. Although the Commission rejected AT&T's 30% reduction, it did accept the testimony of AT&T that some reduction was needed due to technology and competitive pressures. Therefore, the Commission had a sufficient evidentiary basis to reject U S WEST's proposed reduction of 0% and to find a 10% reduction was reasonable.

AT&T objects to the Commission's rejection of the Hatfield Model based in part on the lack of sufficient South Dakota state specific data. The Commission finds that this finding is reasonable since AT&T changed only 15 of the 400 user inputs, all of which related to depreciation lives.

AT&T objects to the Commission's rejection of its input which set U S WEST's corporate overhead at 10%. AT&T reduced corporate overhead to 10% from U S WEST's current 21% by using a regression analysis done on other independent local exchange companies, which were not named, and then further reducing this to 10% by looking at other industries. U S WEST did not

propose any reduction to its corporate overhead factor. Given that AT&T's reduction of U S WEST's corporate overhead by more than 50% was based on other unnamed independent LECs and further reduced by comparison to other industries, the Commission properly found that the reduction was unreasonable. The Commission's finding that U S WEST should reduce its corporate overhead by 10% due to economic efficiencies is reasonable given the evidence presented at the hearing.

AT&T objects to the Commission's finding that its Hatfield model should have used the depreciation lives approved by the Commission rather than depreciation lives approved by the FCC. AT&T points out that U S WEST's cost studies did not use Commission approved depreciation lives either. The Commission finds that it erred in not requiring U S WEST to modify its cost studies to reflect the use of the Commission's prescribed depreciation lives. Thus the Commission shall amend its decision to require that U S WEST shall use the Commission approved depreciation lives.

AT&T objects to the Commission adopting U S WEST's structure sharing model and rejecting the Hatfield Model's inputs for structure sharing. AT&T stated that it had uncontroverted evidence that U S WEST shared underground trenching in South Dakota. This so-called "uncontroverted" evidence consisted of an AT&T witness who stated that he believed he observed a joint occupancy trench situation near the Pierre Airport because there was both a power transformer and pedestal located there. Tr. at 689-698. The witness also makes the less than unequivocal statement that in a forward-looking environment "it's realistic to at least examine the possibilities of sharing that conduit, or sharing that trench, I should say." Tr. at 659 beginning at line 24 to 660, line 2. Given this type of testimony in support of underground trench sharing, it is hardly, as AT&T claims, "preposterous" to assume that no structure sharing of underground trenching will occur.

AT&T objects to the Commission's finding that the Hatfield Model over counted the number of lines by counting DS-1 and DS-3 lines as DSOs. AT&T states the Hatfield line counts were based on U S WEST's reported line counts for DS-1 and DS-3 lines as reported to the FCC. AT&T states that "U S WEST cannot criticize AT&T for using the figures that U S WEST represented as correct to a federal government agency." However, the Commission is obligated to look at the evidence presented at the hearing and, based on that evidence, correctly found that the line counts presented by the Hatfield Model were incorrect since DS-1 and DS-3 lines were not counted as single lines.

AT&T claims that its drop counts figures were the best evidence in the record and should have been accepted. The Commission found that AT&T had used an average of 73 feet for a typical drop length which was based on an estimate from a Bellcore study. This compares with U S WEST's testimony that the average drop is 170 feet. Compared with U S WEST's average drop and drop costs, the Commission could properly find that AT&T's estimates were unreasonable.

AT&T claims that there is no evidence to support the Commission's finding that the Hatfield Model, in the aggregate, understates distribution cable. AT&T neglects to mention that a U S WEST witness provided testimony and exhibits in support of U S WEST's position that the Hatfield Model underestimated distribution cable by 40 to 60 percent. Exhibit 29 at 37-40 and attached Appendix 3.

AT&T asserts that the Commission failed to order U S WEST to use modified inputs for all interconnection and unbundled network element items. In Findings of Fact 108-112, the Commission only required that U S WEST modify inputs for the local loop price. The Commission agrees with AT&T that it should have ordered U S WEST to apply the same modifications to the inputs used for prices for all interconnection and unbundled network element items. Therefore, the Commission will adopt an additional finding to require this.

AT&T claims that the Commission's failure to geographically deaverage prices for interconnection and unbundled network elements results in non-cost based prices. This assertion is incorrect. The prices set by the Commission are still cost based since they are based on the cost to U S WEST of providing the services in South Dakota.

AT&T objects to the Commission's rejection of its simplified avoided cost model used by AT&T to set the wholesale discount rate. AT&T first objects to the Commission's finding that AT&T's model fails to include any return on U S WEST's investment. AT&T states that its model "addresses" return on investment and also removes the portion that is attributable to the assets used in avoided retail activities. However, AT&T's citations to the record to support this statement fail to show where AT&T has included any return on U S WEST's investment. In fact, not only does the AT&T exhibit appear to not include a return on investment, it then appears to take out a return on investment for avoided general support and operator system investment. Exhibit 16, attached Exhibit DBS-2. Thus, AT&T's cost model appears to remove a return on some items even though it failed to first include any return.

AT&T states that the Commission's finding that AT&T's model assumes that all marketing and billing costs will be avoided is incorrect because AT&T's model did not make this assumption in all of the runs submitted. The Commission agrees that AT&T did additional runs, but the Commission's reference to AT&T's model was the model which AT&T was actually advocating at the hearing. Tr. at 925, line 23 to 926, line 1; Tr. at 928, lines 20-23.

AT&T makes the same argument with respect to the Commission's finding that AT&T's assumption that all product management expenses will be eliminated is unreasonable. As with the marketing and billing issue, the Commission relied on the run of the model which AT&T was advocating at the hearing which did, in fact, eliminate all product management expenses. Tr. at 951, lines 14-16.

AT&T objects to the Commission's finding that AT&T's model did not properly match revenues and cost elements. This objection is undercut by AT&T's next assertion of error which is that AT&T's failure to incorporate property tax expense, interarea rent, equal access depreciation, and other operating expenses was correct. AT&T provides no basis for this statement. The Commission affirms that it was error for AT&T to fail to incorporate these items and this failure means that AT&T's cost model also failed to properly match revenues and cost elements. Thus, the Commission's findings with respect to AT&T's failure to properly match expenses and costs and failure to incorporate certain expenses are correct.

AT&T contends the Commission was in error when it required that the wholesale discount must be reduced if AT&T provides its own operator services, directory assistance, and billing and collection. AT&T merely states that logic dictates that the wholesale discount should be increased if it provides its own operator services, directory assistance, and billing and collection. However, it fails to show that when U S WEST's cost model is run without operator services, directory assistance, and billing and collection, that this would in fact increase the discount percentage.

AT&T asserts that U S WEST should have been required to furnish to AT&T more than one white page listing. As explained in its Order, the Commission found that anything beyond a white page listing must be negotiated with U S WEST Direct.

AT&T objects to the Commission's failure to adopt its proposed direct measures of quality and business processes. The Commission finds that its decision not to adopt these standards

because the record was not sufficiently developed is reasonable. In addition, the Commission's position that the record concerning liquidated damages was also insufficiently developed shall stand.

AT&T contends that the requirement for AT&T to obtain written letters of authorization from any end user who wants to switch to AT&T's service is a barrier to entry and conflicts with South Dakota law. However, South Dakota law now provides that written letters of authorization are required before a telecommunications company may change customers. See SDCL 37-30A-9.

AT&T objects to the Commission prohibiting an arbitrator from awarding punitive damages. The Commission finds that this prohibition improperly limits an arbitrator's power to award relief and thus will modify this finding.

With respect to operation support systems, AT&T objects to the Commission finding that each company can assess the users of its gateway on a per transaction basis. The Commission stands by this finding since allowing a company to assess users of its gateway on a per transaction basis is consistent with cost-causation principles.

The Commission makes the following additional findings based on its reconsideration of its March 20, 1997 Order:

1. The terms, conditions, and prices, contained in its March 20, 1997, Order shall be considered interim due to the flaws in the cost models advocated by both AT&T and U S WEST. These terms, conditions, and prices shall remain in effect until such time as the Commission completes a new docket to set permanent terms, conditions, and prices for U S WEST.

2. U S WEST shall modify its cost studies and use the Commission approved depreciation lives as prescribed in Docket TC94-121.

3. U S WEST shall apply the modifications contained in Findings of Fact 109-112 to all interconnection and unbundled network elements items.

4. The second sentence in Finding of Fact 19 is modified by deleting the word "not."

It is therefore

ORDERED, that the Commission's Findings of Fact and Conclusions of Law issued March 20, 1997 in Docket TC96-184 are hereby modified by the additional findings listed above; and it is

FURTHER ORDERED, that AT&T and U S WEST shall submit a complete interconnection agreement signed by both parties to the Commission within 30 days from the date of this Order.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that these Additional Findings of Fact in Docket TC96-184 were duly entered on the 13th of August, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 13th day of August, 1997.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By Delaine Kolbo

Date 8/13/97

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg

JAMES A. BURG, Chairman

Pam Nelson

PAM NELSON, Commissioner

Laska Schoenfelder

LASKA SCHOENFELDER, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	SECOND ARBITRATION ORDER; NOTICE OF ENTRY OF ORDER TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule; Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the

date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single interconnection agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

By order dated August 13, 1997, the Commission granted in part and denied in part AT&T's Motion for Reconsideration/Modification of Order. The Commission also ordered AT&T and U S WEST to submit a complete interconnection agreement within 30 days.

On September 12, 1997, an agreement for network interconnection and service resale between AT&T and U S WEST was filed with the Commission. The agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed. On October 20, 1997, U S WEST filed a Motion for Administrative Notice of the Eighth Circuit Court Order dated October 14, 1997.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues and also considered whether to grant U S WEST's Motion for Administrative Notice. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues. AT&T did not object to the Commission granting U S WEST's Motion for Administrative Notice. The Commission unanimously voted to grant the motion.

On September 4, 1998, U S WEST and AT&T filed another interconnection agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

At the prehearing conference held October 28, 1998, the parties informed the Commission that they had agreed to withdraw all of the disputed issues relating to SPOT frame, shared transport, and recombination. The Commission pointed out that even with those issues withdrawn, other remaining issues argued by the parties may involve facts that are not in the record. In its Order for and Notice of Hearing, dated November 6, 1998, the Commission once again gave notice to the parties that additional evidence may be necessary if the parties want the Commission to decide all of the issues. The Commission also ordered the parties to resubmit their briefs with citations to the record. The Commission stated that if the parties do not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing. Unless both parties expressly waived their right to a hearing, the Commission ordered that a hearing would be held on November 17-19, 1998, beginning at 1:30 p.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre, South Dakota.

On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues. Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998.

At its December 14, 1998, meeting, the Commission considered this matter. The Commission unanimously voted to accept AT&T's definition of "itself" and AT&T's proposed language in section 52.3.3. The Commission also accepted U S WEST's position on the issue of intellectual property with the exception of section 5.2 which the Commission directed the parties to rewrite to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property or may choose to negotiate on its own behalf. The Commission further voted to require that the Party Requesting Access be responsible for all costs associated with obtaining the use of Third Party Intellectual Property and that AT&T's proposed language regarding indemnification be rejected.

Based on the evidence of record and the parties' briefs on these matters, the Commission makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On September 4, 1998, U S WEST and AT&T filed another Interconnection Agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that they had agreed that the disputed issues

may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

2. At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

3. On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement (Revised Brief) and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues (Brief in Support). Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998.

4. The first disputed issue concerns the definition of "itself." Part A, Definitions. U S WEST's definition includes the phrase "for the purposes of interconnection." AT&T's definition does not include that phrase. The effect of which definition is accepted by the Commission is found in Part A, section 52.3. As explained by AT&T, the parties agreed that if the Commission accepts AT&T's definition, the parties will capitalize the term "itself" in section 52.3. If the Commission accepts U S WEST's definition, the parties will leave the term uncapitalized. AT&T's Revised Brief at 5, footnote 1. The apparent effect of not capitalizing "itself" is that the term would be undefined. Thus, U S WEST would have agreed to provide access to its network elements that is "equal in quality" to the access that U S WEST provides to itself, with the term "itself" left undefined.

5. The Commission accepts AT&T's definition of "itself." Section 52.3 concerns the provisioning of network elements. The Commission agrees with AT&T that "U S WEST's proposal to not define the term "itself" when used in the context of performance standards for network elements would seemingly allow U S WEST to afford "Affiliates" or "Subsidiaries" unequal and preferential access to unbundled network elements." AT&T's Revised Brief at 7. Since U S WEST has agreed to provide access to network elements that is "equal in quality" to the access U S WEST provides to itself, that same standard should be equally applicable to its subsidiaries and affiliates. U S WEST should not be allowed to provide preferential access to network elements to its subsidiaries and affiliates.

6. A related issue is the language to be included in section 52.3.3. The Commission first finds that U S WEST's proposed language is ambiguous and vague and can be construed

to conflict with the language of sections 52.3.1 and 52.3.2. The Commission further finds that AT&T's language which defines the words "equal in quality" is reasonable and adds needed specificity to the Interconnection Agreement.

7. Another unresolved issue concerns intellectual property. The Commission accepts Part A, section 5.3 of U S WEST's proposed provision since that is virtually identical to the first three sentences of AT&T's Part A, section 5.1. The Commission also accepts Part A, section 5.1 of U S WEST's proposed provision. The Commission finds that the Party Requesting Access should be responsible for all costs associated with obtaining the use of Third Party Intellectual Property since that is the party that will receive the benefits of the requested access. Thus, the Commission rejects AT&T's proposed language for Part A, section 5.1 because it requires the Party Providing Access to provide any necessary licenses at no cost to the Party Requesting Access.

8. With respect to Part A, section 5.2 of U S WEST's proposed provision, the Commission directs the parties to rewrite the section to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property. The Commission finds that the Party Providing Access may be in a better position to negotiate with its existing vendors to obtain the use of Third Party Intellectual Property for use by the Party Requesting Access. It will be up to the Party Requesting Access to decide whether it will negotiate on its own behalf or ask the Party Providing Access to negotiate.

9. In order to implement Finding of Fact 8, the Commission suggests that section 5.2 may be rewritten as follows:

> Obligations of Party Providing Access. The Party Providing Access shall provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party. The Party Requesting Access may request that the Party Providing Access negotiate any necessary licenses. If that request is made, the Party Providing Access shall enter into good faith negotiations with the owner of the intellectual property to obtain any necessary licenses. Any costs associated with obtaining the necessary licenses are the responsibility of the Party Requesting Access. If no request is made, it is the responsibility of the Party Requesting Access to obtain any necessary licenses and pay any costs associated with obtaining any necessary licenses. The treatment of Third Party licenses shall be in accordance with FCC rules and regulations and/or judicial determination.

This language is a suggestion and is not mandatory. The parties may develop their own language consistent with Finding of Fact 8.

10. On the related issue of indemnification, the Commission rejects Part A, sections 5.2 and 18.2 as proposed by AT&T. The Commission has already found in its Arbitration

Order issued March 20, 1997, in Finding of Fact 23, "that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims." The Commission accepts U S WEST's proposed section 18.2 as being consistent with the Commission's prior decision on this issue. The Commission further finds that it is reasonable to expect that a Party Requesting Access who is made aware of the need to obtain permission or a license and then fails to obtain such license or permission, is liable to the third party for that failure.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, SDCL Chapter 49-31, specifically 49-31-81, and the federal Act, specifically 47 U.S.C. §§ 251 and 252.

2. The Commission accepts AT&T's proposed definition of "itself" as found in Part A, Definitions. The Commission rejects U S WEST's proposed definition of "itself" since the effect may be to allow U S WEST to give preferential access to its subsidiaries and affiliates.

3. The Commission accepts AT&T's proposed language in Part A, section 52.3.3 as a reasonable definition of the term "equal in quality." The Commission rejects U S WEST's proposed language in Part A, section 52.3.3 because it is ambiguous, vague, and can be construed to conflict with sections 52.3.1 and 52.3.2.

4. The Commission accepts Part A, section 5.3 of U S WEST's proposed provision since that is virtually identical to the first three sentences of AT&T's section 5.1.

5. The Commission accepts Part A, section 5.1 of U S WEST's proposed provision, finding that the Party Requesting Access should be responsible for all costs associated with obtaining the use of Third Party Intellectual Property since that is the party that will receive the benefits of the requested access.

6. The Commission further concludes that the parties shall rewrite section 5.2 of U S WEST's proposed provision to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property or may choose to negotiate on its own behalf. However, consistent with U S WEST's section 5.1, the Party Requesting Access shall be responsible for all costs associated with obtaining the use of Third Party Intellectual Property. The Commission suggests, but does not require, that section 5.2 be rewritten as stated in Finding of Fact 9.

7. The Commission rejects Part A, sections 5.2 and 18.2 as proposed by AT&T. The Commission has already found in its Arbitration Order issued March 20, 1997, in Finding

of Fact 33, "that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims." The Commission accepts U S WEST's proposed language for Part A, section 18.2 as consistent with the Commission's prior order.

It is therefore

ORDERED, that AT&T and U S WEST shall incorporate the Commission's Findings of Fact and Conclusions of Law in its Interconnection Agreement.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 30th day of December, 1998. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 30th day of December, 1998.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By Debbie Kelly

Date 12/30/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg

JAMES A. BURG, Chairman

Pam Nelson

PAM NELSON, Commissioner

Laska Schoenfelder

LASKA SCHOENFELDER, Commissioner

INTERCONNECTION AGREEMENT

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	DOCKET NO. TC96-184

JOINT REQUEST FOR APPROVAL OF THE ARBITRATED INTERCONNECTION AGREEMENT BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC.

Pursuant to 47 U.S.C. § 252(e)(1) and Commission Rule 20:10:32:33, AT&T Communications of the Midwest, ("AT&T) and U S WEST Communications, Inc. ("U S WEST") hereby submit this Joint Request for Approval of the Arbitrated Interconnection Agreement between AT&T and U S WEST. As grounds for approval, the Parties state as follows:

INTRODUCTION

On November 20, 1996, AT&T filed a request for arbitration under 47 U.S.C. § 252(b)(1). That request sought Commission assistance in the resolution of disputed issues between the parties. On March 20, 1997, the Commission issued its decision and on April 21, 1997, the parties submitted separate interconnection agreements for Commission approval. The Commission, however, rejected both parties' requests for approval of either agreement. On September 12, 1997, the parties re-submitted a single agreement and requested further Commission assistance in resolving disputed issues. The Commission deferred action on this agreement pending the outcome of the Eighth

their adoption.[1] The parties agree, however, that the Interconnection Agreement can be approved and become effective at this time without the requested modifications and further negotiation toward resolution of the parked issues.

STATEMENTS

I. AT&T'S STATEMENTS REGARDING ADOPTION, MODIFICATION AND COMPLIANCE WITH SECTIONS 251 AND 252.

A. ADOPTION OR MODIFICATION

Throughout the course of this arbitration, AT&T has advocated and continues to advocate positions that are in compliance with §§ 251 and 252. Thus, AT&T requests modification to the contract that conforms to its previous advocacy throughout the arbitration. Therefore, without re-arguing its positions, AT&T incorporates by reference its previous pleadings, briefs and other materials in support of its request for modification.

Should the Commission determine that its previous decisions shall remain unmodified, AT&T requests that the Commission adopt and approve the attached Interconnection Agreement between AT&T and U S WEST. Insofar as there remain "parked" issues that have not yet been renegotiated between the parties, the parties will attempt to negotiate resolutions in light of the recent Supreme Court decision. *See* AT&T Corp. v. Iowa Utilities Board, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 1999 WL 24568 (January 25, 1999), attached hereto as **Exhibit B**.

B. COMPLIANCE WITH SECTIONS 251 AND 252

Because the parties have entered into the attached Agreement without prejudice to

[1] The Agreement contains highlighting that contains those issues that have been "parked." In addition, Part B to the Agreement is a Status Sheet that lists all the parked issues.

AT&T/U S WEST Interconnection Agreement meets the requirements of 47 U.S.C. §§ 251 and 252.

Further, U S WEST reserves its appellate rights as stated under the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

CONCLUSION

For the foregoing reasons, the parties request that the Commission approve the Interconnection Agreement between AT&T and U S WEST.

Respectfully submitted this 2nd day of February, 1999.

AT&T	U S WEST
Signature	Name
Lenny S. D. Friesen	Todd Lundy
Type Name	Type Name
Attorney	Attorney
Title	Title
Date	Date

EXHIBIT A

AGREEMENT
FOR LOCAL WIRELINE NETWORK INTERCONNECTION
AND
SERVICE RESALE

Between

AT&T Communications of the Midwest, Inc.

and

U S WEST Communications, Inc.

[NOTE: In this Agreement, *italicized language* corresponds to language agreed to by the Parties; Courier New pt. 10 font language corresponds to U S WEST proposed language; Times New Roman pt. 11 font language corresponds to AT&T proposed language; **bold language** corresponds to language included to comply with the Commission's Order; bracketed [ ] language corresponds to language proposed to be deleted by a Party]. Issues identified as "Parked" are pending before the United States Supreme Court and will be resolved in accordance with the Court's ruling.

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This Interconnection Agreement (this "Agreement"), effective _____ (the "Effective Date"), is entered into by and between AT&T Communications of the Midwest, Inc., a New York corporation, and U S WEST Communications, Inc., a Colorado corporation, to establish the rates, terms and conditions for local interconnection, local resale, and the purchase of unbundled network elements (individually referred to as the "service" or collectively as the "services").

RECITALS

WHEREAS, pursuant to this Agreement, AT&T and U S WEST will extend certain arrangements to one another within each LATA in which they both operate within South Dakota This Agreement is a combination of agreed terms and terms imposed by arbitration under Section 252 of the Communications Act of 1934, as modified by the Telecommunications Act of 1996, the rules and regulations of the Federal Communications Commission, and the orders, rules and regulations of the Public Utilities Commission of the State of South Dakota, and as such does not necessarily represent the position of either Party on any given issue; and

WHEREAS, the Parties wish to interconnect their local exchange networks in a technically and economically efficient manner for the transmission and termination of calls, so that subscribers of each can seamlessly receive calls that originate on the other's network and place calls that terminate on the other's network, and for AT&T's use in the provision of exchange access ("Local Interconnection"); and

WHEREAS, AT&T wishes to purchase Telecommunications Services for resale to others, and U S WEST is willing to provide such services; and

Issue A-1 - Parked

U S WEST proposes the following.

WHEREAS, AT&T wishes to purchase on an unbundled basis Network Elements, Ancillary Services and Functions and additional features separately and to use such services for itself or for the provision of its Telecommunications Services to others, and U S WEST is willing to provide such services;

AT&T proposes the following.

WHEREAS, AT&T wishes to purchase on an unbundled basis Network Elements, Ancillary Services and Functions and additional features separately or in any Combination that U S WEST chooses to provide and to use such services for itself or for the provision of its Telecommunications Services to others, and U S WEST is willing to provide such services;

Now, therefore, in consideration of the terms and conditions contained herein, AT&T and U S WEST hereby mutually agree as follows:

SCOPE OF AGREEMENT

A This Agreement specifies the rights and obligations of each Party with respect to the purchase and sale of Local Interconnection, Local Resale and Network Elements in the LATAs in South Dakota where U S WEST operates.

B In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement) such action shall not be unreasonably delayed, withheld or conditioned.

C U S WEST will provide interconnection, network elements and other services to AT&T with the level of service quality or performance of obligations set forth in Part A, Section 52 of this Agreement.

D U S WEST shall provide to AT&T Services for Resale that are equal in quality, subject to the same conditions (including the conditions in U S WEST's effective tariffs which are not otherwise inconsistent

with the terms and conditions contained herein), within the same provisioning time intervals that U S WEST provides these services to itself, its Affiliates and others, including end users, and in accordance with any applicable Commission service quality standards, including standards the Commission may impose pursuant to Section 252 (e)(3) of the Act.

E. [Intentionally left blank for numbering consistency]

F. The Parties agree to work jointly and cooperatively in testing and implementing processes for pre-ordering, ordering, maintenance, provisioning and billing and in reasonably resolving issues which result from such implementation on a timely basis.

G. If a Party makes a change in its network which it believes will materially affect the interoperability of its network with that of the other Party, the Party making the change shall provide advance notice of such change to the other Party in accordance with applicable FCC or Commission regulations.

H. In accordance with Section 251(c)(5) of the Act and the rules and regulations established by the FCC and the Commission, the Parties shall provide reasonable notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or network, as well as of any other changes that would affect the interoperability of those facilities and networks.

I. Except as otherwise provided for in Section 8 of Attachment 2, U S WEST shall not discontinue or refuse to provide any service required hereunder without AT&T's prior written agreement in accordance with Section 17 of this Part A, nor shall U S WEST reconfigure, reengineer or otherwise redeploy its network in a manner which would materially impair AT&T's ability to offer Telecommunications Services in the manner contemplated by this Agreement, the Act or the FCC's rules and regulations. U S WEST agrees that all obligations undertaken pursuant to this Agreement, including, without limitation, performance standards, intervals, and technical requirements are material obligations hereof and that time is of the essence.

DEFINITIONS

Certain terms used in this Agreement shall have the meanings set forth herein or as otherwise elsewhere defined throughout this Agreement. Other terms used but not defined herein will have the meanings ascribed to them in the Act and the FCC's rules and regulations.

"911 Service" means a universal telephone number which gives the public direct access to the Public Safety Answering Point (PSAP). Basic 911 service collects 911 calls from one or more local exchange switches that serve a geographic area. The calls are then sent to the correct authority designated to receive such calls.

"911 Site Administrator" is a person assigned by AT&T to establish and maintain 911 service location information for its subscribers.

"Access Services" refers to interstate and intrastate switched access and private line transport services.

"Act" means the Communications Act of 1934 (47 U.S.C. Section 151 et seq.), as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or by the Commission.

"ADSL" or "Asymmetrical Digital Subscriber Line" means a transmission technology which transmits an asymmetrical digital signal using one of several transmission methods (for example, carrier-less AM/PM discrete multi-tone, or discrete wavelet multi-tone).

"Affiliate" is an entity that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another entity. For the purposes of this Agreement, the term "own" means to own an equity interest (or equivalent) of more than ten percent (10%).

"AIN" ("Advanced Intelligent Network") is a network functionality that permits specific conditions to be programmed into a switch which, when met, directs the switch to suspend call processing and to receive special instructions for further call handling instructions in order to enable carriers to offer advanced features and services.

"AIN Services" means architecture and configuration of the AIN Triggers within the SCP as developed and/or offered by U S WEST to its customers.

"ALI" (Automatic Location Identification) is a database developed for E911 systems that provides for a visual display of the caller's telephone number and address, and the names of the emergency response agencies responsible for that address. The ALI also shows an Interim Number Portability (INP) number, if applicable.

"ALI/DMS" (Automatic Location Identification/Data Management System) means the emergency service (E911/911) database containing subscriber location information (including name, address, telephone number, and sometimes special information from the local service provider) used to determine to which Public Safety Answering Point (PSAP) to route the call.

"AMA" means the Automated Message Accounting structure that initially records telecommunication message information. AMA format is contained in the Automated Message Accounting document, published by Bellcore as GR-1100-CORE, which defines the industry standard for message recording.

"Ancillary Services" or "Ancillary Functions" means, collectively, the following: (1) Collocation as described in Section 40; (2) access to poles, ducts, conduits and rights of way as described in Section 47; (3) unused transmission media as described in Section 51; (4) Directory Listings as described in Section 44; (5) E911 as described in Section 50.1; (6) Directory Assistance Service as described in Section 50.2; (7) Operator Services as described in Section 50.3; (8) Directory Assistance and Listings services requests as described in Section 50.4; and (9) Directory Assistance data as described in Section 50.5.

"ANI" (Automatic Number Identification) is a feature that identifies and displays the number of a telephone that originates a call.

"ARS" (Automatic Route Selection) is a service feature that provides for automatic selection of the least expensive or most appropriate transmission facility for each call based on criteria programmed into the system.

"ASR" (Access Service Request) means the industry standard forms and supporting documentation used for ordering Access Services. The ASR may be used to order trunking and facilities between AT&T and U S WEST for Local Interconnection.

"AT&T" means AT&T and any Affiliates, subsidiary companies or other entities performing any of the obligations of AT&T set forth in this Agreement. For purposes of Section 47 of this Part A of this Agreement, the obligations of AT&T shall be limited to those facilities of AT&T Communications of the Midwest, Inc. that are used for the purpose of providing local services under the terms of this Agreement.

"BLV/BLI" (Busy Line Verify/Busy Line Interrupt) means an operator call in which the end user inquires as to the busy status of, or requests an interruption of, a telephone call.

"Business Day" means any day Monday through Friday except for mutually agreed to holidays.

"CABS" means the Carrier Access Billing System which is defined in a document prepared by the Billing Committee of the OBF. The Carrier Access Billing System document is published by Bellcore in Volumes 1, 1A, 2, 3, 3A, 4 and 5 as Special Reports SR-OPT-001868, SR-OPT-0011869, SR-OPT-001871, SR-OPT-001872, SR-OPT-001873, SR-OPT-001874, and SR-OPT-001875, respectively, and contains the recommended guidelines for the billing of access and other connectivity services.

"Calling Party Number" or "CPN" is a CCS parameter which refers to the number transmitted through a network identifying the calling party.

"CCS" (Common Channel Signaling) means a method of digitally transmitting call set-up and network control data over a digital signaling network fully separate from the public switched telephone network that carries the actual call.

"Central Office Switch" means a switch used to provide Telecommunications Services, including, but not limited to:

a) "End Office Switches" which are used to terminate Customer station loops for the purpose of interconnecting to each other and to trunks;

b) "Tandem Office Switches" which are used to connect and switch trunk circuits between and among other Central Office Switches. Access tandems provide connections for exchange access and toll traffic while local tandems provide connections for local/EAS traffic; or

c) Combination End Office/Tandem Office Switches.

"Centrex", including Centrex Plus, means a Telecommunications Service that uses central office switching equipment for call routing to handle direct dialing of calls and to provide numerous private branch exchange-like features.

"Charge Number" is a CCS parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

"CLASS" (Bellcore Service Mark) is a set of call-management service features that utilize the capability to forward a calling party's number between end offices as part of call setup. Features include Automatic Call-back, Automatic Recall, Caller ID, Call Trace, and Distinctive Ringing.

"CLEC" (Competitive Local Exchange Carrier) means an entity authorized to provide Local Exchange Service that does not otherwise qualify as an incumbent LEC.

"Combinations" consist of two or more connected Network Elements that are reasonably related to provide Telecommunications Service in a geographic area or to a specific customer.[1]

"Commission" means the Public Utilities Commission of the State of South Dakota.

"Conduit" means a tube or protected pathway that may be used to house communication or electrical cables. Conduit may be underground or above ground (for example, inside buildings) and may contain one or more innerducts.

"Confidential Information" has the meaning set forth in Section 28 of Part A of this Agreement.

"Contract Year" means a twelve (12) month period during the term of this Agreement commencing on the Effective Date and each anniversary thereof.

"Control Office" is an exchange carrier center or office designated as its company's single point of contact for the provisioning and maintenance of its portion of local interconnection arrangements.

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[1] Pursuant to the Eighth Circuit DecisionPer Iowa Utilities Bd., et al. v. FCC, 120 F.3d 753 (8th Cir. 1997), the Parties agree to this change.

"Custom Calling Features" is a set of call-management service features available to residential and business customers including call-waiting, call-forwarding and three-party calling.

"Customer" means a third-party (residence or business) that subscribes to Telecommunications Services provided by either of the Parties.

"DBMS" (Database Management System) is a computer system used to store, sort, manipulate and update the data required to provide, for example, selective routing and ALI.

"Databases" are the Network Elements that provide the functionality for storage of, access to, and manipulation of information required to offer a particular service and/or capability. Databases include, but are not limited to, Number Portability, LIDB, Toll Free Number Database, Automatic Location Identification/Data Management System, and AIN.

"Digital Signal Level" means one of several transmission rates in the time division multiplexing hierarchy, including, but not limited to:

> "Digital Signal Level 0" or "DS-0" means the 56 or 64 Kbps zero-level signal in the time-division multiplex hierarchy.
>
> "Digital Signal Level 1" or "DS-1" means the 1.544 Mbps first-level signal in the time-division multiplex hierarchy. In the time-division multiplexing hierarchy of the telephone network, DS-1 is the initial level of multiplexing.
>
> "Digital Signal Level 3" or "DS-3" means the 44.736 Mbps third-level in the time-division multiplex hierarchy. In the time-division multiplexing hierarchy of the telephone network, DS-3 is defined as the third level of multiplexing.

"Directory Assistance Database" refers to any set of subscriber records used by U S WEST in its provision of live or automated operator-assisted directory assistance including, but not limited to, 411, 555-1212, NPA-555-1212.

"Directory Assistance Services" provides listings to callers. Directory Assistance Services may include the option to complete the call at the caller's direction.

"Directory Listings" or "Listings" refers to subscriber information, including, but not limited to, name, address and phone numbers, in Directory Assistance Services or directory products.

"Discloser" means that Party to this Agreement which has disclosed Confidential Information to the other Party.

"E911" (Enhanced 911 Service) means a telephone communication service which will automatically route a call dialed "911" to a designated Public Safety Answering Point (PSAP) attendant and will provide to the attendant the calling party's telephone number and, when possible, the address from which the call is being placed, and the emergency response agencies responsible for the location from which the call was dialed.

"E911 Message Trunk" is a dedicated line, trunk or channel between two central offices or switching devices which provides a voice and signaling path for E911 calls.

"EAS" (Extended Area Service) is intraLATA traffic treated as "local" traffic between exchanges (rather than as "toll" traffic) as established by the Commission and as reflected in the effective U S WEST tariffs.

"Effective Date" is the date, indicated in the Preamble, on which this Agreement shall become effective.

"Emergency Response Agency" is a governmental entity authorized to respond to requests from the public to meet emergencies.

"EMR" means the Exchange Message Record System used among LECs for exchanging telecommunications message information for billable, non-billable, sample, settlement and study data. EMR format is contained in BR-010-200-010 CRIS Exchange Message Record, published by Bellcore, which defines the industry standard for exchange message records.

"ESN" (Emergency Service Number) is a number assigned to the ALI and selective routing databases for all subscriber telephone numbers. The ESN designates a unique combination of fire, police and emergency medical service response agencies that serve the address location of each in-service telephone number.

"FCC" means the Federal Communications Commission.

"FCC Interconnection Order" is the Federal Communications Commission's First Report and Order in CC Docket No. 96-98 released August 8, 1996, as effective.

"Fiber-Meet" means an interconnection architecture method whereby the Parties physically interconnect their networks via an optical fiber interface (as opposed to an electrical interface) at a mutually agreed upon location.

"Gateway" (ALI Gateway) is a telephone company computer facility that interfaces with AT&T's 911 administrative site to receive ALI data from AT&T. Access to the Gateway will be via a dial-up modem using a common protocol.

"HDSL" (High-Bit Rate Digital Subscriber Line) means a two-wire or four-wire transmission technology which typically transmits a DS1-level signal (or, higher level signals with certain technologies), using, for example, 2 Binary / 1 Quartenary ("2B1Q").

"IDLC" (Integrated Digital Loop Carrier) means a digital subscriber loop carrier system which interfaces with the switch digitally at a DS1 (1.544Mbps) or higher level.

"ILEC" means the incumbent local exchange carrier.

"Information Service Traffic" means traffic which originates on a local access line and which is addressed to an information service provider.

"INP" (Interim Number Portability) is a service arrangement whereby subscribers who change local service providers may retain existing telephone numbers with minimal impairment of quality, reliability, or convenience when remaining at their current location or changing their location within the geographic area served by the initial carrier's serving central office.

"Interconnection" is as described in the Act and refers to the connection of separate pieces of equipment, facilities, or platforms between or within networks for the purpose of transmission and routing of telephone exchange service traffic and exchange access traffic.

"ISDN" (Integrated Services Digital Network) means a switched network service that provides end-to-end digital connectivity for the simultaneous transmission of voice and data. Basic Rate Interface-ISDN (BRI-ISDN) provides for a digital transmission of two 64 Kbps bearer channels and one 16 Kbps data channel (2B+D). Primary Rate Interface-ISDN (PRI-ISDN) provides for a digital transmission of twenty-three (23) 64 Kbps bearer channels and one 64 Kbps data channel (23B+D).

"Tariff" shall mean U S WEST Communications Inc. or any Affiliate or Subsidiary thereof.

"IXC" (Interexchange Carrier) means a provider of interexchange Telecommunications Services.

"LATA" means Local Access Transport Area.

"LEC" means local exchange carrier.

"LIDB (Line Information Data Base(s)) is an SCP database that provides for such functions as calling card validation for telephone line number cards issued by LECs and other entities and validation for collect and billed-to-third services.

"Local Interconnection" shall have the meaning set forth in the Recitals to this Agreement.

"Local Resale" or "Services for Resale" means, collectively, Telecommunications Services and service features provided by U S WEST to AT&T pursuant to Attachment 2 of this Agreement.

"Local Traffic" is intraLATA traffic within an exchange that is treated as toll free traffic as established by the Commission and as reflected in the effective tariffs of U S WEST.

"Loop" is a transmission facility between a distribution frame, or its equivalent, in a U S WEST central office or wire center, and the Network Interface Device (as defined herein) or network interface at a subscriber's premises, to which AT&T is granted exclusive use. This includes, but is not limited to, two-wire and four-wire analog voice grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide ISDN, ADSL, HDSL, and DS-1 level signals. A Loop may be composed of the following components:

Loop Concentrator / Multiplexer
Loop Feeder
Network Interface Device (NID)
Distribution

"Main Distribution Frame" or "MDF" means the distribution frame of the Party providing the Loop used to interconnect cable pairs and line and trunk equipment terminals on a switching system or transmission facility.

"MECAB" refers to the Multiple Exchange Carrier Access Billing (MECAB) document prepared by the Billing Committee of the OBF, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS). The MECAB document, published by Bellcore as Special Report SR-BDS-000983, contains the recommended guidelines for the billing of an Access Service provided by two or more LECs (including a LEC and a CLEC), or by one LEC in two or more states within a single LATA.

"MECOD" refers to the Multiple Exchange Carriers Ordering and Design (MECOD) Guidelines for Access Services - Industry Support Interface, a document developed by the Ordering/Provisioning Committee under the auspices of the OBF, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS). The MECOD document, published by Bellcore as Special Report SR STS-002643, establishes recommended guidelines for processing orders for Access Service which is to be provided by two or more LECs (including a LEC and a CLEC). It is published by Bellcore as SR-BDS-00983.

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[1] See Second Arbitration Order at page 4, ¶4.

"Two-Point Entry" or "NPR" refers to an arrangement whereby two LECs (including a LEC and AT&T) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or AT&T) receiving an appropriate share of the access element revenues.

"Mid-Span Meet" is a point of interconnection between two networks, designated by two Telecommunications Carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

"MSAG" (Master Street Address Guide) is a database defining the geographic area of an E911 service. It includes an alphabetical list of the street names, high-low house number ranges, community names, and emergency service numbers provided by the counties or their agents to U S WEST.

"NANP" (North American Numbering Plan) means the numbering plan used in the United States that also covers Canada, Bermuda, Puerto Rico and certain Caribbean Islands. The NANP format is a 10-digit number that consists of a 3-digit NPA code (commonly referred to as the area code), followed by a 3-digit NXX code and 4-digit line number.

"NENA" (National Emergency Number Association) is an association with a mission to foster the technological advancement, availability and implementation of 911 nationwide.

"Network Element" means a facility or equipment used in the provision of a telecommunications service, including features, functions, and capabilities that are provided by means of such facility or equipment, including Operational Support Systems[3], subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a Telecommunications Service.

"NP" (Number Portability) means the use of the Location Routing Number (LRN) database solution to provide fully compliant NP for all subscribers and all providers without limitation.

"NPA" (Numbering Plan Area) (sometimes referred to as an area code) is the three digit indicator which is designated by the first three digits of each 10-digit telephone number within the NANP. Each NPA contains 792 possible NXX Codes. There are two general categories of NPA, "Geographic NPAs" and "Non-Geographic NPAs." A "Geographic NPA" is associated with a defined geographic area, and all telephone numbers bearing such NPA are associated with services provided within that geographic area. A "Non-Geographic NPA," also known as a "Service Access Code (SAC Code)" is typically associated with a specialized Telecommunications Service which may be provided across multiple geographic NPA areas; 500, 555, 800, 700, and 888 are examples of Non-Geographic NPAs.

"NXX" means the fourth, fifth and sixth digits of a ten-digit telephone number within the NANP.

"OBF" means the Ordering and Billing Forum, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS).

"Operator Services" includes, but is not limited to, (1) operator handling for call completion (e.g., collect calls); (2) operator or automated assistance for billing after the subscriber has dialed the called number (e.g., credit card calls); and (3) special services (e.g. emergency agency call).

"P.01 Transmission Grade of Service" (GOS) means a trunk facility provisioning standard with the statistical probability of no more than one call in 100 blocked on initial attempt during the average busy hour.

"PLU" (Percent Local Usage) is a calculation which represents the ratio of the local minutes to the sum of local and intraLATA toll minutes between exchange carriers sent over Local Interconnection trunks. Directory assistance, BLV/BLI, 900, 976, transiting calls from other exchange carriers and switched access calls are not included in the calculation of PLU.

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[3] Pursuant to the Eighth Circuit Decision, the Parties agree to this change.

"Party" means either U S WEST or AT&T and "Parties" means U S WEST and AT&T.

"Person" means, collectively, an Affiliate, subsidiary, Customer, end user and subscriber of U S WEST.

"POI" (Point of Interconnection) means the physical point that establishes the technical interface, the test point, where applicable, and the operational responsibility hand-off between AT&T and U S WEST for the local interconnection of their networks for the mutual exchange of traffic.

"Point of Interface" is the physical point where AT&T hands off transmission media to the U S WEST provided entrance facility associated with a Collocation arrangement for the purpose of connecting the entrance facility to some point located within U S WEST's premises.

"Pole Attachment" means the connection of a facility to a utility pole. Some examples of facilities are electrical hardware, grounding and transmission cable, and equipment boxes.

"POP" means an IXC's point of presence.

"Premium Listing", such as additional, foreign, cross reference, informational, non-listed, privacy, etc., are as described in the U S WEST general exchange listing tariff.

"Primary Listing" (for example, main list, additional main, joint user, client main list or answering service list) shall mean the one appearance of an end user telephone subscriber's main telephone number and other content such as name and address, which each AT&T residence or business subscriber is entitled to receive in the White Pages Directory published by U S WEST Dex at no charge from U S WEST Communications. Where U S WEST business end users are entitled to receive a courtesy listing in the yellow pages section of any directory published on U S WEST's behalf, AT&T's business customers will receive the same entitlement.

"Proprietary Information" shall have the same meaning as Confidential Information.

"PSAP" (Public Safety Answering Point) is the public safety communications center where 911 calls placed by the public for a specific geographic area will be answered.

"Rate Center" means the geographic point and corresponding geographic area which are associated with one or more particular NPA-NXX codes which have been assigned to U S WEST or AT&T for its provision of basic exchange Telecommunications Services. The "Rate Center Point" is the finite geographic point identified by a specific V&H coordinate, which is used to measure distance-sensitive end user traffic to/from the particular NPA-NXX designations associated with the specific Rate Center. The "Rate Center Area" is the exclusive geographic area identified as the area within which U S WEST or AT&T will provide basic exchange Telecommunications Services bearing the particular NPA-NXX designations associated with the specific Rate Center. The Rate Center Point must be located within the Rate Center Area.

"Rating Point" means the point at which transport mileage is calculated for the termination of calls. Each Party shall establish its own Rating Point(s) for its own services.

"Real Time" means the actual time in which an event takes place, with the reporting on or the recording of the event simultaneous with its occurrence.

"Recipient" means that Party to this Agreement (1) to which Confidential Information has been disclosed by the other Party, or (2) who has obtained Confidential Information in the course of providing services under this Agreement.

"Reseller" is a category of Telecommunications Services providers who obtain Telecommunications Services from another provider through the purchase of wholesale priced services for resale to their end user customers.

"Routing Point" means a location which U S WEST or AT&T has designated on its own network as the appropriate routing point for traffic inbound to basic exchange Telecommunications Services provided by U S WEST or AT&T which bear a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access Services. Pursuant to Bellcore Practice BR 795-100-100, the Routing Point may be an "End Office" location, or a "LEC Consortium Point of Interconnection." Pursuant to that same Bellcore Practice, examples of the latter shall be designated by a common language location identifier (CLLI) code with (x)KD in positions 9, 10, 11, where (x) may be any alphanumeric A-Z or 0-9. The Routing Point need not be the same as the Rate Center Point, nor must it be located within the Rate Center Area, but must be in the same LATA as the NPA-NXX.

"ROW" (Right of Way) means the right to use the land or other property owned, leased, or controlled by another party to place poles, conduits, cables, other structures and equipment, or to provide passage to access such structures and equipment. A ROW may run under, on, or above public or private property (including air space above public or private property) and may include the right to use discrete space in buildings, building complexes or other locations.

"SAG" (Street Address Guide) is a database containing an alphabetical list of street names, high-low house number ranges, descriptive addresses, community names, tax codes, subscriber names, telephone numbers, NXXs, central office names, CLLI and other information maintained by U S WEST.

"SCP" (Service Control Point) is a specific type of Database Network Element functionality deployed in a Signaling System 7 (SS7) network that executes service application logic in response to SS7 queries sent to it by a switching system also connected to the SS7 network. SCPs also provide operational interfaces to allow for provisioning, administration and maintenance of subscriber data and service application data (e.g., a toll free database stores subscriber record data that provides information necessary to route toll free calls).

"SECAB" means the Small Exchange Carrier Access Billing document prepared by the Billing Committee of the OBF. The Small Exchange Carrier Access Billing document, published by Bellcore as Special Report SR OPT 001856, contains the recommended guidelines for the billing of access and other connectivity services.

"Selective Routing" is a service which automatically routes an E911 call to the PSAP that has jurisdictional responsibility for the service address of the telephone from which 911 is dialed, irrespective of telephone company exchange or wire center boundaries.

"STPs" (Signaling Transfer Points) provide functionality that enable the exchange of SS7 messages among and between switching elements, database elements and Signaling Transfer Points.

"Subsidiary" shall mean any company in which an entity owns directly or indirectly 50% or more of the voting stock or 50% or more of the equity; or any other venture in which it owns either 50% or more of the voting rights or 50% or more of the equity.

"Switch" – See Central Office Switch.

"Switched Access", "Switched Access Service", "Switched Exchange Access Service" or "Switched Access Traffic" are as defined in the Parties' applicable tariffs.

"Tandem Office Switches" are Class 4 switches which are used to connect and switch trunk circuits between and among end office switches and other tandems.

"Tariff Services" as used throughout this Agreement refers to the applicable Party's interstate tariffs and state tariffs, price lists, price schedules and catalogs.

"Technically Feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations, in accordance with the rules and regulations of the FCC and the Commission.

"Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

"Telecommunications Carrier" means any provider of Telecommunications Services, except that such term does not include aggregators of Telecommunications Services (as defined in Section 226 of the Act). A Telecommunications Carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing Telecommunications Services, except that the FCC shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

"Telecommunications Services" means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

"Toll Traffic" is traffic that originates in one Rate Center and terminates in another Rate Center with the exception of traffic that is rated as EAS.

"Transit Service" provides the ability for a Telecommunications Carrier to use its connection to a local or access tandem for delivery of calls that originate with a Telecommunications Carrier and terminate to a company other than the tandem company, such as another CLEC, an existing LEC, or a wireless carrier. In these cases, neither the originating nor terminating end user is a customer of the tandem Telecommunications Carrier. The tandem Telecommunications Carrier will accept traffic originated by a Party and will terminate it at a Point of Interconnection with another local, intraLATA or interLATA network Telecommunications Carrier. This service is provided through local and access tandem switches.

"Transit Traffic" is any traffic, other than Switched Access Traffic, that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Carrier's network.

"TRCO" means Trouble Reporting Control Office.

"U S WEST" means U S WEST Communications, Inc. and any Affiliates, subsidiary companies or other entities performing any of the obligations of U S WEST set forth in this Agreement.

"Voluntary Federal Subscriber Financial Assistance Programs" are Telecommunications Services provided to low income subscribers, pursuant to requirements established by the appropriate federal or state regulatory body.

"Wire Center" denotes, for the purposes of Collocation, a building or space within a building, that serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched. Wire Center can also denote a building where one or more central offices, used for the provision of Telecommunications Services and Access Services, are located. Wire Center shall mean those points eligible for such connections as specified in FCC Docket No. 91-141, and rules adopted pursuant thereto.

TERMS AND CONDITIONS

1. General Provisions

1.1 Each Party is individually responsible to provide facilities within its network which are necessary for routing, transporting, measuring, and billing traffic from the other Party's network and for delivering such traffic to the other Party's network in the standard format compatible with AT&T's network and to terminate the traffic it receives in that standard

format or the proper address on its network. The Parties are each solely responsible for connection of and compliance with national network plans, including the National Network Security Plan and the Emergency Preparedness Plan.

2.2 Neither Party shall impair the quality of service to other carriers or to either Party's Customers, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation, at the earliest practicable time.

2.3 [Intentionally left blank for numbering consistency]

3. Most Favored Nation Terms and Treatment

3.1 Until such time as there is a final court determination interpreting Section 252(i) of the Act, U S WEST shall make available to AT&T the terms and conditions of any other agreement for interconnection, unbundled Network Elements and resale services approved by the Commission under Section 252 of the Act, in that agreement's entirety. If AT&T selects the terms and conditions of another agreement in that agreement's entirety, AT&T may do so only after expiration of this Agreement. After there is a final court determination interpreting Section 252(i) of the Act, the Parties agree to revise this Section 3.1 to reflect such interpretation.[4]

4. Payment

4.1 In consideration of the services provided by U S WEST under this Agreement, AT&T shall pay the charges set forth in Attachment 1. The billing procedures for charges incurred by AT&T hereunder are set forth in Attachment 5 to this Agreement.

4.2 Amounts payable under this Agreement, unless reasonably disputed, **are due and payable within thirty (30) days after the date of U S WEST's invoice**[5] or within twenty (20) days after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.

4.3 A late payment charge[6] of 1.5% applies to all billed balances, not reasonably disputed, which are not paid within the applicable time period set forth in Section 3.2 above To the extent AT&T pays the billed balance on time, but the amount of the billed balance is reasonably disputed by AT&T, and, it is later determined that a refund is due AT&T, interest shall be payable on the refunded amount in the amount of 1.5% per month. To the extent AT&T pays the billed balance on time, but the amount of the billed balance is reasonably disputed by AT&T, and, it is later determined that no refund is due AT&T, no interest shall be payable on the disputed amount.

4.4 Late payment charges shall not be used as a "credit" to a deposit, if any, without the express approval of U S WEST.

4.5 Unless specified otherwise in this Agreement, U S WEST shall bill all amounts due from AT&T for each resold service in accordance with the terms and conditions as specified in the U S WEST tariff.

5. Taxes

[4] Per Commission Order in Docket TC96-184, March 20, 1997 ("First Order") Per First Order at page 5, Paragraph 13.
[5] Per First Order at page 4, Paragraph 13.
[6] Per First Order at page 4, Paragraph 13.

8.1 Any federal, state or local excise, sales, or use taxes (excluding any taxes levied on income) resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. Any such taxes shall be shown as separate items on applicable billing documents between the Parties. The Party so obligated to pay any such taxes may contest the same in good faith, at its own expense, and shall be entitled to the benefit of any refund or recovery, provided that such Party shall not permit any lien to exist on any asset of the other Party by reason of the contest. The Party obligated to collect and remit taxes shall cooperate fully in any such contest by the other Party by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Failure to timely provide said resale tax exemption certificate will result in no exemption being available to the purchasing Party during the applicable reporting period.

9. Intellectual Property.

9.1 Obligations of Party Requesting Access. As a condition to the access or use of patents, copyright, trade secrets, and other intellectual property (including software) owned or controlled by a third party to the extent necessary to implement this Agreement or specifically required by the then applicable federal and state rules and regulations relating to interconnection and access to telecommunications facilities and services ("Third Party Intellectual Property"), the Party providing access may require the other, upon written notice from time to time, to obtain a license or permission for such access or use of Third Party Intellectual Property, make all payment, if any, in connection with obtaining such license, and provide evidence of such license.[7]

9.2 Obligations of Party Providing Access. The party Providing Access shall provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party. The Party Requesting Access may request that the Party Providing Access negotiate any necessary licenses. If that request is made, the party providing Access shall enter into good faith negotiations with the owner of the intellectual property to obtain any necessary licenses. Any costs associated with obtaining the necessary licenses are the responsibility of the party Requesting Access. If no request is made, it is the responsibility of the Party Requesting Access to obtain any necessary licenses. The treatment of Third party licenses shall be in accordance with FCC rules and regulations and/or judicial determination. [8]

9.3 Any intellectual property jointly developed in the course of performing this Agreement shall belong to both Parties who shall have the right to grant non-exclusive licenses to third parties except as otherwise designated in writing by one Party to another. Any intellectual property which originates from or is developed by a Party shall remain the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property presently or hereafter owned,

[7] Per Second Order at page 5, ¶7.
[8] Per Second Order at page 5, ¶9.

controlled or licenseable by a Party, is granted to the other Party or shall be implied or arise by estoppel.[1]

6. Severability

6.1 *In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable or invalid in any respect under law or regulation, the Parties will negotiate in good faith for replacement language. If any part of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will affect only the portion of this Agreement which is invalid or unenforceable. In all other respects this Agreement will stand as if such invalid or unenforceable provision had not been a part hereof, and the remainder of this Agreement shall remain in full force and effect.*

7. Responsibility for Environmental Contamination

7.1 *AT&T shall in no event be liable to U S WEST for any costs whatsoever resulting from the presence or release of any environmental hazard AT&T did not introduce to the affected work location. U S WEST shall, at AT&T's request, indemnify, defend, and hold harmless AT&T, and each of its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) arising out of or resulting from (a) any environmental hazard U S WEST, its contractors or agents introduce to the work location, or (b) the presence or release of any environmental hazard for which U S WEST is responsible under applicable law.*

7.2 *U S WEST shall in no event be liable to AT&T for any costs whatsoever resulting from the presence or release of any environmental hazard U S WEST did not introduce to the affected work location. AT&T shall, at U S WEST's request, indemnify, defend, and hold harmless U S WEST, and each of its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) arising out of or resulting from (a) any environmental hazard AT&T, its contractors or agents introduce to the work location, or (b) the presence of release of any environmental hazard for which AT&T is responsible under applicable law.*

7.3 *In the event any suspect materials within U S WEST-owned, operated or leased facilities are identified to be asbestos-containing, AT&T will ensure that, to the extent any activities which it undertakes in the facility disturb such suspect materials, such AT&T activities will be in accordance with applicable local, state and federal environmental and health and safety statutes and regulations. Except for abatement activities undertaken by AT&T or equipment placement activities that result in the generation of asbestos containing material, AT&T shall not have any responsibility for managing, nor be the owner of, not have any liability for, or in connection with, any asbestos containing material. U S WEST agrees to immediately notify AT&T if U S WEST undertakes any asbestos control or asbestos abatement activities that potentially could affect AT&T equipment or operations, including, but not limited to, contamination of equipment.*

7.4 *Each Party will be solely responsible, at its own expense, for proper handling, storing, transport and disposal of all (a) substances or materials that it or its contractors or agents bring to, create or assume control over at work locations, or (b) waste resulting therefrom or otherwise generated in connection with its or its contractors' or agents' activities at the work locations.*

8. Branding

[1] Per Second Order at page 6, ¶4.

8.1 At the request of AT&T and where technically feasible, U S WEST will rebrand operator services and directory assistance in AT&T's name, provided the costs associated with such rebranding are paid by AT&T. Where not technically feasible to add AT&T's brand, U S WEST will unbrand. U S WEST may not unreasonably interfere with branding by AT&T.

8.2 Branding includes front-end branding, back-end branding, and unbranding to be determined by AT&T. Where services are to be rebranded, AT&T shall have the option of providing its own branding materials or audio announcements, as appropriate. U S WEST will provide comprehensive unbranding of a service when U S WEST can demonstrate that the cost of rebranding such service is unreasonably expensive and when the failure to comprehensively unbrand is competitively discriminatory.

8.3 [Intentionally left blank for numbering consistency.]

8.4 [Intentionally left blank for numbering consistency.]

8.5 [Intentionally left blank for numbering consistency.]

8.6 **With respect to resold repair and maintenance service, U S WEST's personnel shall inform AT&T Customers that such service is being provided on behalf of AT&T. Informational materials (including repair receipts and bills) distributed by repair and maintenance personnel shall be in a generic, carrier-neutral form.**[10]

8.7 U S WEST shall provide, for AT&T's review, the methods and procedures, training and approaches to be used by U S WEST to assure that U S WEST meets AT&T's branding requirements.

8.8 This Section 8 shall confer on U S WEST no rights to the servicemarks, trademarks and trade names owned by or used in connection with services by AT&T or its Affiliates, except as expressly permitted by AT&T.

8.9 At the request of AT&T and where technically feasible, U S WEST will rebrand operator services and directory assistance in AT&T's name.

9. Independent Contractor Status

9.1 Nothing contained herein shall constitute the Parties as joint venturers, partners, employees or agents of one another, and neither Party shall have the right or power to bind or obligate the other.

9.2 Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement and retains full control over the employment, direction, compensation and discharge of all employees assisting in the performance of such obligations. Each Party will be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes, and other payroll taxes with respect to their respective employees, as well as any taxes, contributions or other obligations imposed by applicable state unemployment or workers' compensation acts and all other regulations governing such matters. Each Party has sole authority and responsibility to hire, fire and otherwise control its employees.

9.3 Subject to the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (a) its own acts and performance of all obligations

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[10] Fact Order at page 21, Paragraphs 169, 171.

required by applicable law in connection with its activities, legal status and property, real or personal, and (b) the acts of its own Affiliates, employees, agents and contractors during the performance of that Party's obligations hereunder. Except for provisions herein expressly authorizing one Party to act for the other, nothing in this Agreement shall constitute a Party as a legal representative or agent of the other Party, nor shall a Party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name or on behalf of the other Party unless otherwise expressly permitted by such other Party. Except as otherwise expressly provided in this Agreement, neither Party shall undertake to perform any obligation of the other Party, whether regulatory or contractual, or to assume any responsibility for the management of the other Party's business.

10. Referenced Documents

10.1 All references to Sections, Exhibits, and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. Whenever any provision of this Agreement refers to a technical reference, technical publication, AT&T practice, U S WEST practice, any publication of telecommunications industry administrative or technical standards, or any other document specifically incorporated into this Agreement, it will be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) or such document that is in effect, and will include the most recent version or edition (including any amendments, supplements, addenda, or successors) of each document incorporated by reference in such a technical reference, technical publication, AT&T practice, U S WEST practice, or publication of industry standards, unless the parties agree otherwise.

11. Publicity and Advertising

11.1 Neither Party shall publish or use any advertising, sales promotions or other publicity materials that use the other Party's logo, trademarks or service marks without the prior written approval of the other Party.

12. Executed in Counterparts

12.1 This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but such counterparts shall together constitute one and the same instrument.

13. Headings Not Controlling

13.1 The headings and numbering of Sections, Parts, Appendices and Attachments in this Agreement are for convenience only and shall not be construed to define or limit any of the terms herein or affect the meaning or interpretation of this Agreement.

14. Joint Work Product

14.1 This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

15. Survival

16.4 *Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement; any obligation of a Party under the provisions regarding indemnification, confidential information, limitation of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive, or to be performed after, termination of this Agreement, shall survive cancellation or termination thereof.*

16. Effective Date

16.1 *This Agreement shall become effective pursuant to Sections 251 and 252 of the Act, on _____, 1998.*

17. Amendment of Agreement

17.1 *Except as otherwise provided in this Agreement, no amendment or waiver of any provision of this Agreement, and no consent to any default under this Agreement, shall be effective unless the same is in writing and signed by an officer of the Party against whom such amendment, waiver or consent is claimed. If either Party desires an amendment to this Agreement during the term of this Agreement, it shall provide written notice thereof to the other Party describing the nature of the requested amendment. If the Parties are unable to agree on the terms of the amendment within thirty (30) days after the initial request therefor, the Party requesting the amendment may invoke the dispute resolution process under Section 27 of this Part A of this Agreement to determine the terms of any amendment to this Agreement.*

18. Indemnification

18.1 *Notwithstanding any limitations in remedies contained in this Agreement, each Party (the "Indemnifying Party") will indemnify and hold harmless the other Party ("Indemnified Party") from and against any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the libel, slander, invasion of privacy, misappropriation of a name or likeness, actual or alleged infringement or other violation or breach of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now existing or later created, negligence or willful misconduct by the Indemnifying Party, its employees, agents, or contractors in the performance of this Agreement or the failure of the Indemnifying Party to perform its obligations under this Agreement. In addition, the Indemnifying Party will, to the extent of its obligations to indemnify hereunder, defend any action or suit brought by a third party against the Indemnified Party.*

18.2 **If, after the Party providing access under this Agreement gives written notice to the other Party pursuant to Section 5.1, the other Party fails to obtain a license or permission for access or use of Third Party Intellectual Property, the Party providing access shall have no indemnification obligation hereunder for any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the failure of the other Party to obtain such license or permission.[11]**

18.3 *The Indemnified Party also will cooperate in every reasonable manner with the defense or settlement of such claim, demand, or lawsuit. The Indemnifying Party shall keep the Indemnified Party reasonably and timely apprised of the status of the claim, demand or lawsuit. The Indemnified Party shall have the right to retain its own counsel, including in-house counsel, at its expense, and participate in but not direct the defense; provided, however, that if there are reasonable defenses in addition to those asserted by the Indemnifying Party, the*

[11] Per Second Order at page 5-6, ¶10.

Indemnified Party and its counsel may raise and direct such defenses, which shall be at the expense of the Indemnifying Party.

18.4 The Indemnifying Party will not be liable under this Section 18 for settlements or compromises by the Indemnified Party of any claim, demand or lawsuit unless the Indemnifying Party has approved the settlement or compromise in advance or unless the defense of the claim, demand or lawsuit has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to timely undertake the defense. In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party.

19. Limitation of Liability

19.1 Except as otherwise provided in the indemnity section, no Party shall be liable to the other Party for any Loss, defect or equipment failure caused by the conduct of the other Party, the other Party's agents, servants, contractors or others acting in aid or concert with the other Party.

19.2 [Intentionally left blank for numbering consistency.]

19.3 In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including, but not limited to revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, "Consequential Damages"), even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation to indemnify, defend and hold the other Party harmless against any amounts payable to a third party, including any losses, costs, fines penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third party. Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence); (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such party's negligent act or omission or that of their respective agents, subcontractors or employees, nor shall anything contained in this section limit the Parties indemnification obligations, as specified above.

19.4 [Intentionally left blank for numbering consistency.]

19.5 Notwithstanding the provisions of Section 19.3, to the extent that U S WEST tariffs contain limitations on liability, AT&T shall submit language for inclusion in its Intrastate retail tariffs, that is substantially similar to the limitation of liability language contained in U S WEST's tariffs, and such limitations of liability shall govern for Customer claims. In addition, notwithstanding the provisions of Section 19.3, to the extent that the Commission's quality of service rules provide for remedies to AT&T or its Customers for Customer claims, then those remedies shall govern as to such claims.

20. Term of Agreement

20.1 This Agreement shall be effective for a period of three (3) years, and thereafter shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties shall commence negotiations on a new agreement no later than one year prior to the expiration of the term of this Agreement. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with Section

16.1 *Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement; any obligation of a Party under the provisions regarding indemnification, confidential information, limitation of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive, or to be performed after, termination of this Agreement, shall survive cancellation or termination thereof.*

16. Effective Date

16.1 *This Agreement shall become effective pursuant to Sections 251 and 252 of the Act, on _____, 1998.*

17. Amendment of Agreement

17.1 *Except as otherwise provided in this Agreement, no amendment or waiver of any provision of this Agreement, and no consent to any default under this Agreement, shall be effective unless the same is in writing and signed by an officer of the Party against whom such amendment, waiver or consent is claimed. If either Party desires an amendment to this Agreement during the term of this Agreement, it shall provide written notice thereof to the other Party describing the nature of the requested amendment. If the Parties are unable to agree on the terms of the amendment within thirty (30) days after the initial request therefor, the Party requesting the amendment may invoke the dispute resolution process under Section 27 of the Part A of this Agreement to determine the terms of any amendment to this Agreement.*

18. Indemnification

18.1 *Notwithstanding any limitations in remedies contained in this Agreement, each Party (the "Indemnifying Party") will indemnify and hold harmless the other Party ("Indemnified Party") from and against any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the libel, slander, invasion of privacy, misappropriation of a name or likeness, actual or alleged infringement or other violation or breach of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now existing or later created, negligence or willful misconduct by the Indemnifying Party, its employees, agents, or contractors in the performance of this Agreement or the failure of the Indemnifying Party to perform its obligations under this Agreement. In addition, the Indemnifying Party will, to the extent of its obligations to indemnify hereunder, defend any action or suit brought by a third party against the Indemnified Party.*

18.2 **If, after the Party providing access under this Agreement gives written notice to the other Party pursuant to Section 5.1, the other Party fails to obtain a license or permission for access or use of Third Party Intellectual Property, the Party providing access shall have no indemnification obligation hereunder for any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the failure of the other Party to obtain such license or permission.[11]**

18.3 *The Indemnified Party also will cooperate in every reasonable manner with the defense or settlement of such claim, demand, or lawsuit. The Indemnifying Party shall keep the Indemnified Party reasonably and timely apprised of the status of the claim, demand or lawsuit. The Indemnified Party shall have the right to retain its own counsel, including in-house counsel, at its expense, and participate in but not direct the defense; provided, however, that if there are reasonable defenses in addition to those asserted by the Indemnifying Party, the*

[11] Per Second Order at page 5-6, ¶10.

Indemnified Party and its counsel may raise and direct such defenses, which shall be at the expense of the Indemnifying Party.

18.4 The Indemnifying Party will not be liable under this Section 18 for settlements or compromises by the Indemnified Party of any claim, demand or lawsuit unless the Indemnifying Party has approved the settlement or compromise in advance or unless the defense of the claim, demand or lawsuit has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to timely undertake the defense. In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party.

19. Limitation of Liability

19.1 Except as otherwise provided in the indemnity section, no Party shall be liable to the other Party for any Loss, defect or equipment failure caused by the conduct of the other Party, the other Party's agents, servants, contractors or others acting in aid or concert with the other Party.

19.2 [intentionally left blank for numbering consistency.]

19.3 In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including, but not limited to revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, "Consequential Damages"), even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation to indemnify, defend and hold the other Party harmless against any amounts payable to a third party, including any losses, costs, fines penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third party. Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence); (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such party's negligent act or omission or that of their respective agents, subcontractors or employees, nor shall anything contained in this section limit the Parties indemnification obligations, as specified above.

19.4 [intentionally left blank for numbering consistency.]

19.5 Notwithstanding the provisions of Section 19.3, to the extent that U S WEST tariffs contain limitations on liability, AT&T shall submit language for inclusion in its Intrastate retail tariffs, that is substantially similar to the limitation of liability language contained in U S WEST's tariffs, and such limitations of liability shall govern for Customer claims. In addition, notwithstanding the provisions of Section 19.3, to the extent that the Commission's quality of service rules provide for remedies to AT&T or its Customers for Customer claims, then those remedies shall govern as to such claims.

20. Term of Agreement

20.1 This Agreement shall be effective for a period of three (3) years, and thereafter shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties shall commence negotiations on a new agreement no later than one year prior to the expiration of the term of this Agreement. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with Section

27 of this Agreement and the resulting contract shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

31. Governing Law

31.1 This Agreement shall be governed by and construed in accordance with the Act and FCC rules and regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of South Dakota, without regard to its conflicts of laws principles, shall govern.

32. Cancellation Charges

32.1 Except as provided pursuant to a Bona Fide Request, or as otherwise provided in any applicable tariff or contract referenced herein, no cancellation charges shall apply.

33. Regulatory Approvals

33.1 This Agreement, and any amendment or modification hereof, will be submitted to the Commission for approval in accordance with Section 252 of the Act. In the event any governmental authority or agency rejects any provision hereof, the Parties shall negotiate promptly and in good faith such revisions as may reasonably be required to achieve approval.

33.2 U S WEST shall provide AT&T a summary describing the proposed change(s) to each Telecommunications Service which is available pursuant to this Agreement. U S WEST shall also provide AT&T a summary describing the proposed change(s) of each intrastate and interstate tariff which provides for an Interconnection, unbundled Network Element or Ancillary Service that is available pursuant to this Agreement. Such summaries shall be available through an Internet Web page to be posted on the same day the proposed change is filed with the Commission or the FCC or at least thirty (30) days in advance of its effective date, whichever is earlier.

33.3 In the event any governmental authority or agency orders U S WEST to provide any service covered by this Agreement in accordance with any terms or conditions that individually differ from one or more corresponding terms or conditions of this Agreement, AT&T may elect to amend this Agreement to reflect any such differing terms or conditions contained in such decision or order, with effect from the date AT&T makes such election. The other services covered by this Agreement and not covered by such decision or order shall remain unaffected and shall remain in full force and effect.

33.4 The Parties intend that any additional services requested by either Party relating to the subject matter of this Agreement will be incorporated into this Agreement by amendment.

33.5 Each Party shall be responsible for maintaining such regulatory approvals as necessary for it to perform under this Agreement. Each Party shall have an obligation to cooperate with the other Party in obtaining and maintaining necessary regulatory approvals.[12]

34. Compliance

34.1 Each Party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.

34.2 Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with the Communications Law Enforcement

[12] See First Order at page 5, Paragraph 26.

Act of 1994 ("CALEA"). Each Party (the "Indemnifying Party") shall indemnify and hold the other Party (the "Indemnified Party") harmless from any and all penalties imposed upon the Indemnified Party for such noncompliance and shall, at the Indemnifying Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the Indemnified Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

24.3 All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders. Each Party shall be responsible for obtaining and keeping in effect all FCC, Commission, franchise authority and other regulatory approvals that may be required in connection with the performance of its obligations under this Agreement. In the event the Act or FCC or Commission rules and regulations applicable to this Agreement are held invalid, this Agreement shall survive, and the Parties shall promptly renegotiate any provisions of this Agreement which, in the absence of such invalidated Act, rule or regulation, are insufficiently clear to be effectuated, violate, or are either required or not required by the new rule or regulation. During these negotiations, each Party will continue to provide the same services and elements to each other as are provided for under this Agreement. Provided, however, that either Party shall give ten (10) Business Days notice if it intends to cease any development of any new element or service that is not at that time being provided pursuant to this Agreement. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute, including liability for non-compliance with the new clause or the cost, if any, of performing activities no longer required by the rule or regulation during the renegotiation of the new clause under the applicable procedures set forth in Section 27 herein.

25. Force Majeure

25.1 Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, equipment failure, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers. No delay or other failure to perform shall be excused pursuant to this Section 25 unless such delay or failure and consequences thereof are beyond the control and without the fault or negligence of the Party claiming excusable delay or other failure to perform. In the event of any such excused delay in the performance of a Party's obligation(s) under this Agreement, the due date for the performance of the original obligation(s) shall be extended by a term equal to the time lost by reason of the delay. In the event of such delay, the delaying Party shall perform its obligations at a performance level no less than that which it uses for its own operations. In the event of a labor dispute or strike, the Parties agree to provide service to each other at a level equivalent to the level they provide themselves. In the event of a labor dispute or strike or work stoppage that continues for a period in excess of forty-eight (48) hours, AT&T may obtain replacement services for those services affected by such labor dispute or strike or work stoppage, in which event any liability of AT&T for the affected services shall be suspended for the period of the work stoppage or labor dispute or strike. In the event of such performance delay or failure by U S WEST, U S WEST agrees to resume performance in a nondiscriminatory manner and not favor its own provision of Telecommunications Services above that of AT&T.

26. Escalation Procedures

26.1 AT&T and U S WEST agree to exchange escalation lists which reflect contact personnel including vice president-level officers. These lists shall include name, department, title, phone number, and fax number for each person. AT&T and U S WEST agree to exchange up-to-date lists as reasonably necessary.

27. Dispute Resolution

27.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it may be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof and shall be noticed to the Commission. The arbitrator shall determine which Party or Parties will bear the costs of arbitration, including apportionment, if appropriate. The arbitration shall occur in Denver, Colorado and the governing law shall be in accordance with Section 21.1 above.

27.2 In the event AT&T and U S WEST are unable to agree on certain issues during the term of the Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted .

27.3 If a Dispute is submitted to arbitration pursuant to Section 27.1 above, the procedures described in this Section 27.3 shall apply, notwithstanding the then current rules of the AAA. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set forth below. Each Party may submit in writing to a Party, and that Party shall so respond, to an agreed amount of the following: interrogatories, demands to produce documents, and requests for admission. Not less than ten (10) days prior to the arbitration hearing, the Parties shall exchange witness and exhibit lists. Deposition discovery shall be controlled by the arbitrator. Additional discovery may be permitted upon mutual agreement of the Parties or the determination of the arbitrator. The arbitration hearing held in accordance with the provisions of Section 27.1 shall be commenced within thirty (30) days after a demand for arbitration by either Party, and shall be held in Denver, Colorado. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within seven (7) days after the close of hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. The decision of the arbitrator shall be final and entered in a court having jurisdiction. The decision shall also be submitted to the Commission.

28. Nondisclosure

28.1 All information, including, but not limited to, specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data, (a) furnished by one Party to the other Party dealing with Customer specific, facility specific, or usage specific information, other than Customer information communicated for the purpose of publication of directory database inclusion, or (b) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (c) declared orally or in writing to the Recipient at the time of delivery, or by written notice given to the Recipient within ten (10) days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the Discloser. A Party who receives Proprietary Information via an oral communication may request written confir-

mation that the material is Proprietary Information. A Party who delivers Proprietary Information via an oral communication may request written confirmation that the Party receiving the information understands that the material is Proprietary Information.

28.2 Upon request by the Discloser, the Recipient shall return all tangible copies of Proprietary Information, whether written, graphic or otherwise, except that the Recipient's legal counsel may retain one (1) copy for archival purposes.

28.3 Each Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

28.4 Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Agreement do not apply to such Proprietary Information as:

28.4.1 was, at the time of receipt, already known to the Recipient free of any obligation to keep it confidential evidenced by written records prepared prior to delivery by the Discloser; or

28.4.2 is or becomes publicly known through no wrongful act of the Recipient; or

28.4.3 is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the Discloser with respect to such information; or

28.4.4 is independently developed by an employee, agent, or contractor of the Recipient which individual is not involved in any manner with the provision of services pursuant to this Agreement and does not have any direct or indirect access to the Proprietary Information; or

28.4.5 is approved for release by written authorization of the Discloser; or

28.4.6 required by law, a court, or governmental agency, provided that the Discloser has been notified of the requirement promptly after the Recipient becomes aware of the requirement, and provided that the Recipient undertakes all lawful measures to avoid disclosing such information until the Discloser has had reasonable time to obtain a protective order. The Recipient agrees to comply with any protective order that covers the Proprietary Information to be disclosed.

28.5 For a period of ten (10) years from receipt of Proprietary Information, the Recipient shall (a) use it only for the purpose of performing under this Agreement, (b) hold it in confidence and disclose it only to employees, authorized contractors and authorized agents who have a need to know it in order to perform under this Agreement, and (c) safeguard it from unauthorized use or disclosure using no less than the degree of care with which the Recipient safeguards its own Proprietary Information. Any authorized contractor or agent to whom Proprietary Information is provided must have executed a written agreement comparable in scope to the terms of this Section. Notwithstanding the foregoing, each Party shall provide advance notice of three (3) Business Days to the other of the intent to provide Proprietary Information to a governmental authority and the Parties shall cooperate with each other in attempting to obtain a suitable protective order. The Recipient agrees to comply with any protective order that covers the Proprietary Information to be disclosed.

28.6 Each Party agrees that the Discloser would be irreparably injured by a breach of this Section 28 by the Recipient or its representatives and that the Discloser shall be entitled to

seek equitable relief, including injunctive relief and specific performance, in the event of any breach of this Section 28. Such remedies shall not be exclusive but shall be in addition to all other remedies available at law or in equity.

28.7 CPNI related to either Party's subscribers obtained by virtue of Local Interconnection or any other service provided under this Agreement shall be the Discloser's Proprietary Information and may not be used by the Recipient for any purpose except performance of its obligations under this Agreement, and in connection with such performance, shall be disclosed only to employees, authorized contractors and authorized agents with a need to know, unless the subscriber expressly directs the Discloser to disclose such information to the Recipient pursuant to the requirements of Section 222(c)(2) of the Act. If the Recipient seeks and obtains written approval to use or disclose such CPNI from the Discloser, such approval shall be obtained only in compliance with Section 222(c)(2) and, in the event such authorization is obtained, the Recipient may use or disclose only such information as the Discloser provides pursuant to such authorization and may not use information that the Recipient has otherwise obtained, directly or indirectly, in connection with its performance under this Agreement.

28.8 Except as otherwise expressly provided in this Section 28, nothing herein shall be construed as limiting the rights of either Party with respect to its subscriber information under any applicable law, including, without limitation, Section 222 of the Act.

28.9 Notwithstanding any other provision of this Agreement, the Proprietary Information provisions of this Agreement shall apply to all Proprietary Information furnished by either Party with a claim of confidentiality or proprietary nature at any time.

29. Notices

29.1 Except as otherwise provided herein, all notices or other communication hereunder shall be deemed to have been duly given when made in writing and delivered in person or deposited in the United States mail, certified mail, postage prepaid, return receipt requested, or delivered by prepaid overnight express mail, and addressed as follows:

To AT&T:
Vice President, Local Services
AT&T Corp.
1875 Lawrence Street
Denver, Colorado 80202

Copy to:
General Counsel
AT&T Corp.
1875 Lawrence Street
Denver, Colorado 80202

To U S WEST:
Director - Interconnect Compliance
1801 California Street, 24th Floor
Denver, CO 80202

Copy to:
Vice President-U S WEST, Sioux Falls
125 S. Dakota Avenue
Sioux Falls, SD 57194

Copy to:
U S WEST, Inc. Law Department
Attention: General Counsel Interconnection
1801 California Street, 51st floor
Denver, CO 80202

29.2 If personal delivery is selected to give notice, a receipt of such delivery shall be obtained. The address to which notices or communications may be given to either Party may be changed by seven (7) days written notice given by such Party to the other pursuant to this Section 29.

30. Assignment

30.1 Neither Party may assign, transfer (whether by operation of law or otherwise) or delegate this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, provided that each Party may assign this Agreement to an Affiliate or an entity under its common control or an entity acquiring all or substantially all of its assets or equity by providing prior written notice to the other Party of such assignment or transfer. Any attempted assignment or transfer that is not permitted under the provisions of this Section 30 is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement.

30.2 If any obligation of U S WEST under this Agreement is performed by a subcontractor or Affiliate, U S WEST shall remain fully responsible for the performance of this Agreement in accordance with its terms and U S WEST shall be solely responsible for payments due to its subcontractors.

30.3 If any obligation of AT&T under this Agreement is performed by a subcontractor or Affiliate, AT&T shall remain fully responsible for the performance of this Agreement in accordance with its terms, and AT&T shall be solely responsible for payments due to its subcontractors.

31. Warranties

31.1 U S WEST shall conduct all activities and interfaces which are provided for under this Agreement with AT&T Customers in a carrier-neutral, nondiscriminatory manner.

31.2 U S WEST warrants that it has provided, and during the term of this Agreement it will continue to provide, to AT&T true and complete copies of all material agreements in effect between U S WEST and any third party (including Affiliates) providing any services to AT&T on behalf of or under contract to U S WEST in connection with U S WEST's performance of this Agreement, or from whom U S WEST has obtained licenses or other rights used by U S WEST to perform its obligations under this Agreement, provided, however, that U S WEST may provide such agreements under appropriate protective order.

32. Default

32.1 In the event of a breach of any material provision of this Agreement by either Party, the non-breaching Party shall give the other Party and the Commission written notice thereof, and:

32.1.1 If such material breach is for non-payment of amounts due hereunder pursuant to Section 3.2 of Part A of this Agreement, the breaching Party shall cure such breach within thirty (30) calendar days of receiving such notice. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Amounts disputed in good faith and withheld or set off shall not be deemed "amounts due hereunder" for the purpose of this provision.

32.1.2 If such material breach is for any failure to perform in accordance with this Agreement, which, in the sole judgment of the non-breaching Party, adversely affects the non-breaching Party's subscribers, the non-breaching Party shall give notice of the

breach and the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within ten (10) calendar days or within a period of time equivalent to the applicable interval required by this Agreement, whichever is shorter. If the breaching Party does not cure such breach within the applicable time period, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Notice under this Subsection 32.1.2 may be given electronically or by facsimile, provided that a hard copy or original of such notice is sent by overnight delivery service.

32.1.3 *If such material breach is for any other failure to perform in accordance with this Agreement, the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within forty-five (45) calendar days, and if it does not, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach.*

32.2 **This Agreement may be terminated by either party in whole at any time only for cause upon sixty (60) calendar days' prior written notice.**[13]

32.3 *In the event of any termination under this Section 32, U S WEST and AT&T agree to cooperate to provide for an uninterrupted transition of services to AT&T or another vendor designated by AT&T to the extent that U S WEST has the ability to provide such cooperation.*

32.4 *Notwithstanding any termination hereof, the Parties shall continue to comply with their obligations under the Act.*

33. Remedies

33.1 *In the event U S WEST fails to switch a subscriber to AT&T service as provided in this Agreement, U S WEST shall reimburse AT&T in an amount equal to all fees paid by such subscriber to U S WEST for such failed-to-be-transferred services from the time of such failure to switch to the time at which the subscriber switch is accomplished. This remedy shall be in addition to all other remedies available to AT&T under this Agreement or otherwise available.*

33.2 *All rights of termination, cancellation or other remedies prescribed in this Agreement, or otherwise available, are cumulative and are not intended to be exclusive of other remedies to which the injured Party may be entitled at law or equity in case of any breach or threatened breach by the other Party of any provision of this Agreement. Use of one or more remedies shall not bar use of any other remedy for the purpose of enforcing the provisions of this Agreement.*

34. Waivers

34.1 *No waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed.*

34.2 *No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right or condition.*

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[13] Per First Order at page 3, Paragraph 12.

34.3 Waiver by either Party of any default or breach by the other Party shall not be deemed a waiver of any other default or breach.

34.4 By entering into this Agreement, neither Party waives any right granted to it pursuant to the Act.

35. No Third Party Beneficiaries

35.1 The provisions of this Agreement are for the benefit of the Parties hereto and not for any other person; provided, however, that this shall not be construed to prevent AT&T from providing its Telecommunications Services to other carriers. This Agreement shall not provide any person not a Party hereto with any remedy, claim, liability, reimbursement, claim of action, or other right in excess of those existing without reference hereto.

36. Physical Security

36.1 U S WEST shall exercise the same degree of care to prevent harm or damage to AT&T or its employees, agents or subscribers, or their property as U S WEST provides itself. AT&T shall exercise the same degree of care to ensure the security of its equipment physically collocated within U S WEST's space as AT&T provides such security to itself.

36.1.1 U S WEST will restrict access to approved personnel to U S WEST's buildings. AT&T is responsible for the action of its employees and other authorized non-AT&T personnel; U S WEST is responsible for the action of its employees and other authorized non-U S WEST personnel.

36.1.2 U S WEST will furnish to AT&T the current name(s) and telephone number(s) of those central office supervisor(s) where a physical Collocation arrangement exists. The central office supervisor(s) will be the only U S WEST employee(s) with access to AT&T Collocation space.

36.1.3 U S WEST will comply at all times with U S WEST security and safety procedures at the individual central office locations where AT&T has physical Collocation arrangements. The Parties will cooperate to analyze security procedures of each company to evaluate ways in which security procedures of U S WEST may be enhanced.

36.1.4 U S WEST will allow AT&T to inspect or observe its physical spaces which house or contain AT&T equipment or equipment enclosures at any time upon completion of the physical Collocation quotation. Upon completion of the build out of the physical space, U S WEST will furnish AT&T with all keys, entry codes, lock combinations, or other materials or information which may be needed to gain entry via direct access to AT&T's physical space.

36.1.5 U S WEST agrees to logically partition any U S WEST owned access device systems, whether biometric or card reader, or types which are encoded identically or mechanical coded locks on external and or internal doors to spaces which house AT&T equipment.

36.1.6 U S WEST agrees to limit the keys used in its keying systems for spaces which contain AT&T equipment to the U S WEST supervisor for the specific facility to emergency access only. AT&T shall further have the right to change locks where deemed necessary for the protection and security of its physical spaces and will provide the U S WEST supervisor with the current key.

36.1.8 *U S WEST shall control unauthorized access from passenger and freight elevators, elevator lobbies and spaces which contain or house AT&T equipment or equipment space in the same manner as U S WEST provides such control for itself.*

36.1.9 *U S WEST will provide notification to designated AT&T personnel to indicate an actual or attempted security breach of AT&T physical space in the same time frame as U S WEST provides such notification to itself.*

37. Network Security

37.1 *U S WEST shall provide an appropriate and sufficient back-up and recovery plan to be used in the event of a system failure or emergency.*

37.2 *U S WEST shall install controls to (a) disconnect a user for a pre-determined period of inactivity on authorized ports; (b) protect subscriber proprietary information; and (c) ensure both ongoing operational and update integrity.*

37.3 *Each Party shall be responsible for the security arrangements on its side of the network to the Point of Interconnection. The Parties shall jointly cooperate to analyze network security procedures and cooperate to ensure the systems, access and devices are appropriately secured and compatible.*

38. Revenue Protection

38.1 *U S WEST shall make available to AT&T all present and future fraud prevention or revenue protection features that U S WEST provides to itself or others. These features include, but are not limited to, operator screening codes, information digits '29' and '70' which indicate prison and COCOT pay phone originating line types respectively, in accordance with the requirements established by the FCC, call blocking of domestic, international blocking for business and residence, 900, NPA-976, and specific line numbers. U S WEST shall additionally provide partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems ("OSS") which include, but are not limited to, Line Information Data Base Fraud monitoring systems. Fraud prevention upgrades as part of the normal*

38.2 *Uncollectible or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the Party causing such error.*

38.3 *Uncollectible or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending operational support systems by unauthorized third parties shall be the responsibility of the Party having administrative control of access to said Network Element or operational support system software.*

38.4 *Each Party shall be responsible for any uncollectible or unbillable revenues resulting from the unauthorized use of facilities under its control or services it provides, including clip-on fraud.*

38.5 *The Parties shall work cooperatively to minimize fraud associated with third-number billed calls, calling card calls, and any other services related to this Agreement.*

39. Law Enforcement Interface

39.1 *U S WEST shall provide all necessary assistance to facilitate the execution of wiretap or dialed number recorder orders from law enforcement authorities.*

40. Collocation

40.1 General Description

40.1.1 *"Collocation" is the right of AT&T to obtain dedicated space in U S WEST Local Serving Office (LSO) or other U S WEST locations, including, but not limited to, U S WEST serving wire center and tandem offices, as well as all buildings or similar structures owned or leased by U S WEST, including those on public rights-of-way, that house U S WEST network facilities, including, but not limited to, vaults containing loop concentrators or similar structures, and the right to place equipment in such spaces for the purposes of interconnection with U S WEST's network or access to U S WEST's unbundled Network Elements. Collocation also includes U S WEST providing resourcesnecessary for the operation and economical use of collocated equipment, as provided below in this Section 40, and by the Act and FCC rules.*

40.1.2 *Collocation is offered for network interconnection between the Parties. AT&T may cross connect to other collocated parties via facilities provided by U S WEST, provided that AT&T's collocated equipment is also used for Interconnection with U S WEST or access to U S WEST's unbundled Network Elements.*

40.1.3 *AT&T is responsible for bringing its own or leased facilities to the U S WEST-designated Point of Interface ("POI"). U S WEST will extend AT&T's facilities from the POI to the cable vault within the wire center. If necessary, U S WEST may bring the facilities into compliance with U S WEST internal fire code standards and extend the facilities to the collocated space.*

40.1.4 *AT&T will be provided two (2) points of entry into the U S WEST wire center only when there are at least two (2) existing entry points for U S WEST cable and when there are vacant entrance ducts in both.*

40.1.5 **AT&T may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Units (RSUs)) to terminate basic transmission facilities. U S WEST is not required to permit Collocation of equipment used to provide enhanced services.** [14] *AT&T must identify what equipment will be installed, to allow for U S WEST to use this information in engineering the power, floor loading, heat release, environmental particulant level, and HVAC.*

40.1.6 **AT&T may collocate the amount and type of equipment it deems necessary in its collocated space in accordance with FCC Rules and Regulations. U S WEST shall not restrict the types of equipment to be installed except to the extent that U S WEST may demonstrate to the Commission that a particular request is not technically feasible.**[15]

40.1.7 *Expanded Interconnection Channel Termination (EICT). Telecommunications interconnection between AT&T's collocated equipment and U S WEST's network may be accomplished via an Expanded Interconnection Channel Termination (EICT). This element can be at the DS-3, DS-1, DS-0, or any other technically feasible level, subject to network disclosure requirements of the FCC, depending on the U S WEST service to which it is connected. The terms and conditions of the tariff for EICT are incorporated only to the extent that they are agreed to by the*

[14] Per First Order at page 9, Paragraph 55.
[15] Per First Order at page 8, Paragraph 49.

Parties. Within ninety (90) days of a request by either Party the Parties will meet to review the tariff and seek resolution on disagreed items.

40.1.8 Consistent with U S WEST's internal practice, within ten (10) Business Days of AT&T's request for any space, U S WEST shall provide information available to it regarding the environmental conditions of the space provided for placement of equipment and interconnection, including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in U S WEST's possession or files, or the possession of an agent, contractor, employee, lessor, or tenant of U S WEST's that holds such information on U S WEST's behalf.

40.1.9 U S WEST shall allow AT&T to perform any environmental site investigations, including, but not limited to, asbestos surveys, which AT&T deems to be necessary in support of its Collocation needs. AT&T shall advise U S WEST in writing of its intent to conduct such investigation, and shall receive written approval from U S WEST to proceed. AT&T shall indemnify U S WEST according to Section 18 of this Agreement for any loss or claim for damage suffered by U S WEST as a result of AT&T's actions during any site inspection.

40.1.10 If the space provided for the placement of equipment, Interconnection, or provision of service contains environmental contamination or hazardous material, particularly, but not limited to, asbestos, lead paint or radon, which makes the placement of such equipment or Interconnection hazardous, U S WEST shall offer an alternative space, if available, for AT&T's consideration.

Issue A-1 - Parked

[U S WEST proposed language]

40.1.11 AT&T may utilize its collocated space for the purpose of combining two or more unbundled Network Elements it has purchased from U S WEST. AT&T may combine unbundled Network Elements within AT&T's physical collocation space. Alternatively, AT&T may combine unbundled network elements by placing jumpers on a SPOT frame as described in Section 19 of Attachment 3 of this Agreement. U S WEST and AT&T shall have access to a common demarcation point for test purposes.

[AT&T proposed language]

40.1.11 [Intentionally left blank for numbering consistency.]

40.2 Virtual Collocation

40.2.1 U S WEST shall provide virtual Collocation for the purpose of Interconnection or access to unbundled Network Elements subject to the rates, terms and conditions of this Agreement.

40.2.2 Upon mutual agreement, AT&T will have physical access to the U S WEST wire center building pursuant to a virtual Collocation arrangement.

40.2.3 AT&T will be responsible for obtaining and providing to U S WEST administrative codes, e.g., common language codes, for all equipment specified by AT&T and installed in wire center buildings.

40.2.4 AT&T will be responsible for payment of training of U S WEST employees for the maintenance, operation and installation of AT&T's virtually collocated equipment when that equipment is different than the equipment used by U S WEST. Training conditions are further described in the Virtual Collocation Rate Element section following.

40.2.5 AT&T will be responsible for payment of reasonable charges incurred as a result of agreed upon maintenance and/or repair of AT&T's virtually collocated equipment.

40.2.6 U S WEST does not guarantee the reliability of AT&T's virtually collocated equipment, but U S WEST is responsible for proper installation, maintenance and repair of such equipment, including the change out of electronic cards provided by AT&T.

40.2.7 AT&T is responsible for ensuring the functionality and interoperability of virtually collocated SONET equipment provided by different manufacturers.

40.2.8 AT&T, as bailor, will transfer possession of AT&T's virtually collocated equipment to U S WEST, as bailee, for the sole purpose of providing U S WEST with the ability to install, maintain and repair AT&T's virtually collocated equipment. Title to the AT&T virtually collocated equipment shall not pass to U S WEST.

40.2.9 AT&T shall ensure that upon receipt by U S WEST of AT&T's virtually collocated equipment, AT&T will make available all access to ongoing technical support to U S WEST, as available under the equipment warranty or other terms and conditions, all at AT&T's expense. AT&T shall advise the manufacturer and seller of the virtually collocated equipment that it will be installed, maintained and repaired by U S WEST.

40.2.10 AT&T's virtually collocated equipment must comply with the Bellcore Network Equipment Building System (NEBS) Generic Equipment Requirements TR-NWT-000063, electromagnetic compatibility (EMC) per GR-1089-CORE, Company wire center environmental and transmission standards and any statutory (local, state or federal) and/or regulatory requirements, all of the foregoing which may be in effect at the time of equipment installation or which may subsequently become effective. AT&T shall provide U S WEST interface specifications (e.g., electrical, functional, physical and software) of AT&T's virtually collocated equipment.

40.2.11 AT&T must specify all software options and associated plug-ins for its virtually collocated equipment.

40.2.12 AT&T is responsible for purchasing and maintaining a supply of spares. Upon failure of the AT&T virtually collocated equipment, AT&T is responsible for transportation and delivery of maintenance spares to U S WEST at the wire center housing the failed equipment.

40.2.13 Where AT&T is virtually collocated in a premises which was initially prepared for virtual Collocation, AT&T may elect to retain its virtual Collocation in that premises and expand that virtual Collocation according to the rates, terms and conditions of this Agreement.

40.3 Physical Collocation

40.3.1 U S WEST shall provide to AT&T physical Collocation of equipment necessary for Interconnection or for access to unbundled Network Elements, except that U S WEST shall provide for virtual Collocation where space is available or expan-

sion or rearrangement is possible if U S WEST demonstrates to the Commission that physical Collocation is not practical for technical reasons or because of space limitations, as provided in Section 251(c)(6) of the Act. AT&T shall pay a prorated amount for expansion of said space. U S WEST shall provide such Collocation for the purpose of Interconnection or access to unbundled Network Elements, except as otherwise mutually agreed to in writing by the Parties or as required by the FCC or the Commission subject to the rates, terms and conditions of this Agreement.[16]

40.3.1.1 U S WEST shall permit AT&T to use vendors for all required engineering and installation services associated with its collocated equipment which are being collocated by AT&T pursuant to this Agreement. Within one hundred and twenty (120) days of a request by either U S WEST and AT&T shall compose and agree on a list of approved vendors and/or agree on minimum qualifications for such contractors consistent with industry standards, such agreement not to be unreasonably withheld. In the event such agreement cannot be reached and the dispute resolution process outlined herein has not concluded on the issue of approved vendors, the list of approved vendors maintained by U S WEST as of the Effective Date of the Agreement shall be the default list until the conclusion of the dispute resolution process. **If U S WEST objects to a vendor, U S WEST shall have the burden of proof as to why the vendor is unacceptable.**[17]

40.3.2 Where AT&T is virtually collocated in a premises which was initially prepared for virtual Collocation, AT&T may elect, unless it is not practical for technical reasons or because of space limitations, to convert its virtual Collocation to physical Collocation at such premises in which case AT&T shall coordinate the construction and rearrangement with U S WEST of its equipment (IDLC and transmission) and circuits for which AT&T shall pay U S WEST at applicable rates, and pursuant to the other terms and conditions in this Agreement. In addition, all applicable physical Collocation recurring charges shall apply.

40.3.3 AT&T will be allowed access to the POI on non-discriminatory terms. AT&T owns and is responsible for the installation, maintenance and repair of its equipment located within the space rented from U S WEST.

40.3.4 AT&T must use leased space as soon as reasonably possible and may not warehouse space for later use or sublease to another provider. Physical Collocation is offered on a space-available, first-come, first-served basis.

40.3.5 The minimum standard leasable amount of floor space is one hundred (100) square feet. AT&T must efficiently use the leased space and no more than fifty percent (50%) of the floor space may be used for storage cabinets and work surfaces. AT&T and U S WEST may negotiate other storage arrangements on a case-by-case basis. AT&T may store spares within its collocated space.

40.3.6 AT&T's leased floor space will be separated from other competitive providers and U S WEST space through cages or hard walls. AT&T may elect to have U S WEST construct the cage, or choose from U S WEST approved contractors to

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[16] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: U S WEST will enable AT&T to combine two or more unbundled Network Elements through physical collocation arrangements consistent with the preceding provisions of this Agreement.
[17] Per First Order at page 9, Paragraph 57.

construct the cage, meeting U S WEST's installation Technical Publication 77350. Any deviation to AT&T's request must be approved.

40.3.7 The following standard features will be provided by U S WEST:

(a) Heating, ventilation and air conditioning.

(b) Smoke/fire detection and any other building code requirement.

40.3.8 U S WEST Responsibilities

(a) Design the floor space within each location which will constitute AT&T's leased space.

(b) Ensure that the necessary construction work is performed on a timely basis to build AT&T's leased physical space and the riser from the vault to the leased physical space.

(c) Develop a quotation specific to AT&T's request.

(d) Extend U S WEST-provided and owned fiber optic cable from the POI through the cable vault and extend the cable to AT&T's leased physical space or place the cable in fire retardant tubing prior to extension to AT&T's leased physical space.

(e) Installation and maintenance and all related activity necessary to provide Channel Termination between U S WEST's and AT&T's equipment.

(f) Work cooperatively with AT&T in matters of joint testing and maintenance.

40.3.9 AT&T Responsibilities

(a) Determine the type of enclosure for the physical space.

(b) Procure, install and maintain all fiber optic facilities of AT&T up to the U S WEST designated POI.

(c) Provide for installation, maintenance, repair and service of all AT&T's equipment located in the leased physical space.

(d) Ensure that all equipment installed by AT&T complies with Bellcore Network Equipment Building System Generic Equipment requirements, U S WEST environmental and transmission standards, and any statutory (local, federal, or state) or regulatory requirements in effect at the time of equipment installation or that subsequently become effective.

40.3.10 The installation of any interconnection service will be coordinated between the Parties so that AT&T may utilize those services once AT&T has accepted its leased physical space.

40.3.11 If, at any time, U S WEST reasonably determines that the equipment or the installation does not meet standard industry requirements, such failure being due to actions of AT&T or its agents, AT&T will be responsible for the costs associated with the removal, modification to, or installation of the equipment to bring it into compliance. If AT&T fails to correct any non-compliance within thirty (30) calen-

dar days or as soon as reasonably practical after the receipt of written notice of non-compliance, U S WEST may have the equipment removed or the condition corrected at AT&T's expense.

40.3.12 If, during installation, U S WEST reasonably determines that AT&T activities or equipment are unsafe, non-industry standard or in violation of any applicable laws or regulations, U S WEST has the right to stop work until the situation is remedied. If such conditions pose an immediate threat to the safety of personnel, interfere with the performance of U S WEST's service obligations, or pose an immediate threat to the physical integrity of the conduit system or the cable facilities, U S WEST may perform such work and/or take action as is necessary to correct the condition at AT&T's expense.

40.3.13 U S WEST shall provide basic telephone service with a connection jack as requested by AT&T from U S WEST for the collocated space. Upon AT&T's request and following the normal provisioning process, this service shall be available at the AT&T collocated space on the day the space is turned over to AT&T by U S WEST.

40.3.14 Where available, U S WEST shall provide access to eyewash stations, bathrooms, and drinking water within the collocated facility on a twenty-four (24) hours per day, seven (7) days per week basis for AT&T personnel and its designated agents.

40.3.15 U S WEST shall provide AT&T with written notice five (5) Business Days prior to those instances where U S WEST or its subcontractors may be performing work that could reasonably potentially affect AT&T's service. U S WEST will make reasonable efforts to inform AT&T by telephone of any emergency related activity prior to the start of the activity that U S WEST or its subcontractors may be performing that could reasonably potentially affect AT&T's service, so that AT&T can take any action required to monitor or protect its service.

40.3.16 U S WEST shall provide information regarding the location, type, and cable termination requirements (i.e., connector type, number and type of pairs, and naming convention) for U S WEST point of termination to AT&T within five (5) Business Days of AT&T's acceptance of U S WEST's quote for collocated space.

40.3.17 U S WEST shall provide the dimensions for AT&T outside plant fiber ingress and egress into AT&T collocated space within five (5) Business Days of AT&T's acceptance of U S WEST's quote for collocated space.

40.3.18 U S WEST shall provide the sizes and number of power feeders for the collocated space to AT&T within ten (10) Business Days of AT&T's acceptance of U S WEST's quote for collocated space.

40.3.19 U S WEST shall provide positive confirmation to AT&T when construction of AT&T collocated space is fifty percent (50%) completed. This confirmation shall also include confirmation of the scheduled completion and turnover dates.

40.3.20 [Intentionally left blank for numerical consistency.]

40.3.21 With the exception of Subparagraph (b) below, U S WEST shall provide the following information to AT&T within five (5) Business Days or as reasonably necessary upon receipt of a written request from AT&T:

(a) *additional work restriction guidelines.*

(b) *U S WEST or industry technical publication guidelines that impact the design of U S WEST collocated equipment, unless such documents are already in the possession of AT&T. The following U S WEST Technical Publications provide information regarding central office equipment and Collocation guidelines:*

77350 Central Office Telecommunications Equipment Installation and Removal Guidelines
77351 Central Office Telecommunications Equipment Engineering Standards
77355 Grounding - Central Office and Remote Equipment Environment
77386 Expanded Interconnection and Collocation for Private Line Transport and Switched Access Services.

AT&T may obtain the above documents from

Faison Office Products Company
3251 Revere St. Suite 200
Aurora, Colorado 80011
(303) 340-3572

(c) *appropriate U S WEST contacts (names and telephone numbers) for the following areas:*

Engineering
Physical & Logical Security
Provisioning
Billing
Operations
Site and Building Managers
Environmental and Safety

(d) *escalation process for the U S WEST employees (names, telephone numbers and the escalation order) for any disputes or problems that might arise pursuant to AT&T's Collocation.*

40.3.22 *Power as referenced in this Agreement refers to any electrical power source supplied by U S WEST for AT&T equipment. U S WEST will supply power to support AT&T equipment at equipment specific DC and AC voltages.* [18] *U S WEST shall supply power to AT&T at parity with that provided by U S WEST to itself. If U S WEST performance, availability or restoration falls below industry standards, U S WEST shall bring itself into compliance with such industry standards as soon as technologically feasible.*

(a) *Central office power supplied by U S WEST into the AT&T equipment area, shall be supplied in the form of power feeders (cables) on cable racking into the designated AT&T equipment area. The power feeders (cables) shall efficiently and economically support the requested quantity and*

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18 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "at a minimum".

capacity of AT&T equipment. The termination location shall be mutually agreed upon by the Parties.

(b) U S WEST power equipment supporting AT&T's equipment shall:

i. comply with applicable industry standards (e.g., Bellcore, NEBS, IEEE, UL, and NEC) or manufacturer's equipment power requirement specifications for equipment installation, cabling practices, and physical equipment layout;

ii. have redundant power feeds with physical diversity and battery back-up as required by the equipment manufacturer's specifications for AT&T equipment, or,[19] at parity with that provided for similar U S WEST equipment at that location;

iii. provide central office ground, connected to a ground electrode located within the AT&T collocated space, at a level above the top of AT&T equipment plus or minus two (2) feet to the left or right of AT&T's final request;

iv. provide an installation sequence and access that will allow installation efforts in parallel without jeopardizing personnel safety or existing services of either Party;

v. provide cabling that adheres to Bell Communication Research (Bellcore) Network Equipment-Building System (NEBS) standards TR-EOP-000063;

vi. provide Lock Out-Tag Out and other electrical safety procedures and devices in conformance with the most stringent of OSHA or industry guidelines; and

vii. ensure that installed equipment meets Bellcore specifications.

40.4 Collocation Rate Elements

40.4.1 Common Rate Elements

The following rate elements are common to both virtual and physical Collocation:

(a) Quote Preparation Fee. This covers the work involved in developing a quotation for AT&T for the total costs involved in its Collocation request

(b) Entrance Facility. Provides for fiber optic cable on a per two (2) fiber increment basis from the point of interconnection utilizing U S WEST owned, conventional single mode type of fiber optic cable to the collocated equipment (for virtual collocation) or to the leased space (for physical Collocation). Entrance facility includes riser, fiber placement, entrance closure, conduit/innerduct, and core drilling.

(c) Cable Splicing. Represents the labor and equipment to perform a subsequent splice to the AT&T provided fiber optic cable after the initial installation splice. Includes a per-setup and a per-fiber-spliced rate elements.

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[19] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "at a minimum".

(d) *48 Volt Power. Provides 48 volt power to the AT&T collocated equipment. Charged on a per ampere basis.*

(e) *48 Volt Power Cable. Provides for the transmission of -48 Volt DC power to the collocated equipment. It includes engineering, furnishing and installing the main distribution bay power breaker, associated power cable, cable rack and local power bay to the closest power distribution bay. It also includes the power cable (feeders) A and B from the local power distribution bay to the leased physical space (for physical Collocation) or to the collocated equipment (for virtual collocation).*

(f) *Inspector Labor. Provides for the U S WEST qualified personnel necessary when AT&T requires access to the POI after the initial installation or access to its physical Collocation floor space, where an escort is required. A call-out of an inspector after business hours is subject to a minimum charge of four (4) hours. Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8:00 am to 5:00 pm and after business hours are after 5:00 pm and before 8:00 am, Monday through Friday, all day Saturday, Sunday and holidays.*

(g) *Expanded Interconnection Channel Regeneration. Required when the distance from the leased physical space (for physical Collocation) or from the collocated equipment (for virtual Collocation) to the U S WEST network is of sufficient length to require regeneration.*

(h) *U S WEST will provide external synchronization when available.*

(i) *U S WEST will provide 20 hertz ringing supply when available.*

40.4.2 Physical Collocation Rate Elements

The following rate elements apply only to physical Collocation arrangements:

(a) *Enclosure Buildout. The Enclosure Buildout element, either Cage or Hardwall, includes the material and labor to construct the enclosure specified by AT&T or AT&T may choose from U S WEST approved contractors to construct the cage, meeting U S WEST's installation Technical Publication 77350. It includes the enclosure (cage or hardwall), air conditioning (to support AT&T loads specified), lighting (not to exceed 2 watts per square foot), and convenience outlets (3 per cage or number required by building code for the hardwall enclosure). Also provides for humidification, if required. Pricing for Enclosure Buildout will be provided on an individual basis due to the uniqueness of AT&T's requirements, central office structure and arrangements.*

(b) *Floor Space Rental. This element provides for the rental of the floor space provided to AT&T pursuant to physical Collocation arrangement.*

40.4.3 Virtual Collocation Rate Elements

The following rate elements apply only to virtual Collocation arrangements:

(a) *Maintenance Labor. Provides for the labor necessary for repair of out of service and/or service-affecting conditions and preventative maintenance of the AT&T virtually collocated equipment. AT&T is responsible for ordering maintenance spares. U S WEST will perform maintenance and/or repair work upon receipt of the replacement maintenance spare and/or equipment for AT&T. A call-out of a maintenance technician after business hours is subject to a minimum charge of four (4) hours. Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8:00 am to 5:00 pm and after business hours are after 5:00 pm and before 8:00 am, Monday through Friday, all day Saturday, Sunday and holidays.*

(b) *Training Labor. Provides for the billing of vendor-provided training for U S WEST personnel on a metropolitan service area basis, necessary for AT&T virtually collocated equipment which is different from equipment used by U S WEST. U S WEST will require three (3) U S WEST employees to be trained per metropolitan service area in which the AT&T virtually collocated equipment is located. If, by an act of U S WEST, trained employees are relocated, retired, or are no longer available, U S WEST will not require AT&T to provide training for additional U S WEST employees for the same virtually collocated equipment in the same metropolitan area. Fifty percent (50%) of the amount of training billed to AT&T will be refunded to AT&T should a second collocator or U S WEST in the same metropolitan area select the same virtually collocated equipment as AT&T. The second collocator or U S WEST will be charged one half of the original amount paid by AT&T for the same metropolitan area.*

(c) *Equipment Bay. Provides mounting space for the AT&T virtually collocated equipment. Each bay includes the seven (7) foot bay, its installation, and all necessary environmental supports. Mounting space on the bay, including space for the fuse panel and air gaps necessary for heat dissipation is limited to 78 inches. The monthly rate is applied per shelf.*

(d) *Engineering Labor. Provides the planning and engineering of the AT&T virtually collocated equipment at the time of installation, change or removal.*

(e) *Installation Labor. Provides for the installation, change or removal of the AT&T virtually collocated equipment.*

40.5. Collocation Installation Intervals

40.5.1 *U S WEST shall have a period of thirty (30) calendar days after receipt by AT&T of a Request for Collocation to provide AT&T with a written quotation containing all nonrecurring charges and fees for the requested Collocation (the "Quotation Preparation Period"). AT&T shall make payment of fifty (50) percent of the nonrecurring charges and fees upon acceptance of the quotation ("Initial Payment") with the remainder due upon completion of the construction. In the event AT&T disputes the amount of U S WEST's proposed nonrecurring charges and fees, AT&T shall deposit fifty percent (50%) of the nonrecurring charges and fees to an interest bearing escrow account prior to the commencement of construction ("Initial Deposit"). The remainder of the nonrecurring charges and fees shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance with the resolution of such dispute and any interest that has accrued with respect to amounts of the account shall be distributed proportionately to the Parties. U S*

WEST shall complete installation pursuant to the AT&T Request for Collocation within a maximum of three (3) months after the Initial Payment or Initial Deposit for physical or virtual Collocation. If there is a dispute between U S WEST and AT&T regarding the amount of any nonrecurring charges and fees, such dispute shall be resolved in accordance with Section 27. The pendency of any such dispute shall not affect the obligation of U S WEST to complete Collocation within the installation intervals described above.

41. Technical References - Collocation

Subject to Sections 52.5.1 and 52.5.2 of this Part A of this Agreement, U S WEST shall provide collocation in accordance with the following standards:

41.1 Institute of Electrical and Electronics Engineers (IEEE) Standard 383, IEEE Standard for Type Test of Class 1 E Electric Cables, Field Splices, and Connections for Nuclear Power Generating Stations;

41.2 National Electrical Code (NEC), use most recent issue;

41.3 TA-NPL-000286, NEBS Generic Engineering Requirements for System Assembly and Cable Distribution, Issue 2 (Bellcore, January 1989);

41.4 TR-EOP-000063 Network Equipment-Building System (NEBS) Generic Equipment Requirements, Issue 3, March 1988;

41.5 TR-EOP-000151, Generic Requirements for 24-, 48-, 130-, and 140- Volt Central Office Power Plant Rectifiers, Issue 1 (Bellcore, May 1985);

41.6 TR-EOP-000232, Generic Requirements for Lead-Acid Storage Batteries, Issue 1 (Bellcore, June 1985);

41.7 TR-NWT-000154, Generic Requirements for 24-, 48-, 130, and 140- Volt Central Office Power Plant Control and Distribution Equipment, Issue 2 (Bellcore, January 1992);

41.8 TR-NWT-000295, Isolated Ground Planes: Definition and Application to Telephone Central Offices, Issue 2 (Bellcore, July 1992);

41.9 TR-NWT-000840, Supplier Support Generic Requirements (SSGR), (A Module of LSSGR, FR-NWT-000064), Issue 1 (Bellcore, December 1991);

41.10 TR-NWT-001275 Central Office Environment Installations/Removal Generic Requirements, Issue 1, January 1993; and

41.11 Underwriters' Laboratories Standard, UL 94.

42. Number Portability

42.1 Interim Number Portability (INP)

42.1.1 General Terms.

(a) The Parties shall provide Interim Number Portability (INP) on a reciprocal basis to the extent technically feasible.

(b) Until permanent number portability is implemented by the industry pursuant to regulations issued by the FCC or the Commission, the Parties agree to

provide INP to each other through Remote Call Forwarding, Direct Inward Dialing, or other appropriate means as agreed to by the Parties.

(c) *Once permanent number portability is implemented pursuant to FCC or Commission regulation, either Party may withdraw, at any time and at its sole discretion, its INP offerings, subject to advance notice to the other Party with sufficient time to allow for coordination to allow the seamless and transparent conversion of INP Customer numbers to permanent number portability. Upon implementation of permanent number portability pursuant to FCC regulations, both Parties agree to conform and provide such permanent number portability. Parties agree to expeditiously convert Customers from interim number portability to permanent number portability, provided that the interim service is not removed until the Customer has been converted.*

(d) *U S WEST will update and maintain its Line Information Database ("LIDB") listings for numbers retained by AT&T and its Customer, and restrict or cancel calling cards associated with these forwarded numbers as directed by AT&T. Further, U S WEST will not block third party and collect calls to those numbers unless requested by AT&T.*

(e) *The ordering Party shall specify on a per telephone number basis which method of INP is to be employed and the providing Party shall provide such method to the extent technically feasible.*

(f) *Where either Party has activated an entire NXX, or activated a substantial portion of an NXX with the remaining numbers in that NXX either reserved for future use or otherwise unused, if these Customer(s) choose to receive service from the other Party, the first Party shall cooperate with the second Party to have the entire NXX reassigned in the LERG (and associated industry databases, routing tables, etc.) to an End Office operated by the second Party. Such transfer will be accomplished with appropriate coordination between the Parties and subject to appropriate industry lead-times for movement of NXXs from one switch to another.*

42.1.2 Description Of Service

(a) *Interim Number Portability Service ("INP") is a service arrangement that can be provided by U S WEST to AT&T or by AT&T to U S WEST.*

(b) *INP applies to those situations where an end-user Customer elects to change service providers, and such Customer also wishes to retain its existing or reserved telephone number(s). INP consists of providing the capability to route calls placed to telephone numbers assigned to one Party's switches to another Party's switches.*

(c) *INP is available as INP-Remote Call Forwarding ("INP-RCF") permitting a call to a U S WEST assigned telephone number to be translated to AT&T's dialable local number. AT&T may terminate the call as desired. Additional capacity for simultaneous call forwarding is available where technically feasible on a per path basis. AT&T will need to specify the number of simultaneous calls to be forwarded for each number ported.*

(d) *DID is another INP method that makes use of direct inward dialing trunks. Each DID trunk group used for INP is dedicated to carrying DID INP traffic.*

between the U S WEST end office and the AT&T switch. Traffic on these trunks cannot overflow to other trunks, so the number of trunks shall be conservatively engineered by U S WEST. Also, inter-switch signaling is usually limited to multi-frequency (MF). This precludes passing Calling Line ID to the AT&T switch.

(e) *RI-PH will route a dialed call to the U S WEST switch associated with the NXX of the dialed number. The U S WEST switch shall then insert a prefix onto the dialed number which identifies how the call is to be routed to AT&T. The prefixed dialed number is transmitted to the U S WEST tandem switch to which AT&T is connected. Route indexing is only available with seven digit local dialing.*

(f) *The prefix is removed by the operation of the tandem switch and the dialed number is routed to AT&T's switch so the routing of the call can be completed by AT&T.*

i. *DN-RI is a form of RI-PH that requires direct trunking between the U S WEST switch to which the ported number was originally assigned and the AT&T switch to which the number has been ported. The U S WEST switch shall send the originally dialed number to the AT&T switch without a prefix.*

ii. *U S WEST shall provide RI-PH or DN-RI on an individual telephone number basis, as designated by AT&T. Where technically feasible, calls to ported numbers are first directed to the AT&T switch over direct trunks but may overflow to tandem trunks if all trunks in the direct group are occupied.*

iii. *For both RI-PH and DN-RI the trunks used may, at AT&T's option, be the same as those used for exchange of other local traffic with U S WEST. At AT&T's option, the trunks shall employ SS7 or in band signaling and may be one way or two way.*

(g) *INP is subject to the following restrictions:*

i. *An INP telephone number may be assigned by AT&T only to AT&T's Customers located within U S WEST's local calling area and toll rating area that is associated with the NXX of the ported number. This is to prevent the possibility of Customers using number portability to extend the local calling area.*

ii. *INP is applicable only if AT&T is engaged in a reciprocal traffic exchange arrangement with U S WEST.*

iii. *INP is not offered for NXX Codes 555, 976, 960 and 1+ sent-paid telephones, and Service Access Codes (i.e. 500, 700, 800/888, 900). INP is not available for FGA seven-digit numbers (including foreign exchange (FEX), FX and FX/ONAL and foreign Central Office Service),. Furthermore, INP numbers may only be used consistent with network efficiency and integrity, i.e., inhibitions on mass calling events.*

iv. *The ported telephone number will be returned to the switch which originally had the ported number when the ported service is dis-*

connected. The normal intercept announcement will be provided by the porting company for the period of time until the telephone number is reassigned.

v. Within thirty (30) days of a request of either AT&T U S WEST shall provide AT&T a list of those features that are not available for INP telephone numbers due to technical limitations.

42.1.3 Ordering and Maintenance

(a) AT&T is responsible for all direct interactions with AT&T's end users with respect to ordering and maintenance.

(b) U S WEST shall exchange with AT&T SS7 TCAP messages as required for the implementation of Custom Local Area Signaling Services (CLASS) or other features available in the U S WEST network.

(c) Each Party's designated INP switch must return answer and disconnect supervision to the other Party's switch.

(d) U S WEST shall disclose to AT&T any technical or capacity limitations that would prevent use of a requested INP in a particular switching office.

(e) The Parties will develop and implement an efficient deployment process to ensure call routing integrity for toll and local calls, with the objective to eliminate Customer downtime.

(f) For INP, AT&T shall have the right to use the existing U S WEST 911 infrastructure for all 911 capabilities. When RCF is used for AT&T subscribers both the ported numbers and shadow numbers shall be stored in ALI databases. AT&T shall have the right to verify the accuracy of the information in the ALI databases via direct connection to the SCC ALI database pursuant to the same process and procedures SCC makes available to U S WEST.

42.2 Permanent Number Portability (PNP)

42.2.1 Upon implementation of Permanent Number Portability (PNP) pursuant to FCC regulations, both Parties agree to conform and provide such Permanent Number Portability. To the extent consistent with the FCC rules as amended from time to time, the requirements for PNP shall include the following:

42.2.2 Subscribers must be able to change local service providers and retain the same telephone number(s) consistent with FCC rules and regulations and the Western Region LLC agreements as amended from time to time.

42.2.3 The PNP network architecture shall not subject alternate local exchange carriers to any degradation of service compared to U S WEST in any relevant measure, including transmission quality, switching and transport costs, increased call set-up time and post-dial delay, and AT&T shall not be required to rely on the U S WEST network for calls completing to its ported Customers.

42.2.4 When an office is equipped with PNP, in accordance with the procedures specified by the North American Numbering Council, the NXX's in the office shall be defined as portable and translations will be changed in the Parties' switches to open those NXXs for database queries.

42.2.5 *When an NXX is defined as portable, it shall also be defined as portable in all PNP-capable offices which have direct trunks to the given switch.*

42.2.6. *Upon introduction of PNP in a Metropolitan Statistical Area ("MSA"), the applicable switches will be converted according to a published schedule with no unreasonable delay. All portable NXXs shall be recognized as portable, with queries launched from these switches.*

42.2.7 *Prior to implementation of PNP, the Parties agree to develop, implement, and maintain efficient methods to maintain 911 database integrity when a subscriber ports to another service provider. The Parties agree that the Customer should not be dropped from the 911 database during the transition.*

42.2.8 *When a subscriber ports to another service provider and has previously secured a reservation of line numbers from the donor provider for possible activation at some future point, these reserved but inactive numbers shall "port" along with the active numbers being ported by the subscriber. So long as AT&T maintains the reserved numbers, U S WEST shall not reassign said numbers. Upon request by either Party, the Parties will allocate the revenue generated from number reservations in accordance with a schedule to be mutually agreed upon. U S WEST shall provide AT&T the ability to reserve numbers.*

42.2.9 *During the process of porting a subscriber, the donor service provider shall implement the 10-Digit trigger feature, when the technology is made available in each switch in accordance with the schedules adopted by the FCC. When the donor provider receives the porting request, the unconditional trigger shall be applied to the subscriber's line at the time that has been agreed to via the Western Region LNP Operations Guidelines in order to overcome donor network time delays in the disconnection of the subscriber. Alternatively, when an activation notice is sent to an NPAC to trigger a broadcast to service provider databases, the donor switch shall have its translations changed to disconnect the subscriber's line within four hours or less after the donor network Local SMS's has received the broadcast. Porting requests that require coordination between service providers, in accordance with the guidelines, will be handled on a case-by-case basis and will not be covered by the above.*

42.2.10 *Both AT&T and U S WEST shall:*

(a) *support all emergency and Operator Services.*

(b) *use scarce numbering resources efficiently and administer such resources in a competitively neutral manner.*

(c) *jointly cooperate with each other to provide the information necessary to rate and bill all types of calls.*

(d) *jointly cooperate with each other to apply PNP consistently on a nationwide basis, and in accordance with all FCC directives.*

42.2.11 *A ten-digit code, consistent with the North American Numbering Plan, shall be used as a network address for each switch that terminates subscriber lines, i.e., an end office. This address shall support existing six-digit routing and may be implemented without changes to existing switch routing algorithms. In existing end offices, this*

address shall be selected from one of its existing NPA-NXXs. New end offices shall be assigned an address through normal administrative processes.

42.2.12 PNP employs an "N-1" (N minus 1) Query Strategy for interLATA or intraLATA toll calls, by which the originating carrier will pass the call to the appropriate toll carrier who will perform a query to an external routing database and efficiently route the call to the appropriate terminating local carrier either directly or through an access tandem office.

42.2.13 U S WEST shall furnish AT&T with the first six digits of the originating address when it supplies AT&T with the Jurisdiction Information Parameter for the originating address message.

42.2.14 U S WEST agrees to begin the introduction of PNP to end user subscribers who may begin changing local service providers and retaining their existing telephone number based on the time line set out by the FCC in its Telephone Number Portability Order (CC Docket No. 95-116), or in accordance with a Commission order if such time for introduction of PNP set by the Commission is earlier than would result under the FCC Order.

42.2.15 The generic requirements for the PNP alternative will be implemented in accordance with industry-standard specifications.

42.2.16 For a local call to a ported number, the originating carrier is the "N-1" carrier. It will perform an external database query as soon as the call reaches the first PNP-capable switch in the call path and pass the call to the appropriate terminating carrier. A PNP-capable originating switch shall query on a local call to a portable NXX as soon as it determines that it (the originating switch) does not serve the dialed number.

42.2.17 U S WEST shall be the default carrier for database queries where AT&T is unable to perform its own query due to abnormal conditions. AT&T shall be the default carrier for database queries where U S WEST is unable to perform its own query due to abnormal conditions.

42.2.18 U S WEST will provide AT&T PNP for subscribers moving to a different location, or staying at the same location, within the same rate center area.

42.2.19 U S WEST will work cooperatively with other local service providers to establish the Western Region Number Portability Administration Center/Service Management System (SMS). The SMS shall be administered by a neutral third party to provide for the efficient porting of numbers between carriers. There must be one (1) exclusive NPAC per portability State or region, and U S WEST shall provide all information uploads and downloads regarding ported numbers to/from, respectively, the exclusive NPAC. U S WEST and AT&T shall cooperate to facilitate the expeditious deployment of PNP through the process prescribed by the FCC, including, but not limited to, participation in the selection of a neutral third party and development of SMS, as well as SMS testing for effective procedures, electronic system interfaces, and overall readiness for use consistent with that specified for provisioning in this Agreement.

42.3 Requirements for INP and MP

42.3.1 [Intentionally left blank for numbering consistency.]

42.3.2 Cut-Over Process

The Parties shall cooperate in the process of porting numbers from one carrier to another so as to limit service outage for the ported subscriber. This shall include, but not be limited to, each Party updating its respective network element translations within fifteen (15) minutes following notification by the industry SMS, or ported-to local service provider, and deploying such temporary translations as may be required to minimize service outage, e.g., unconditional triggers. In addition, AT&T shall have the right to determine who initiates the order for INP in specific cut-over situations. The timeframes in this paragraph shall be pursuant to Generic Requirements for SCP Application and GTT Function for Number Portability, Issue 0.99, January 6, 1997 and subsequent versions which may be adopted from time to time. The Parties shall cooperate to review, and if necessary, adjust the above time frame based on their actual experiences.

42.3.3 Testing

U S WEST and AT&T shall cooperate in conducting AT&T's testing to ensure interconnectivity between systems. U S WEST shall inform AT&T of any system updates that may affect the AT&T network and U S WEST shall, at AT&T's request, perform tests to validate the operation of the network. Additional testing requirements may apply as specified by this Agreement.

42.3.4 Engineering and Maintenance

(a) U S WEST and AT&T will cooperate to ensure that performance of trunking and signaling capacity is engineered and managed at levels which are at least the same level of service as provided by U S WEST to its subscribers and to ensure effective maintenance testing through activities such as routine testing practices, network trouble isolation processes and review of operational elements for translations, routing and network fault isolation.

(b) Additional specific engineering and maintenance requirements shall apply as specified in this Agreement.

42.3.5 Recording and Billing

The Parties shall provide each other with accurate billing and subscriber account record exchange data necessary for billing their subscribers whose numbers have been ported.

42.3.6 Operator Services and Directory Assistance

With respect to Operator Services and Directory Assistance associated with NP for AT&T subscribers, U S WEST shall provide the following:

(a) While INP is deployed and prior to conversion to PNP:

i. The Parties acknowledge that technology, as of the Effective Date of this Agreement, does not permit the provision of BLV/BLI to ported numbers. When such becomes available in the U S WEST network, such technology shall be made available to AT&T.

ii. U S WEST shall allow AT&T to order provisioning of Telephone Line Number (TLN) calling cards and Billed Number Screening (BNS), in its

LIDB, for ported numbers, as specified by AT&T. U S WEST shall continue to allow AT&T access to its LIDB. Other LIDB provisions are specified in this Agreement.

iii. Where U S WEST has control of Directory Listings for NXX codes containing ported numbers, U S WEST shall maintain entries for ported numbers as specified by AT&T in accordance with the Listings Section of this Agreement.

(b) When PNP is in place:

i. The provisions in Section 42.3.6 preceding, shall apply when PNP is in place.

ii. If Integrated Services Digital Network User Part (ISUP) signaling is used, U S WEST shall provide the Jurisdiction Information Parameter in the SS7 Initial Address Message. (See Generic Switching and Signaling Requirements for Number Portability, Issue 1.0, February 12, 1996 (Editor - Lucent Technologies, Inc.)).

iii. The Parties shall provide, when received from the NPAC, a 10-Digit Global Title Translation (GTT) Node for routing queries for TCAP-based Operator Services (e.g., LIDB). The acquiring company will provide the GTT to the NPAC. The NPAC will distribute this information to the donor company and all other parties.

iv. U S WEST OSS shall meet all requirements specified in "Generic Operator Services Switching Requirements for Number Portability," Issue 1.1, June 20, 1996 as updated from time to time.

43. Dialing Parity

43.1 The Parties shall provide dialing parity to each other as required under Section 251(b)(3) of the Act or state law or regulation as appropriate.

43.2 U S WEST shall ensure that all AT&T Customers experience the same dialing parity as similarly-situated Customers of U S WEST services, such that, for example, for all call types: (a) an AT&T Customer is not required to dial any greater number of digits than a similarly-situated U S WEST Customer; and (b) the AT&T Customer may retain its local telephone number, so long as the Customer continues receiving service in the same central office serving area.

44. Directory Listings

44.1 Directory Listings General Requirements

44.1.1 This Section 44 pertains to Directory Listings requirements for the appearance of AT&T end user Directory Listings in Directory Assistance service or directory product.

44.1.2 U S WEST shall include in its master Directory Listing database all list information for AT&T Customers.

44.1.3 U S WEST shall not sell or license, nor allow any third party, the use of AT&T Customer Listings without the prior written consent of AT&T. U S WEST shall not disclose nor allow any third party to disclose non-listed name or address

information for any purpose other than what may be necessary to complete directory distribution.

44.1.4 *AT&T Customer Listings in the U S WEST Directory Assistance database and Directory Listing database shall be co-mingled with listings of U S WEST and other CLEC Customers.*

44.1.5 **Each AT&T Customer Primary Listing shall be provided, at no charge, the same white page listings that U S WEST provides its Customers.**[20]

44.1.6 *Each AT&T business Customer Primary Listing shall be provided, at no charge, the same yellow page classified courtesy listings that U S WEST provides its Customers.*

44.1.7 *U S WEST shall also ensure that its directory publisher publishes all types of listings for AT&T Customers that are available to U S WEST Customers under the same terms, and conditions, including but not limited to:*

(a) Foreign Listings
(b) Reference Listings
(c) Information Listings
(d) Alternate call Listings
(e) Multi-line Listings
(f) Multi-line/Multi-owner Listings

44.1.8 *AT&T end user Listings properly identified by AT&T as State, Local, and Federal government Listings shall be appropriately coded in the U S WEST Directory Listing database. U S WEST will provide government code information to AT&T.*

44.1.9 *The listing and handling of AT&T listed and non-listed telephone numbers shall be at least at parity with that provided by U S WEST to its own Customers, including AT&T customers who have ported telephone numbers from U S WEST.*

44.1.10 *U S WEST shall ensure that its directory publisher publishes AT&T sales, service, billing, and repair information for business and residential Customers, along with the AT&T logo in the customer information/guide pages of each directory at no charge to AT&T.*

44.1.11 *U S WEST is responsible for maintaining Listings, including entering, changing, correcting, rearranging and removing listings in accordance with AT&T's orders. Upon request, and at least one (1) month prior to a given white page directory close, a method of reviewing and correcting Listings will be provided.*

44.1.12 **Any other issues with respect to directory listings must be negotiated with U S WEST Dex.**[21]

44.1.13 *U S WEST will permit AT&T Customers to place orders for Premium Listings and privacy listings. AT&T will be charged for Premium Listings and privacy listings at U S WEST's general exchange tariff rates less the wholesale discount rate. The Premium and privacy listing charges will be billed to AT&T and itemized at the telephone number sub-account level.*

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20 Per First Order at page 30, Paragraph 246.
21 Per First Order at page 30, Paragraph 246.

44.1.14 U S WEST shall ensure a third party distributes appropriate alphabetical and classified directories (white and yellow pages) and recycling services to AT&T Customers at parity with U S WEST end users, including providing directories, a) upon establishment of new service; b) during annual mass distribution; and c) upon Customer request.

44.1.15 [Intentionally left blank for numbering consistency.]

44.1.16 U S WEST will provide the option of having CENTREX users listed when AT&T purchases CENTREX type services for resale.

44.1.17 [Intentionally left blank for numbering consistency.]

44.2 Scope

44.2.1 AT&T grants U S WEST a non-exclusive license to incorporate Listings information into its Directory Assistance database. AT&T shall select one of two options for U S WEST's use of Listings and dissemination of Listings to third parties.

EITHER:

a Treat the same as U S WEST's end user Listings - No prior authorization is needed for U S WEST to release Listings to directory publishers or other third parties. U S WEST will incorporate Listings information in all existing and future Directory Assistance applications developed by U S WEST. AT&T authorizes U S WEST to sell and otherwise make Listings available to directory publishers. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

OR:

b. Restrict to U S WEST's Directory Assistance services -- Prior authorization required from AT&T for all other uses. AT&T makes its own, separate agreements with U S WEST, third Parties and directory publishers for all uses of its Listings beyond Directory Assistance. U S WEST will sell or provide Listings to directory publishers (including U S WEST's publisher affiliate) or other third Parties only after the third party presents proof of AT&T's authorization. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

(c) U S WEST shall be entitled to retain all revenue associated with any sales pursuant to subparagraphs (a) and (b) above.

44.3 U S WEST will take reasonable steps in accordance with industry practices to accommodate non-published and non-listed Listings provided that AT&T has supplied U S WEST the necessary privacy indicators on such Listings.

44.4 AT&T Responsibilities

44.4.1 AT&T agrees to provide to U S WEST its end user names, addresses and telephone numbers in a standard mechanized format, as utilized by U S WEST.

44.4.2 AT&T will supply its ACNA/CIC or CLCC/OCN, as appropriate, with each order to provide U S WEST the means of identifying Listings ownership.

44.4.3 AT&T represents the end user information provided to U S WEST is accurate and correct. AT&T further represents that it has reviewed all Listings provided to U S WEST, including end user requested restrictions on use such as non-published and non-listed.

44.4.4 AT&T is responsible for dealings with, and on behalf of, AT&T's end users on the following subjects:

a) All end user account activity, e.g., end user queries and complaints.

b) All account maintenance activity, e.g., additions, changes, issuance of orders for Listings to U S WEST.

c) Determining privacy requirements and accurately coding the privacy indicators for AT&T's end user information. If end user information provided by AT&T to U S WEST does not contain a privacy indicator, no privacy restrictions will apply.

45. *[Intentionally left blank for numbering consistency.]*

46. U S WEST Dex Issues

46.1 U S WEST and AT&T agree that certain issues, such as yellow page advertising, directory distribution, access to call guide pages, and yellow page listings, will be the subject of negotiations between AT&T and U S WEST Dex or other directory publishers.[22] *U S WEST acknowledges that AT&T may request U S WEST to facilitate discussions between AT&T and U S WEST Dex.*

47. Access to Poles, Ducts, Conduits, and Rights of Way

47.1 Each Party shall provide the other Party nondiscriminatory access to its poles, ducts, rights-of-way and conduits it controls on terms, conditions and prices as described herein. While the language in Section 47 describes the provision of poles, ducts, rights-of-way and conduits by U S WEST to AT&T, the language in this Section shall apply reciprocally to the provision of poles, ducts, rights-of-way and conduits by AT&T to U S WEST when AT&T becomes a local exchange carrier.[23]

47.2 U S WEST shall provide AT&T nondiscriminatory access to poles, ducts, rights-of-way and conduits it owns or controls, except where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.[24]

U S WEST may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business. U S WEST shall provide nondiscriminatory access on a first come, first served basis.[25] U S WEST shall take all reasonable steps to accommodate requests for access.[26] Before denying access based on lack of capacity, U S WEST must explore potential accommodations in good faith with the party seeking access.[27]

47.3 Definitions

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22 Per First Order at Page 30, Paragraph 246.
23 Per First Order at page 27, Paragraph 223.
24 Per First Order at page 27, Paragraph 221.
25 Per First Order at page 27, Paragraph 222.
26 Per First Order at page 27, Paragraph 224.
27 Per First Order at page 27, Paragraph 224.

"Poles, ducts, conduits and ROW" refer to all the physical facilities and legal rights which provide for access to pathways across public and private property. These include poles, pole attachments, ducts, innerducts, conduits, building entrance facilities, building entrance links, equipment rooms, remote terminals, cable vaults, telephone closets, building risers, rights of way, or any other requirements needed to create pathways. These pathways may run over, under, across or through streets, traverse private property, or enter multi-unit buildings. A Right of Way ("ROW") is the right to use the land or other property owned, leased, or controlled by any means by U S WEST to place poles, ducts, conduits and ROW or to provide passage to access such poles, ducts, conduits and ROW. A ROW may run under, on, or above public or private property (including air space above public or private property) and shall include the right to use discrete space in buildings, building complexes, or other locations.

47.4 Requirements

47.4.1 U S WEST shall make poles, ducts, conduits and ROW available to AT&T upon receipt of a request for use within the time periods provided in this Section, providing all information necessary to implement such a use and containing rates, terms and conditions, including, but not limited to, maintenance and use in accordance with this Agreement and at least equal to those which it affords itself, its Affiliates and others. Other users of these facilities, including U S WEST, shall not interfere with the availability or use of the facilities by AT&T.

47.4.2 Within ten (10) Business Days of AT&T's request for specific poles, ducts, conduits, or ROW, U S WEST shall provide any information in its possession or available to it regarding the environmental conditions of such requested poles, ducts, conduits or ROW route or location including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in U S WEST's possession or files, or if reasonably obtainable, in the possession of an agent, contractor, employee, lessor, tenant of U S WEST's that holds such information on U S WEST's behalf. If the poles, ducts, conduits or ROW contain such environmental contamination, making the placement of equipment hazardous, U S WEST shall offer alternative poles, ducts, conduits or ROW for AT&T's consideration. U S WEST shall allow AT&T to perform any environmental site investigations, including, but not limited to, Phase I and Phase II environmental site assessments, as AT&T may deem to be necessary.

47.4.3 U S WEST shall not prevent or delay any third party assignment of ROW to AT&T.

47.4.4 U S WEST shall offer the use of such poles, ducts, conduits and ROW it has obtained from a third party to AT&T, to the extent such agreement does not prohibit U S WEST from granting such rights to AT&T. They shall be offered to AT&T on the same terms as are offered to U S WEST. **U S WEST shall exercise its eminent domain power to expand an existing ROW, to the extent permitted by law, when necessary to accommodate AT&T's request for access.** [28] *If U S WEST exercises its eminent domain authority on behalf of AT&T at AT&T's request, then AT&T shall reimburse U S WEST for U S WEST's reasonable costs, if any, incurred as a result of such exercise of its eminent domain authority.*

47.4.5 U S WEST shall provide AT&T non-discriminatory access to poles, ducts, conduit and ROW and any other pathways on terms and conditions equal to that provided by U S WEST to itself or to any other Person. Further, U S WEST shall not

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[28] Per First Order at page 27, Paragraph 225.

preclude or delay allocation of these facilities to AT&T because of the potential needs of itself or of other Person, except a maintenance spare may be retained as described below.

47.4.6 *U S WEST shall not attach, or permit other entities to attach facilities on, within or overlashed to existing AT&T facilities without AT&T's prior written consent.*

47.4.7 *On a timely basis, U S WEST agrees to provide immediately necessary information, on a case-specific route basis, current detailed engineering and other plant records and drawings for specific requests for poles, ducts, conduit and ROW, including facility route maps at a city level, and the fees and expenses incurred in providing such records and drawings on the earlier of twenty (20) Business Days from AT&T request or the time within which U S WEST provides this information to itself or any other Person. If U S WEST is unable to provide this information within the twenty (20) day period, it shall immediately advise AT&T of the expected delay, the reason for such delay, and the expected date on which AT&T will receive the information requested. AT&T may request an earlier response time. Such information shall be of equal type and quality as that which is available to U S WEST's own engineering and operations staff. U S WEST shall also allow personnel designated by AT&T to jointly examine with U S WEST personnel, at no cost to AT&T for such personnel, such engineering records and drawings for a specific routing at U S WEST Central Offices and U S WEST Engineering Offices upon ten (10) days' written notice to U S WEST. U S WEST acknowledges that the request for information and the subject matter related to the request made under this Section shall be treated as Proprietary Information*

47.4.8 *U S WEST shall provide to AT&T a Single Point of Contact for negotiating all structure lease and ROW agreements.*

47.4.9 *U S WEST shall provide information regarding the availability and condition of poles, ducts, conduits and ROW within five (5) Business Days of AT&T's request if the information then exists in U S WEST's records (a records based answer) and within twenty (20) Business Days of AT&T's request if U S WEST must physically examine the poles, ducts, conduits and ROW (a field based answer) ("Request"). AT&T shall have the option to be present at the field based survey and U S WEST shall provide AT&T at least twenty-four (24) hours' notice prior to the start of such field survey. During and after this period, U S WEST shall allow AT&T personnel to enter manholes and equipment spaces and view pole structures to inspect such structures in order to confirm usability or assess the condition of the structure. U S WEST shall send AT&T a written notice confirming availability pursuant to the Request within such twenty (20) day period ("Confirmation").*

47.4.10 **US WEST may not reserve space for its local exchange service to the detriment of an entrant in the local exchange business. U S WEST shall provide nondiscriminatory access on a first come, first served basis.**[20] *For the period beginning at the time of the Request and ending ninety (90) days following Confirmation, U S WEST shall reserve such poles, ducts, conduits and ROW for AT&T and shall not allow any use thereof by any Party, including U S WEST. AT&T shall elect whether or not to accept such poles, ducts, conduits and ROW within the ninety (90) day period following Confirmation. AT&T may accept such facilities by sending written notice to U S WEST ("Acceptance"). From the time of the Request pursuant to Section 47.4.9 above until ninety (90) days after Confirmation, U S WEST shall reserve any*

[20] Per First Order at page 27, Paragraph 222.

such requested poles, ducts, conduits and/or ROW for AT&T's use, provided, however, that if another party makes a bona fide request in writing to use any such requested poles, ducts, conduits and/or ROW, including U S WEST, U S WEST shall so inform AT&T. U S WEST shall not allow the requesting party, including itself, to use the requested poles, ducts, conduits and/or ROW without first giving AT&T the right to continue its reservation of such poles, ducts, conduits and/or ROW. If AT&T chooses to exercise its right of first refusal, it shall compensate U S WEST in a manner equal to the amount the requesting party would have otherwise paid U S WEST for AT&T's reserved facilities.

47.4.11 Reservation. After Acceptance by AT&T, AT&T shall have six (6) months to begin attachment and/or installation of its facilities to the poles, ducts, conduits and ROW or request U S WEST to begin make ready or other preparation[30] activities. Any such construction, installation or make ready by AT&T shall be completed by the end of one (1) year after Acceptance. AT&T shall not be in default of the 6-month or 1-year requirement above if such default is caused in any way by any action, inaction or delay on the part of U S WEST or its Affiliates or subsidiaries.

47.4.12 Make Ready. U S WEST shall rearrange, modify and/or make ready existing poles, ducts, conduits and ROW where necessary and feasible to provide space for AT&T's requirements. Subject to the requirements above, the Parties shall endeavor to mutually agree upon the time frame for the completion of such work within five (5) days following AT&T's request; provided, however, that any such work required to be performed by U S WEST shall be completed within sixty (60) days or a reasonable period of time based on standard[31] intervals in the industry, unless otherwise agreed by AT&T in writing.

47.4.13 Construction After Acceptance. U S WEST shall complete any new construction, relocation or installation of poles, ducts, conduits or ROW required to be performed by U S WEST or any U S WEST construction, relocation or installation requested by AT&T within a reasonable period of time based on standard construction intervals in the industry or sixty (60) days after obtaining all governmental authority or permits necessary to complete such construction, relocation or installation. If U S WEST anticipates that construction, relocation or installation will go beyond standard industry intervals or the sixty (60) day period, U S WEST shall immediately notify AT&T and the Parties shall mutually agree on a completion date.

47.4.14 AT&T shall begin payment for the use of newly constructed poles, ducts, conduits, and ROW upon completion of such construction and installation and confirmation by appropriate testing methods that the facilities are in a condition ready to operate in AT&T's network or upon use (other than for testing) by AT&T, whichever is earlier.

47.4.15 AT&T shall make payment for construction, relocation, rearrangements, modifications and make ready in accordance with Section 3, Construction and Implementation Costs of Attachment 1 of this Agreement.

47.4.16 [Intentionally left blank for numbering consistency.]

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30 Pursuant to the Eighth Circuit Decision, the Parties agree to add "preparation" and delete the following: "construction".

31 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "construction".

47.4.17 AT&T may, at its option, install its facilities on poles, ducts, conduits and ROW and use AT&T or AT&T designated personnel to attach its equipment to such U S WEST poles, ducts, conduits and ROW.

47.4.18 If available, U S WEST shall provide AT&T space in manholes for racking and storage of cable and other materials as requested by AT&T.

47.4.19 U S WEST shall rearrange, modify and/or make ready any conduit system or poles with retired cable by removing such retired cable from conduit systems or poles to allow for the efficient use of conduit space and pole space. Before denying access based on a lack of capacity, U S WEST must explore potential accommodations with AT&T.

47.4.20 Where U S WEST has innerducts which are not, at that time, being used or are not reserved as emergency or maintenance spare in accordance with FCC rules and regulations, U S WEST shall offer such ducts for AT&T's use.

47.4.21 Where a spare innerduct does not exist, U S WEST shall allow AT&T to install an innerduct in U S WEST conduit, at AT&T's cost and expense. U S WEST must review and approve any installation of innerduct in any U S WEST's duct prior to the start of construction. Such approval shall not be unreasonably delayed, withheld or conditioned. AT&T shall provide notice to U S WEST of any work activity not less than twenty-four (24) hours prior to the start of construction.

47.4.22 Where U S WEST has any ownership or other rights to ROW to buildings or building complexes, or within buildings or building complexes, U S WEST shall offer such ROW to AT&T:

(a) Subject to the approval of the building owner, if required, the right to use any available space owned or controlled by U S WEST in the building or building complex to install AT&T equipment and facilities;

(b) Subject to the approval of the building owner, if required, ingress and egress to such space; and

(c) Subject to the approval of the building owner, if required, the right to use electrical power at parity with U S WEST's rights to such power.

47.4.23 Whenever U S WEST intends to modify or alter any poles, ducts, conduits or ROW which contain AT&T's facilities, U S WEST shall provide written notification of such action to AT&T so that AT&T may have a reasonable opportunity to add to or modify its facilities. AT&T shall advise U S WEST, in writing, of its intentions to add or modify the facilities within fifteen (15) Business Days of U S WEST's notification. If AT&T adds to or modifies its facilities according to this paragraph, AT&T shall bear a proportionate share of the costs incurred by U S WEST in making such facilities accessible.

47.4.24 AT&T shall not be required to bear any of the costs of rearranging or replacing its facilities, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any entity other than AT&T, including U S WEST.

47.4.25 U S WEST shall maintain the poles, ducts, conduits and ROW at its sole cost. AT&T shall maintain its own facilities installed within the poles, ducts, conduits and ROW at its sole cost. In the event of an emergency, U S WEST shall begin repair

of its facilities containing AT&T's facilities within a reasonable time frame based on industry standards or a time frame requested by AT&T. If U S WEST cannot begin repair within the requested time frame, upon notice and approval of U S WEST, which shall not be unreasonably withheld, AT&T may begin such repairs without the presence of U S WEST personnel. AT&T may climb poles and enter the manholes, handholds, conduits and equipment spaces containing U S WEST's facilities in order to perform such emergency maintenance, but only until such time as qualified personnel of U S WEST arrives ready to continue such repairs. For both emergency and non-emergency repairs, AT&T may use spare innerduct or conduits, including the innerduct or conduit designated by U S WEST as emergency spare for maintenance purposes; provided, however, that AT&T may only use such spare conduit or innerduct for a maximum period of ninety (90) days.

47.4.26 In the event of a relocation necessitated by a governmental entity exercising the power of eminent domain, when such relocation is not reimbursable, all parties shall share pro rata in costs for relocating the base conduit or poles and shall each pay its own cost of cable and installation of the facilities in the newly rebuilt U S WEST poles, ducts, conduits and ROW.

48. Bona Fide Request Process

48.1 Any request for Interconnection or access to an unbundled Network Element not already available via price lists, tariff, or as described herein shall be treated as a "Request" under this Section.

48.2 USWC shall use the Bona Fide Request (BFR) process, as described in this Section 48, to determine the technical feasibility of the requested interconnection or Network Element(s) and, for those items found to be technically feasible, to provide the terms and timetable for providing the requested items. Additionally, elements, services and functions which are materially or substantially different from those services, elements or functions already provided by USWC to itself, its Affiliates, Customers, or end users may, at the discretion of AT&T, be subject to this BFR process.

48.3 A Request shall be submitted in writing and, at a minimum, shall include: (a) a complete and accurate technical description of each requested Network Element or interconnection; (b) the desired interface specifications; (c) a statement that the interconnection or Network Element will be used to provide a telecommunications service; (d) the quantity requested; (e) the location(s) requested; and (f) whether AT&T wants the requested item(s) and terms made generally available. AT&T may designate a Request as Confidential.

48.4 Within forty-eight (48) hours of receipt of a Request, USWC shall acknowledge receipt of the Request and review such request for initial compliance with Subsection 48.3 above. In its acknowledgment, USWC shall advise AT&T of any missing information reasonably necessary to move the Request to the preliminary analysis described in Subsection 48.5 below.

48.5 Unless otherwise agreed to by the Parties, within thirty (30) calendar days of its receipt of the Request and all information necessary to process it, USWC shall provide to AT&T a preliminary analysis of the Request. As reasonably requested by AT&T, USWC agrees to provide weekly status updates to AT&T. USWC will notify AT&T if the quote preparation fee, if any, will exceed $5,000. AT&T will approve the continuation of the development of the quote prior to USWC incurring any reasonable additional expenses. The preliminary analysis shall specify whether or not the requested interconnection or access to an unbundled Network Element is technically feasible and otherwise qualifies as a Network Element or interconnection as defined under the Act.

48.5.1 If USWC determines during the thirty (30) day period that a Request is not technically feasible or that the Request otherwise does not qualify as a Network Element or interconnection required to be provided under the Act, USWC shall so advise AT&T as soon as reasonably possible of that fact, and promptly provide a written report setting forth the basis for its conclusion in no case later than ten (10) calendar days after making such determination.

48.5.2 If USWC determines during the thirty (30) day period that the Request is technically feasible and otherwise qualifies under the Act, it shall notify AT&T in writing of such determination in no case later than ten (10) calendar days after making such determination.

48.5.3 Unless otherwise agreed to by the Parties, as soon as feasible, but no more than ninety (90) calendar days after USWC notifies AT&T that the Request is technically feasible, USWC shall provide to AT&T a Request quote which will include, at a minimum, a description of each interconnection and Network Element, the quantity to be provided, the installation intervals (both initial and subsequent), the impact on shared systems software interfaces, the ordering process changes, the functionality specifications, any interface specifications, and either:

(a) the applicable rates (recurring and nonrecurring), including the amortized development costs, as appropriate pursuant to Section 48.5.4 below, of the interconnection or Network Element; or

(b) the payment for development costs, as appropriate per Section 48.5.4, of the interconnection or Network Element and the applicable rates (recurring and nonrecurring), excluding the development costs.

48.5.4 The choice of using either option (a) or (b) above shall be at USWC's sole discretion. A payment for development cost, however, is appropriate only where AT&T is the only conceivable user of the functionality (including consideration of USWC as a potential user) or where the requested quantity is insufficient to provide amortization.

48.6 If USWC has used option (a) above in its Request quote, then, within thirty (30) days of its receipt of the Request quote, AT&T must indicate its nonbinding interest in purchasing the interconnection or Network Element at the stated quantities and rates, cancel it Request, or seek remedy under the Dispute Resolution Section of this Agreement.

48.7 If USWC has used option (b) above in its Request quote, then, within thirty (30) days of its receipt of the Request quote, AT&T must either agree to pay the development costs of the interconnection or Network Element, cancel its Request, or seek remedy under the Dispute Resolution Section of this Agreement.

48.8 If USWC has used option (b) in its Request quote and AT&T has accepted the quote, AT&T may cancel the Request at any time, but will pay USWC's reasonable development costs of the interconnection or Network Element up to the date of cancellation.

48.9 USWC will use reasonable efforts to determine the technical feasibility and conformance with the Act of the Request within the first thirty-two (32) days of receiving the Request. In the event USWC has used option (b) above in its Request quote and USWC later determines that the interconnection or Network Element requested in the Request is not technically feasible or otherwise does not qualify under the Act, USWC shall notify AT&T

within ten (10) business days of making such determination and AT&T shall not owe any compensation to USWC in connection with the Request. Any quotation preparation fees or development costs paid by AT&T to the time of such notification shall be refunded by USWC.

48.10 To the extent possible, USWC will utilize information from previously developed BFRs to address similar arrangements in order to shorten the response times for the currently requested BFR. In the event AT&T has submitted a BFR and USWC determines in accordance with the provisions of this Section 48 that the Request is technically feasible, the Parties agree that AT&T's subsequent request or order for the identical type of Interconnection or Network Element shall not be subject to the BFR process. To the extent USWC has deployed an identical Network Element under a previous BFR, a subsequent BFR is not required. For purposes of this Section 48.10, an "identical" request shall be one that is materially identical to a previous request with respect to the information provided pursuant to Subsections (a) through (e) of Section 48.3 above.

48.11 In the event of a dispute under this Section 48, the Parties agree to seek expedited Commission resolution of the dispute, to be completed within twenty (20) days of U S WEST's response denying AT&T's BFR, and in no event more than thirty (30) days after the filing of AT&T's petition. Alternatively, the Parties may mutually agree to resolve any disputes under this section through the Dispute Resolution process pursuant to Section 27, Part A of this Agreement .

48.12 All time intervals within which a response is required from one Party to another under this Section 48 are maximum time intervals. The Parties agree that they will provide all responses to the other Party as soon as the Party has the information and analysis required to respond, even if the time interval stated herein for a response is not over.

49. . Audit Process

49.1 As used herein "Audit" shall mean a comprehensive review of services performed under this Agreement. Either Party (the "Requesting Party") may perform up to three (3) Audits per 12-month period commencing with the Effective Date.

49.2 Upon thirty (30) days' written notice by the Requesting Party to the other Party (the "Audited Party"), the Requesting Party shall have the right, through its authorized representative, to make an Audit, during normal business hours, of any records, accounts and processes which contain information related to the services provided and performance standards agreed to under this Agreement. Within the above-described 30-day period, the Parties shall reasonably agree upon the scope of the Audit, the documents and processes to be reviewed, and the time, place and manner in which the Audit shall be performed. The Audited Party agrees to provide Audit support, including appropriate access to and use of the Audited Party's facilities (e.g., conference rooms, telephones, copying machines).

49.3 Each Party shall bear its own expenses in connection with the conduct of the Audit. The reasonable cost of special data extractions required by the Requesting Party to conduct the Audit will be paid for by the Requesting Party. For purposes of this Section 49.3, a "Special Data Extraction" shall mean the creation of an output record or informational report (from existing data files) that is not created in the normal course of business. If any program is developed to the Requesting Party's specifications and at the Requesting Party's expense, the Requesting Party shall specify at the time of request whether the program is to be retained by the Audited Party for reuse for any subsequent Audit. Notwithstanding the foregoing, the Audited Party shall pay all of the Requesting Party's external expenses (including, without limitation, the fees of any independent auditor), in the event an Audit results in an adjustment in the charges or in any invoice paid or payable by the Requesting

Party hereunder in an amount that is, on an annualized basis, more than the greater of (a) one percent (1%) of the amount in dispute or (b) $10,000.

49.4 Adjustments, credits or payments shall be made and any corrective action shall commence within thirty (30) days from the Audited Party's receipt of the final audit report to compensate for any errors or omissions which are disclosed by such Audit and are agreed to by the Parties. The highest interest rate allowable by law for commercial transactions shall be assessed and shall be computed by compounding daily from the time of the original due date of the amount of dispute.

49.5 Neither such right to examine and audit nor the right to receive an adjustment shall be affected by any statement to the contrary appearing on checks or otherwise.

49.6 This Section 49 shall survive expiration or termination of this Agreement for a period of two (2) years after expiration or termination of this Agreement.

49.7 All transactions under this Agreement which are over thirty-six (36) months old are no longer subject to Audit.

49.8 All information received or reviewed by the Requesting Party or the independent auditor in connection with the Audit is to be considered Proprietary Information as defined by this Agreement. The Audited Party reserves the right to require any non-employee who is involved directly or indirectly in any Audit or the resolution of its findings as described above to execute a nondisclosure agreement satisfactory to the Audited Party. To the extent an Audit involves access to information of third parties, the Audited Party will aggregate such competitors' data before release to the Requesting Party, to insure the protection of the proprietary nature of information of other competitors. To the extent a competitor is an Affiliate of the Audited Party (including itself and its subsidiaries), the Parties shall be allowed to examine such Affiliate's disaggregated data, as required by reasonable needs of the Audit.

49.9 "Examination" shall mean an inquiry reasonably requested by either Party into a specific element of or process where the requesting Party raises a dispute concerning services performed by the other Party under this Agreement and such dispute has not been resolved through the escalation process described in this Agreement. Only that information that is necessary to resolve the dispute in issue must be provided in the course of an Examination and the total time involved for each Party may not exceed three people for three days and no more than 10,000 pages of documents may be reviewed. Appropriate provisions of Section 49 that apply to Audits shall also apply to Examinations, except that either Party may conduct only a total of six (6) Examinations and Audits per year, with a maximum of three (3) Audits per year.

50. Miscellaneous Services

50.1 Basic 911 and E911 General Requirements

50.1.1 Basic 911 and E911 provides a caller access to the appropriate emergency service bureau by dialing a 3-digit universal telephone number (911). Basic 911 and E911 access from Local Switching shall be provided to AT&T in accordance with the following:

50.1.2 Each Party will be responsible for those portions of the 911 System for which it has reasonable control, including any necessary maintenance to each Party's portion of the 911 System.

50.1.3 *E911 shall provide additional routing flexibility for 911 calls. E911 shall use Customer data, contained in the Automatic Location Identification/Data Management System (ALI/DMS), to determine to which Public Safety Answering Point (PSAP) to route the call.*

50.1.4 *If available in the U S WEST network, U S WEST shall offer a third type of 911 service, S911. All requirements for E911 also apply to S911 with the exception of the type of signaling used on the interconnection trunks from the local switch to the E911 Tandem.*

50.1.5 *Basic 911 and E911 functions provided to AT&T shall be at least at parity with the support and services that U S WEST provides to its Customers for such similar functionality.*

50.1.6 *Basic 911 and E911 access from Local Switching shall be provided to AT&T in accordance with the following:*

50.1.6.1 *U S WEST shall conform to all state regulations concerning emergency services.*

50.1.6.2 *For E911 provided to resold lines or in association with unbundled switching, U S WEST shall use its service order process to update and maintain Customer information in the ALI/DMS data base. Through this process, U S WEST shall provide and validate Customer information resident or entered into the ALI/DMS data base.*

50.1.7 *U S WEST shall provide for overflow 911 traffic consistent with U S WEST policy and procedure.*

50.1.8 *Basic 911 and E911 access from the AT&T local switch shall be provided to AT&T in accordance with the following:*

50.1.8.1 *If required by AT&T, U S WEST shall interconnect direct trunks from the AT&T network to the E911 Tandem for connection to the PSAP. Such trunks to the E911 Tandem may alternatively be provided by AT&T.*

50.1.8.2 *In government jurisdictions where U S WEST has obligations under existing agreements as the primary provider of the 911 System to the county, AT&T shall participate in the provision of the 911 System as follows:*

(a) *Each Party shall be responsible for those portions of the 911 System for which it has control, including any necessary maintenance to each Party's portion of the 911 System.*

(b) *U S WEST shall be responsible for maintaining the E-911 database.*

50.1.8.3 *If a third party is the primary service provider to a government agency, AT&T shall negotiate separately with such third party with regard to the provision of 911 service to the agency. All relations between such third party and AT&T are totally separate from this Agreement and U S WEST makes no representations on behalf of the third party.*

50.1.8.4 *If AT&T or Affiliate is the primary service provider to a government agency, AT&T and U S WEST shall negotiate the specific provisions necessary for providing 911 service to the agency and shall include such provisions in an amendment to this Agreement.*

50.1.8.5 *Interconnection and database access shall be priced as specified in Attachment 1 to this Agreement or at any rate charged to other interconnected carriers, whichever is lower.*

50.1.8.6 *AT&T will separately negotiate with each county regarding the collection and reimbursement to the county of applicable Customer taxes for 911 service.*

50.1.8.7 *U S WEST shall comply with established, competitively neutral intervals for installation of facilities, including any Collocation facilities, diversity requirements, etc.*

50.1.8.8 *In a resale situation, where it may be appropriate for U S WEST to update the ALI database, U S WEST shall update such database with AT&T data in an interval no less than is experienced by U S WEST Customers, or than for other carriers, whichever is faster, at no additional cost.*

50.1.9 *The following are Basic 911 and E911 Database Requirements:*

50.1.9.1 *The ALI database shall be managed by U S WEST, but is the property of U S WEST and any participating telephone company and CLEC for those records provided by the company.*

50.1.9.2 *U S WEST, or its agent, will be responsible for maintaining the E-911 Database. U S WEST, or its agent, will provide a copy of the Master Street Address Guide ("MSAG"), and periodic updates, to AT&T.*

50.1.9.3 *Copies of the MSAG shall be provided within twenty-one (21) calendar days from the time requested and shall be provided on diskette, magnetic tape, or in a format suitable for use with desktop computers.*

50.1.9.4 *AT&T assumes all responsibility for the accuracy of the data that AT&T provides to U S WEST for MSAG preparation and E-911 Database operation.*

50.1.9.5 *AT&T shall be solely responsible for providing AT&T database records to U S WEST for inclusion in U S WEST's ALI database on a timely basis.*

50.1.9.6 *AT&T will provide end user data to the U S WEST ALI database that are Master Street Address Guide (MSAG) valid.*

50.1.9.7 *AT&T will update its end user records provided to the U S WEST ALI database to agree with the 911 MSAG standards for its service areas.*

50.1.9.8 *U S WEST and AT&T shall arrange for the automated input and periodic updating of the E911 database information related to AT&T end users for resold lines in accordance with Attachment 2 to this Agreement. AT&T may request, through the BFR process, similar*

arrangements for AT&T customers served on a non-resale basis. U S WEST will furnish AT&T any variations to NENA recommendations required for ALI database input. The cost of magnetic tape transfer shall be borne by AT&T.

50.1.9.9 *U S WEST and AT&T shall arrange for the automated input and periodic updating of the E911 database information related to AT&T end users. For resold services, U S WEST shall work cooperatively with AT&T to ensure the accuracy of the data transfer by verifying it against the Master Street Address Guide (MSAG). For AT&T's customers served by unbundled Network Elements or through AT&T's own facilities, AT&T shall ensure the accuracy of its 911 data by verifying it against the MSAG.*

50.1.9.10 *AT&T shall assign an E911 database coordinator charged with the responsibility of forwarding AT&T end user ALI record information to U S WEST or via a third-party entity, charged with the responsibility of ALI record transfer. AT&T assumes all responsibility for the accuracy of the data that AT&T provides to U S WEST.*

50.1.9.11 *The Parties shall maintain a single point of contact to coordinate all E911 activities under this Agreement.*

50.1.9.12 *For resold services, AT&T shall provide information on new Customers to U S WEST within one (1) Business Day of the order completion. U S WEST shall update the database within two (2) Business Days of receiving the data from AT&T. If U S WEST detects an error in the AT&T provided data, the data shall be returned to AT&T within two (2) Business Days from when it was provided to U S WEST. AT&T shall respond to requests from U S WEST to make corrections to database record errors by uploading corrected records within two (2) Business Days. Manual entry shall be allowed only in the event that the system is not functioning properly. AT&T may request, through the BFR process, similar services from U S WEST for their customers who are served on a non-resale basis.*

50.1.9.13 *The Parties will cooperate to implement the adoption of a Carrier Code (NENA standard five-character field) on all ALI records received from AT&T, when those standards, NENA-02-00N, are adopted by the industry standards process. U S WEST will furnish AT&T any variations from NENA recommendations required for ALI database input. The Carrier Code will be used to identify the carrier of record in INP configurations.*

50.1.9.14 *AT&T will provide end user data to the U S WEST ALI database utilizing NENA-02-001 Recommended Formats For Data Exchange, and Recommended Standard For Street Thoroughfare Abbreviations and Protocols For Data Exchange and Data Quality utilizing NENA Recommended Formats for Data Exchange document dated June 1993.*

50.1.9.15 *U S WEST shall identify which ALI databases cover which states, counties or parts thereof, and identify and communicate a point of contact for each.*

50.1.9.16 *U S WEST will provide AT&T with the identification of the U S WEST 911 controlling office that serves each geographic area served by AT&T.*

50.1.9.17 *U S WEST shall provide to AT&T, for AT&T Customers, E911/911 call routing to the appropriate Public Safety Answering Point ("PSAP") for resold lines. U S WEST shall provide and validate AT&T Customer information to the PSAP in the same fashion as it does for its own Customers. U S WEST shall use its service order process to update and maintain, on the same schedule that it uses for its end users, the AT&T Customer service information in the ALI/DMS used to support E911/911 services. AT&T may request, through the BFR process, similar services from U S WEST for their customers who are served on a non-resale basis.*

50.1.9.18 *AT&T exchanges to be included in U S WEST's E-911 Database will be indicated via written notice and will not require an amendment to this Agreement.*

50.1.10 *The following are Basic 911 and E911 Network Requirements:*

50.1.10.1 *U S WEST, at AT&T option, shall provide a minimum of two (2) E911 trunks per jurisdictional area, or that quantity which will maintain P.01 transmission grade of service, or the level of service provided by U S WEST to itself, whichever is the higher grade of service. These trunks will be dedicated to routing 911 calls from AT&T switch to a U S WEST E911 tandem.*

50.1.10.2 *U S WEST shall provide AT&T a data link to the ALI/DMS database or permit AT&T to provide its own data link to the ALI/DMS database. U S WEST shall provide error reports from the ALI/DMS database to AT&T immediately after AT&T inputs information into the ALI/DMS database. Alternately, AT&T may utilize U S WEST or a third party entity to enter Customer information into the database on a demand basis, and validate Customer information on a demand basis.*

50.1.10.3 *U S WEST shall provide the selective routing of E911 calls received from AT&T switching office. This includes the ability to receive the ANI of AT&T Customer, selectively route the call to the appropriate PSAP, and forward the Customer's ANI to the PSAP. U S WEST shall provide AT&T with the appropriate CLLI codes and specifications regarding the tandem serving area associated addresses and meet points in the network.*

50.1.10.4 *Copies of E911 Tandem Boundary Maps shall be available to AT&T. Each map shows the areas served by that E91 tandem. The map provides AT&T the information necessary to set up its network to route E911 callers to the correct E911 tandem.*

50.1.10.5 *AT&T shall ensure that its switch provides an eight-digit ANI consisting of an information digit and the seven-digit exchange code. AT&T shall also ensure that its switch provides the line number of the calling station. In the event of a change in industry standards, the Parties shall cooperate to incorporate the changed standards in their respective networks.*

50.1.10.6 *Each ALI discrepancy report shall be jointly researched by U S WEST and AT&T. Corrective action shall be taken immediately by the responsible party.*

50.1.10.7 *Technical specifications for E911 network interface are available through U S WEST technical publication 77338. Technical specifications for database loading and maintenance are available through the third party database manager – SCC.*

50.1.10.8 *U S WEST shall begin restoration of E911 and/or E911 trunking facilities immediately upon notification of failure or outage. U S WEST must provide priority restoration of trunks or networks outages on the same terms/conditions it provides itself and without the imposition of Telecommunications Service Priority (TSP).*

50.1.10.9 *U S WEST shall identify any special operator-assisted calling requirements to support 911.*

50.1.10.10 *Trunking shall be arranged to minimize the likelihood of central office isolation due to cable cuts or other equipment failures. There will be an alternate means of transmitting a 911 call to a PSAP in the event of failures.*

50.1.10.11 *Circuits shall have interoffice, loop and carrier system diversity when such diversity can be achieved using existing facilities. Circuits will be divided as equally as possible across available carrier systems. Diversity will be maintained or upgraded to utilize the highest level of diversity available in the network.*

50.1.10.12 *Equipment and circuits used for 911 shall be monitored at all times. Monitoring of circuits shall be done to the individual circuit level. Monitoring shall be conducted by U S WEST for trunks between the tandem and all associated PSAPs.*

50.1.10.13 *Repair service shall begin immediately upon receipt of a report of a malfunction. Repair service includes testing and diagnostic service from a remote location, dispatch of or in-person visit(s) of personnel. Technicians will be dispatched without delay.*

50.1.10.14 *All 911 trunks must adhere to the Americans with Disabilities Act requirements.*

50.1.10.15 *The Parties will cooperate in the routing of 911 traffic in those instances where the ALI/ANI information is not available on a particular 911 call.*

50.1.10.16 *AT&T is responsible for network management of its network components in compliance with the Network Reliability Council Recommendations and meeting the network standard of U S WEST for the 911 call delivery.*

50.1.11 *Basic 911 and E911 Additional Requirements*

50.1.11.1 *All AT&T lines that have been ported via INP shall reach the correct PSAP when 911 is dialed. U S WEST shall send both the ported number and the AT&T number (if both are received from AT&T). The PSAP attendant shall see both numbers where the PSAP is using a standard ALI display screen and the PSAP extracts both numbers from the data that is sent.*

50.1.11.2 *U S WEST shall work with the appropriate government agency to provide AT&T the ten-digit POTS number of each PSAP which sub-tends each U S WEST E-911 Tandem to which AT&T is interconnected.*

50.1.11.3 *U S WEST will provide AT&T with the ten-digit telephone numbers of each PSAP agency, for which U S WEST provides the 911 function, to be used by AT&T operators for handling emergency calls in those instances where the AT&T Customer dials "O" instead of "911."*

50.1.11.4 *AT&T will provide U S WEST with the ten-digit telephone numbers of each PSAP agency, for which AT&T provides the 911 function, to be used by U S WEST operators for handling emergency calls in those instances where the U S WEST Customer dials "O" instead of "911."*

50.1.11.5 *U S WEST shall notify AT&T forty-eight (48) hours in advance of any scheduled testing or maintenance affecting AT&T 911 service, and provide notification as soon as possible of any unscheduled outage affecting AT&T 911 service.*

50.1.11.6 *AT&T shall be responsible for reporting all errors, defects and malfunctions to U S WEST. U S WEST shall provide AT&T with the point of contact for reporting errors, defects, and malfunctions in the service and shall also provide escalation contacts.*

50.1.11.7 *AT&T may enter into subcontracts with third parties, including AT&T affiliates, for the performance of any of AT&T duties and obligations stated herein.*

50.1.11.8 *U S WEST shall provide sufficient planning information regarding anticipated moves to SS7 signaling for the next twelve (12) months.*

50.1.11.9 *U S WEST shall provide notification of any pending tandem moves, NPA splits, or scheduled maintenance outages, with enough time to react.*

50.1.11.10 *U S WEST shall provide "reverse ALI" inquiries by public safety entities, consistent with U S WEST's practices and procedures.*

50.1.11.11 *U S WEST shall manage NPA splits by populating the ALI database with the appropriate new NPA codes, consistent with U S WEST's practices and procedures for resold services.*

50.1.11.12 *U S WEST must provide the ability for AT&T to update 911 database with end user information for lines that have been ported via INP or NP.*

50.1.11.13 *The data in the ALI database shall be managed by U S WEST, but is the property of U S WEST and all participating telephone companies.*

50.1.12 *Performance Criteria. E-911 Database accuracy shall be as set forth below:*

50.1.12.1 *Accuracy of ALI (Automatic Location Identification) data submitted by AT&T to U S WEST will be measured jointly by the PSAPs and U S WEST. All such reports shall be forwarded to AT&T by U S WEST and will indicate incidents when incorrect or no ALI data is displayed. A report regarding any inaccuracy shall be prepared by U S WEST.*

50.1.12.2 *Each discrepancy report will be jointly researched by U S WEST and AT&T. Corrective action will be taken immediately by the responsible party.*

50.1.12.3 *Each party will be responsible for the accuracy of the Customer records it provides.*

50.2 Directory Assistance Service

50.2.1 *U S WEST shall provide for the routing of Directory Assistance calls (including but not limited to 411, 555-1212, NPA-555-1212) dialed by AT&T Customers directly to either the AT&T Directory Assistance service platform or U S WEST Directory Assistance service platform as specified by AT&T.*

50.2.2 *AT&T Customers shall be provided the capability by U S WEST to dial the same telephone numbers for access to AT&T Directory Assistance that U S WEST Customers use to access U S WEST Directory Assistance.*

50.2.3 *U S WEST shall provide Directory Assistance functions and services to AT&T for its Customers as described below until, at AT&T's discretion, U S WEST routes calls to the AT&T Directory Assistance Services platform.*

50.2.3.1 *U S WEST agrees to provide AT&T Customers with the same Directory Assistance service available to U S WEST Customers.*

50.2.3.2 *U S WEST shall notify AT&T in advance of any changes or enhancements to its Directory Assistance Service, and shall make available such service enhancements on a non-discriminatory basis to AT&T.*

50.2.3.3 *U S WEST shall provide Directory Assistance to AT&T Customers in accordance with U S WEST's internal operating procedures and standards, which shall, at a minimum, comply with accepted professional and industry standards.*

50.2.3.4 *U S WEST shall provide AT&T with the same level of support for the provisioning of Directory Assistance as U S WEST provides itself.*

50.2.3.5 *Service levels shall comply, with the Commission requirements for Directory Assistance or with what U S WEST provides itself, if greater.*

50.2.3.6 *U S WEST agrees to maintain an adequate operator work force based on a review and analysis of actual call attempts and abandonment rate.*

50.2.3.7 *In the event that AT&T becomes aware of complaints or concerns about Directory Assistance services provided by U S WEST pursuant to this Agreement, AT&T shall be entitled, upon written notice to U S WEST, to retain a mutually acceptable independent third party to monitor Directory Assistance services. Subject to the provisions of applicable U S WEST collective bargaining agreements, the third party retained by AT&T shall be entitled to participate in call monitoring activities available to U S WEST and to remote call monitor for the express purpose of investigating the complaints or concerns. The written request from AT&T shall specify the nature of the complaints or concerns, the limited period for which call monitoring is being requested, and the identity of the third party that is to perform such activities. The third party retained by AT&T shall limit its report to AT&T to information relating only to the complaints or concerns giving rise to the call monitoring program or any issues identified by the third party during the course of the call monitoring program that concern services provided to AT&T and its end users. In addition, AT&T is entitled at any time during the course of this Agreement to place test calls into U S WEST Directory Assistance service offices similar to end user calls to monitor test quality. It is expressly understood that U S WEST will not be required to add recorded announcements specifically to allow for third party call monitoring if U S WEST does not make such announcements for itself.*

50.2.3.8 *U S WEST shall provide the following minimum Directory Assistance capabilities to AT&T Customers:*

(a) *A maximum of two Customer listings and/or addresses or U S WEST party per AT&T Customer request.*

(b) *Name and address to AT&T Customers upon request, except for unlisted numbers, in the same states where such information is provided to U S WEST Customers.*

(c) *For AT&T customers who are served exclusively through resold U S WEST retail services, AT&T may resell U S WEST's Directory Assistance call completion services to the extent U S WEST offers call Directory Assistance completion to its own end users. For AT&T customers who are served from an AT&T switch, AT&T may request Directory Assistance call completion services through the BFR process. Such BFR process shall address the identification of the AT&T end user at the U S WEST Directory Assistance platform for purposes of routing and billing of intraLATA and interLATA toll calls.*

(d) *When the mechanized interface is available, U S WEST will populate the Directory Assistance database in the same manner and in the same time frame as for U S WEST Customers.*

(e) *Any information provided by a Directory Assistance Automatic Response Unit (ARU) shall be repeated the same number of times for AT&T Customers as for U S WEST Customers.*

(f) When an AT&T Customer served on a resale or unbundled switching basis requests a U S WEST Directory Assistance operator to provide instant credit on a Directory Assistance call, the U S WEST Directory Assistance operator shall inform the AT&T Customer to call an 800 number for AT&T Customer service to request a credit. The accurate identification of AT&T as the customer's local service provider by the U S WEST Directory Assistance operator requires the use of separate AT&T trunks to the Directory Assistance Platform.

50.2.3.9 For resold lines and unbundled switching, U S WEST shall provide data regarding billable events as requested by AT&T.

50.2.3.10 U S WEST agrees to (1) provide to AT&T operators, on line access to U S WEST's Directory Assistance database equivalent to the access provided to U S WEST operators; (2) allow AT&T or an AT&T designated operator bureau to license U S WEST's subscriber listings database on terms and conditions equivalent to the terms and conditions upon which U S WEST utilizes such databases; and (3) in conjunction with branded or unbranded Directory Assistance services pursuant to Section 8 of this Part A, provide caller-optional Directory Assistance call completion service which is comparable in every way to the Directory Assistance call completion service U S WEST makes available to its own users. AT&T may, at its option, request U S WEST not to provide call completion services to AT&T.

50.2.3.11 In addition to charges for Directory Assistance, when call completion for an intraLATA toll call is requested, the applicable charge for the completion of such intraLATA toll call will apply.

50.3 Operator Services

50.3.1 U S WEST shall provide for the routing of local Operator Services calls (including but not limited to 0+, 0-) dialed by AT&T Customers directly to either the AT&T Operator Service platform or U S WEST Operator Service platform as specified by AT&T.

50.3.2 AT&T Customers shall be provided the capability by U S WEST to dial the same telephone numbers to access AT&T Operator Service that U S WEST Customers dial to access U S WEST Operator Service.

50.3.3 U S WEST shall provide Operator Services to AT&T as described below until, at AT&T's discretion, U S WEST routes calls to the AT&T local Operator Services platform.

50.3.3.1 U S WEST agrees to provide AT&T Customers the same Operator Services available to U S WEST Customers. U S WEST shall make available its service enhancements on a non-discriminatory basis.

50.3.3.2 U S WEST shall provide the following minimum Operator Service capabilities to AT&T Customers:

(a) U S WEST shall complete 0+ and 0- dialed local calls, including O-Coin, Automatic Coin Telephone Service (ACTS) and the

completion of coin calls, the collection of coins and, the provision of coin rates.

(b) U S WEST shall complete 0+ intraLATA and, when offered, interLATA toll calls. The Parties will cooperate to develop industry standards to include the end user's PIC in Operator Services signaling and the development of associated routing procedures.

(c) U S WEST shall complete calls for AT&T Customers that are billed to calling cards and other commercial cards on the same basis as provided to U S WEST own customers and AT&T shall designate to U S WEST the acceptable types of special billing.

(d) U S WEST shall complete person-to-person calls.

(e) U S WEST shall complete collect calls.

(f) U S WEST shall provide the capability for callers to bill to a third party and complete such calls.

(g) U S WEST shall complete station-to-station calls.

(h) U S WEST shall process emergency calls.

(i) U S WEST shall process Busy Line Verify and Busy Line Interrupt requests.

(j) U S WEST shall process emergency call trace in accordance with its normal and customary procedures.

(k) U S WEST shall process operator-assisted Directory Assistance calls.

(l) U S WEST operators shall provide AT&T Customers with long distance rate quotes to the extent U S WEST provides such rate quotes to its own end users. Based on technology available as of the Effective Date of this Agreement, the provision of rate quotes to AT&T Customers requires a separate AT&T trunk group to the U S WEST Operator Services platform to identify the caller as an AT&T Customer.

(m) U S WEST operators shall provide AT&T Customers with time and charges to the extent U S WEST provides such time and charges to its own end users. Based on technology available as of the Effective Date of this Agreement, the provision of time and charges to AT&T Customers requires a separate AT&T trunk group to the U S WEST Operator Services platform to identify the caller as an AT&T Customer.

(n) U S WEST shall route 0- traffic to a "live" operator team.

(o) When requested by AT&T, U S WEST shall provide instant credit on Operator Services calls on a non-discriminatory basis as provided to U S WEST Customers or shall inform AT&T

Customers to call a toll free number for AT&T Customer service to request a credit. U S WEST shall provide one (1) toll free number for business Customers and another for residential Customers. Pending Commission approval of permanent pricing, U S WEST may charge AT&T, on an interim basis, the costs of providing such credit as specified by the Operator Assistance line item in Appendix A.

(p) U S WEST shall provide caller assistance for the disabled in the same manner as provided to U S WEST Customers.

(q) When available to U S WEST end users, U S WEST shall provide operator-assisted conference calling to AT&T.

50.3.3 U S WEST shall exercise at least the same level of fraud control in providing Operator Service to AT&T that U S WEST provides for its own operator service, where the AT&T fraud control data is in U S WEST's LIDB database.

50.3.4 U S WEST shall perform billed number screening when handling collect, third party, and calling card calls, both for station to station and person to person call types.

50.3.5 In the event that AT&T becomes aware of complaints or concerns about Operator Services provided by U S WEST pursuant to this Agreement, AT&T shall be entitled, upon written notice to U S WEST, to retain a mutually acceptable independent third party to monitor Operator Services. Subject to the provisions of applicable U S WEST collective bargaining agreements, the third party retained by AT&T shall be entitled to participate in call monitoring activities available to U S WEST and to remote call monitor for the express purpose of investigating the complaints or concerns. The written request from AT&T shall specify the nature of the complaints or concerns, the limited period for which call monitoring is being requested, and the identity of the third party that is to perform such activities. The third party retained by AT&T shall limit its report to AT&T to information relating only to the complaints or concerns giving rise to the call monitoring program or any issues identified by the third party during the course of the call monitoring program that concern services provided to AT&T and its end users. In addition, AT&T is entitled at any time during the course of this Agreement to place test calls into U S WEST Operator Service offices similar to end user calls to monitor test quality. It is expressly understood that U S WEST will not be required to add recorded announcements specifically to allow for third party call monitoring if U S WEST does not make such announcements for itself.

50.3.6 U S WEST shall direct Customer account and other similar inquiries to the Customer service center designated by AT&T.

50.3.7 U S WEST shall provide an electronic feed of Customer call records in "EMR" format to AT&T in accordance with the time schedule mutually agreed between the Parties.

50.3.8 U S WEST shall update the Line Information Data Base ("LIDB") for AT&T Customers. Additionally, U S WEST must provide access to LIDB for validation of collect, third party billed, and LEC card billed calls

50.3.9 Where INP is deployed and when a BLV/BLI request for a ported number is directed to a U S WEST operator and the query is not successful (i.e., the request yields an abnormal result), AT&T may request, through the BFR process, that the

operator confirm whether the number has been ported and direct the request to the appropriate operator.

50.3.10 U S WEST shall allow AT&T to order provisioning of Telephone Line Number ("TLN") calling cards and BNS, in its LIDB, for ported numbers, as specified by AT&T. U S WEST shall continue to allow AT&T access to its LIDB.

50.3.11 Toll and Assistance ("T/A") refers to functions Customers associate with the "0" operator. Subject to availability and capacity, access may be provided via Operator Services trunks purchased from U S WEST or provided by AT&T via Collocation arrangements to route calls to AT&T's platform.

50.3.12 Automated Branding is the ability to announce the carrier's name to the Customer during the introduction of the call .

50.3.13 Interconnection to the U S WEST Toll and Assistance Operator Services from an end office to U S WEST T/A is technically feasible at least at three (3) distinct points on the trunk side of the switch. The first connection point is an Operator Services trunk connected directly to the T/A host switch. The second connection point is an Operator Services trunk connected directly to a remote T/A switch. The third connection point is an Operator Services trunk connected to a remote access tandem with operator concentration capabilities.

50.3.14 All trunk interconnections will be digital.

50.3.15 The technical requirements of Operator Services type trunks and the circuits to connect the operator positions to the host are covered in the Operator Services Switching Generic Requirements ("OSSGR") Bellcore Document number FR-NWT-000271.

50.3.16 Busy Line Verify and Interrupt

50.3.16.1 At the request of AT&T operators or Customers, U S WEST operators will perform Busy Line Verify ("BLV") and/or Busy Line Interrupt ("BLI") operations where such capacity exists.

50.3.16.2 When possible and where consistent with the service U S WEST provides to its own Customers and/or end users, U S WEST shall engineer its BLV/BLI facilities to accommodate the anticipated volume of BLV/BLI requests during the busy hour. AT&T may, from time to time, provide its anticipated volume of BLV/BLI requests to U S WEST. In those instances when failures occur to significant portions of the BLV/BLI systems and databases and those systems and databases become unavailable, U S WEST shall promptly inform AT&T.

50.3.16.3 BLV is performed when one Party's Customer requests assistance from the other Party's operator or operator bureau to determine if the called line is in use, provided however, that the operator bureau will not complete the call for the Customer initiating the BLV inquiry. Only one (1) BLV attempt will be made per Customer operator bureau call, and a charge shall apply whether or not the called party releases the line.

50.3.16.4 BLI is performed when one Party's Customer requests assistance from the other Party's operator bureau to interrupt a telephone call in progress after BLV has occurred. The operator bureau will interrupt

the busy line and inform the called party that there is a call waiting. The operator bureau will only interrupt the call and will not complete the telephone call of the Customer initiating the BLI request. The operator bureau will make only one BLI attempt per Customer operator telephone call and the applicable charge applies whether or not the called party releases the line.

50.3.16.5 Each Party's operator bureau shall accept BLV and BLI inquiries from the operator bureau of the other Party in order to allow transparent provision of BLV/BLI traffic between the Parties' networks.

50.3.16.6 Each Party shall route BLV/BLI Traffic inquiries over direct trunks between the Parties' respective operator bureaus. Unless otherwise mutually agreed, the Parties shall configure BLV/BLI trunks over the Interconnection architecture defined in Attachment 4 to this Agreement

50.4 Directory Assistance and Listings Service Requests

50.4.1 These requirements pertain to U S WEST's Directory Assistance and Listings Service Request process that enables AT&T to (a) submit AT&T Customer information for inclusion in U S WEST Directory Assistance and Directory Listings databases, (b) submit AT&T Customer information for inclusion in published directories; and (c) provide AT&T Customer delivery address information to enable U S WEST to fulfill directory distribution obligations.

50.4.1.1 (Intentionally left blank for numerical consistency.)

50.4.1.2 U S WEST will accept the following Directory Listing Migration Orders from AT&T, valid under all access methods, including but not limited to, Resale, unbundled Network Elements and facilities-based, and will process the orders in a mechanized format:

(a) Migrate with no Changes: Maintain all Directory Listings for the Customer in both Directory Assistance and Directory Listing. Transfer ownership and billing for listings to AT&T.

(b) Migrate with Additions: Maintain all Directory Listings for the Customer in both Directory Assistance and Directory Listing. Incorporate the specified additional listings order. Transfer ownership and billing for the listings to AT&T.

(c) Migrate with Deletions: Maintain all Directory Listings for the Customer in both Directory Assistance and Directory Listing. Delete the specified listings from the listing order. Transfer ownership and billing for the listings to AT&T.

50.4.1.3 The Directory Listings Migration Options should not be tied to migration options specified for a related service order (if any) such that a service order specified as migration with changes may be submitted along with a Directory Listing order specified as migration with no changes.

50.4.1.4 U S WEST shall enable AT&T to electronically transmit multi-line listing orders.

50.4.1.5 *U S WEST agrees to work cooperatively with AT&T to define specifications for, and implement a daily summary report of Directory Service Requests. The summary information will include but is not limited to the following information:*

(a) White page listings text and format (name, address, phone, title, designation, extra line requirements)

(b) Listing Instruction codes

50.4.1.6 *To ensure accurate order processing, U S WEST shall provide to AT&T the following information, with updates within one (1) Business Day of change and via electronic exchange:*

(a) A matrix of NXX to central office
(b) Geographical maps if available of U S WEST service area
(c) A description of calling areas covered by each directory, including but not limited to maps of calling areas and matrices depicting calling privileges within and between calling areas
(d) Listing format rules
(e) Listing alphabetizing rules
(f) Standard abbreviations acceptable for use in listings and addresses
(g) Titles and designations

50.4.1.7 *Based on changes submitted by AT&T, U S WEST shall update and maintain Directory Assistance and Directory Listings data for AT&T Customers who:*

(a) Disconnect Service
(b) Change carrier
(c) Install Service
(d) Change any service which affects Directory Assistance information
(e) Specify Non-Solicitation
(f) Are Non-Published, Non-Listed, or Listed

50.4.1.8 *U S WEST shall not charge for storage of AT&T Customer information in the Directory Assistance and Directory Listing systems.*

50.4.1.9 *AT&T shall not charge for storage of U S WEST Customer information in the Directory Assistance and Directory Listing systems.*

50.5 Directory Assistance Data

50.5.1 *This Section refers to the residential, business, and government Customer records used by U S WEST to create and maintain databases for the provision of live or automated operator assisted Directory Assistance. Directory Assistance Data is information that enables telephone exchange carriers to swiftly and accurately respond to requests for directory information, including, but not limited to name, address and phone numbers. Under the provisions of the Act and the FCC's Interconnection Order, U S WEST shall provide unbundled and non-discriminatory access to the residential, business and government Customer records used by U S WEST to create and maintain databases for the provision of live or automated operator assisted Directory Assistance.*

50.5.2 *U S WEST shall provide an initial load of Customer records and Customer list information to AT&T, in a mutually-agreed-to format, via electronic transfer, within thirty (30) calendar days of as requested by AT&T. The initial load shall include all data resident in the U S WEST databases and/or systems used by U S WEST for housing Directory Assistance data and/or Customer listing data. In addition, the initial load shall be current as of the prior Business Day on which the initial load is provided.*

50.5.3 *U S WEST shall provide AT&T daily updates to the Customer records and Customer list information in a mutually-agreed-to format via electronic transfer.*

50.5.4 *U S WEST shall provide the ability for AT&T to electronically query the U S WEST Directory Assistance database and Listings database in a manner at least consistent with and equal to that which U S WEST provides to itself or any other Person.*

50.5.5 *U S WEST shall provide AT&T a complete list of ILECs, CLECs, and independent telephone companies that provided data contained in the database.*

50.5.6 *On a daily basis, U S WEST shall provide updates (end user and mass) to the Listing information via electronic data transfer. Updates shall be current as of one Business Day prior to the date provided to AT&T.*

50.5.7 *U S WEST shall provide AT&T access to Directory Assistance support databases. For example, AT&T requires access to use restriction information including, but not limited to, call completion.*

50.5.8 *Directory Assistance data shall specify whether the Customer is a residential, business, or government Customer.*

50.5.9 *Directory Assistance data shall be provided on the same terms, conditions, and rates that U S WEST provides such data to itself or other third parties.*

50.5.13 *U S WEST shall provide complete refresh of the Directory Assistance data upon request by AT&T.*

50.5.14 *U S WEST and AT&T will cooperate in the designation of a location at which the data will be provided.*

51. Unused Transmission Media

51.1 Definitions

51.1.1 *Unused Transmission Media is physical inter-office transmission media (e.g. optical fiber, copper twisted pairs, coaxial cable) which have no lightwave or electronic transmission equipment terminated to such media to operationalize transmission capabilities.*

51.1.2 **Dark fiber is excess fiber optic cable which has been placed in a network and is not currently being lit by electronics from any carrier.**[32] *Dark Fiber, one type of Unused Transmission Media, is unused strands of optical fiber. Dark Fiber also includes strands of optical fiber which may or may not have lightwave repeater (regenerator or optical amplifier) equipment interspliced, but which has no line terminating facilities terminated to such strands. Unused Transmission*

32 Per First Order at page 10, Paragraph 69.

Media also includes unused wavelengths within a fiber strand for purposes of coarse or dense wavelength division multiplexed (WDM) applications. Typical single wavelength transmission involves propagation of optical signals at single wavelengths (1.3 or 1.55 micron wavelengths). In WDM applications, a WDM device is used to combine optical signals at different wavelengths on to a single fiber strand. The combined signal is then transported over the fiber strand. For coarse WDM applications, one (1) signal each at 1.3 micron and 1.55 micron wavelength are combined. For dense WDM applications, many signals in the vicinity of 1.3 micron wavelength and/or 1.55 micron wavelength are combined. **Dark fiber is not a network element.**[33]

51.2 *While U S WEST is not required to provide Unused Transmission Media,* **other than Dark Fiber,**[34] *AT&T may, subject to the agreement of U S WEST, lease copper twisted pairs, coaxial cable or other Unused Transmission Media.* **U S WEST may not refuse a request for fiber based on lack of lit fiber if it has installed dark fiber that it can make functional in order to meet the capacity request. U S WEST will not be required to light its installed dark fiber if it needs to retain the dark fiber to accommodate its customers in the future. The burden is on U S WEST to show that dark fiber is needed for its own customers.**[35]

51.3 Requirements

51.3.1 Subject to Section 51.2 above, U S WEST shall make available Unused Transmission Media to AT&T under a lease agreement or other arrangement.

51.3.2 U S WEST shall provide a single point of contact for negotiating all Unused Transmission Media use arrangements.

51.3.3 AT&T may test the quality of the Unused Transmission Media to confirm its usability and performance specifications.

51.3.4 Where Unused Transmission Media is required to be offered or is agreed to be offered by U S WEST, U S WEST shall provide to AT&T information regarding the location, availability and performance of Unused Transmission Media within ten (10) Business Days for a records-based answer and twenty (20) Business Days for a field- based answer, after receiving a request from AT&T ("Request"). Within such time period, U S WEST shall send written or electronic confirmation or any other method of notification agreed to by the Parties of availability of the Unused Transmission Media ("Confirmation").

51.3.5 Where Unused Transmission Media is required to be offered or is agreed to be offered by U S WEST, U S WEST shall make Unused Transmission Media available for AT&T's use in accordance with the terms of this Section 51 within twenty (20) Business Days or a reasonable time frame consistent with industry standards after it receives written acceptance from AT&T that the Unused Transmission Media is wanted for use by AT&T. Splicing of AT&T fiber may be performed at the same points that are available for U S WEST splices.

51.4 Requirements Specific to Dark Fiber

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33 Per First Order at page 10, Paragraph 72.
34 Per First Order at page 10, Paragraph 72.
35 Per First Order at page 10, Paragraph 72.

51.4.1 AT&T may test Dark Fiber leased from U S WEST using AT&T or AT&T designated personnel subject to Section 51.2. U S WEST shall provide appropriate interfaces to allow testing of Dark Fiber. U S WEST shall provide an excess cable length of twenty-five (25) feet minimum, where available, for fiber in underground conduit. U S WEST shall provide splicing of AT&T fiber to U S WEST Dark Fiber under normal circumstances (e.g., no construction) in metropolitan areas within seventeen (17) calendar days of AT&T's request, and within thirty (30) calendar days of a request in a non-metropolitan area. AT&T may request expedited splicing, which shall be subject to available U S WEST resources.

51.4.2 For WDM applications, U S WEST shall provide to AT&T an interface to an existing WDM device or allow AT&T to install its own WDM device (where sufficient system loss margins exist or where AT&T provides the necessary loss compensation) to multiplex the traffic at different wavelengths. This applies to both the transmit and receive ends of the Dark Fiber.

51.5 [Intentionally left blank for numbering consistency.]

51.6 Portions of the bandwidth of the fiber may be sectioned and AT&T may share the bandwidth with U S WEST and other CLECs.

52. Service Standards

52.1 General. U S WEST shall provide services to AT&T under this Agreement in conformity with the performance standards specified in this Agreement, subject to this Section 52, and in conformity with applicable law.

52.2 Interconnection. With respect to any performance standard specified in this Agreement, U S WEST will provide interconnection to AT&T with at least the level of service quality or performance of obligations under this Agreement as U S WEST provides itself or any other Person. AT&T acknowledges that certain provisions contained in this Agreement may conflict with this standard. If AT&T requests a particular level of quality for interconnection set forth herein, but U S WEST demonstrates that it does not provide that level of quality to itself, U S WEST shall only be required to provide AT&T that level of quality that U S WEST provides to itself.[36]

52.3 Network Elements.

52.3.1 U S WEST shall provide nondiscriminatory access to the network elements specified in this Agreement at any technically feasible point that is equal in quality to the access which U S WEST provides to itself[37] or any other Person and that is on rates, terms and conditions that are just, reasonable and nondiscriminatory. AT&T acknowledges that certain provisions contained in this Agreement may conflict with this standard.

52.3.2 For purposes of this Agreement, "rates, terms and conditions that are just, reasonable and nondiscriminatory" shall mean that (i) such terms and conditions are equal in quality to the terms and conditions that U S WEST provides to itself[38] or any other Person,

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[36] Pursuant to the Eighth Circuit Decision, the Parties agree to this language.
[37] Per Second Arbitration Order, page 4, ¶6.
[38] Per Second Arbitration Order, page 4, ¶6.

or, (ii) where it is technically infeasible to provide such terms and conditions to AT&T, such terms and conditions are offered equally to all requesting carriers.

52.3.3 **For purposes of this Agreement, "equal in quality" shall mean, among other things, equal to the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself and equal in the quality of design, performance, features, functions, capabilities and other characteristics, including, but not limited to, levels and types of redundant equipment and facilities for power, diversity and security, that U S WEST provides to itself.**[39]

52.3.4 *If AT&T requests a particular level of access that is set forth herein, but U S WEST demonstrates that it does not provide that particular level of access to itself or that such access is technically infeasible, U S WEST shall not be required to provide that level of access to network elements,*[40] *but rather the level of access U S WEST provides itself (if technically feasible) or the level of access equal to that provided to all other competing carriers.*

52.4 *Technical Feasibility. The Parties recognize that providing a number of the services specified in this Agreement depend upon the "technical feasibility" of providing that service, as that term is defined under the Act and/or by FCC or Commission rules and decisions. If the Parties cannot agree on whether providing a service is technically feasible, the matter, including cost and expenses (if any), shall be resolved through good faith negotiation or the dispute resolution process outlined in this Agreement.*

52.5 *Equipment.*

52.5.1 *The Parties recognize that equipment vendors may manufacture telecommunications equipment that does not fully incorporate and may deviate from industry standards referenced in this Agreement. Due to the manner in which individual equipment manufacturers have chosen to implement industry standards into the design of their products, along with differing vintages of individual facility components and the presence of embedded technologies pre-dating current technical standards, some of the individual facility components deployed within U S WEST's network, including, without limitation, Network Elements and associated business processes and the standards associated with the equipment providing such Network Elements (collectively, "Network Components"), may not adhere to all the specifications set forth and described in the Bellcore, ANSI, ITU and other technical and performance standards outlined in this Agreement. Upon request by either Party, the Parties will develop a process by which U S WEST will inform AT&T of deviations from standards referenced in this Agreement. In addition, the Parties agree that those deviations from such standards documented by U S WEST to AT&T shall, to the extent permitted by FCC and Commission*

[39] Per Second Arbitration Order, page 4, ¶6.

[40] Pursuant to the Eighth Circuit Decision, the Parties agree to this language.

rules and regulations, supersede sections of this Agreement referencing technical standards otherwise applicable for the affected Network Elements.

52.5.2 *U S WEST agrees that in no event shall it intentionally allow any Network Component provided by U S WEST to AT&T under this Agreement to perform below the standards or deviations therefrom reflected in Section 52.5.1. U S WEST shall minimize any degradation to its equipment relative to currently applicable service, where reasonable in view of industry adopted performance standards and technological developments. Written notice (the "Change Notice") of any planned changes in standards for any Network Component which could impact that Network Component will be provided at least ninety (90) days (or at the make/buy point) prior to the planned implementation. If AT&T notifies U S WEST of how the proposed change may adversely impact AT&T or its Customers within fourteen (14) calendar days after receipt of U S WEST's Change Notice, U S WEST and AT&T will schedule joint discussions to address and attempt to resolve the matter, including without limitation consideration of proposed alternatives. In addition, if U S WEST learns that any Network Component purchased by AT&T under this Agreement has been permitted (even if not intentionally) to fall materially below the level or specification in effect as of the Effective Date, U S WEST shall inform AT&T immediately.*

52.6 Services and Processes. *The Parties recognize that services and processes to be provided or followed by U S WEST may deviate from those desired by AT&T or otherwise outlined in this Agreement. Due to the manner in which U S WEST has chosen to adopt its own processes or implement industry standards into the design of its services or support functions, some of the services or support functions deployed within U S WEST may not adhere to all the specifications set forth and described in this Agreement. Within forty-five (45) days after a request by either Party, the Parties will develop processes by which U S WEST will inform AT&T of the standards known by U S WEST to differ from standards referenced in this Agreement for services or support functions actually provided to AT&T. In addition, the Parties agree that such deviations documented by U S WEST pursuant to such process shall, to the extent permitted by FCC and Board rules and regulations, supersede sections of this Agreement referencing such standards, services, or functions.*

52.7 *U S WEST and AT&T agree to amend this Section and all relevant portions of this Agreement, to incorporate any performance standards and reporting measures to which the Parties may mutually agree. In the event the Parties do not reach agreement as to specific performance standards and reporting measures, U S WEST will provide to AT&T performance standard reports that U S WEST prepares for itself or can reasonably develop.*[41] *Either Party may resolve specific disputes regarding performance standards and reporting measures in accordance with the dispute resolution process contained herein. However, AT&T is*

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41 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "AT&T may request any additional reports, provided that it pays U S WEST's efficient incremental costs for providing these additional reports."

not entitled to demand in the name of parity service levels at any predetermined level, nor will any performance penalties or credits be included in this agreement except as the Parties may otherwise agree.

52.8 Existing Network. Nothing in this Agreement shall be construed as an agreement by the parties to waive any continuing legal requirement that U S WEST need only provide access to or interconnection with its network as it exists at the time that AT&T may request such access. Modifications to U S WEST's network may be limited to those required to accommodate interconnection or access to unbundled network elements as required by law. Nothing in this agreement shall constitute a waiver of any obligation that U S WEST has to meet applicable state or federal standards respecting the nature, extent, or capabilities of its network that serves customers in South Dakota.

52.9 Application. These provisions in Section 52 shall apply to each and every provision in this Agreement. Failure to specifically refer to these provisions shall not be construed to mean these provisions do not apply. The provisions of this Section 52 are applicable for the entire contract and takes precedence over any other conflicting section. The absence of specific references to this Section 52 in potentially conflicting sections is not to be construed to mean that this Section does not apply. Resolution of disputes under this provision shall be resolved by the Commission or through the dispute resolution process of Section 27 of Part A of this Agreement.

53. Entire Agreement

53.1 This Agreement shall include the Attachments, Appendices and other documents referenced herein all of which are hereby incorporated by reference, and constitutes the entire agreement between the Parties and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.

53.2 If a provision contained in any U S WEST tariff conflicts with any provision of this Agreement, the provision of this Agreement shall control, unless otherwise ordered by the FCC or the Commission.

54. Reservation of Rights

54.1 The Parties acknowledge that the terms of this Agreement were established pursuant to an order of the Commission. Any or all of the terms of this Agreement may be altered or abrogated by a successful challenge to this Agreement (or the order approving this Agreement) as permitted by applicable law. By signing this Agreement, neither Party waives its right to pursue such a challenge.

54.2 The Parties enter into this Agreement without prejudice to any position they may have taken previously, or may take in the future in any legislative, regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

AT&T Communications of the Midwest, Inc.

Signature

CATHERINE A. KILSTROM
Name Printed/Typed

BUSINESS MKTS VICE PRES.
Title

1/15/99
Date

U S WEST Communications, Inc.

*Signature

Kathy Fleming
Name Printed/Typed

Executive Director – Interconnection
Title

1/11/99
Date

*Signed as ordered by the arbitrator/commission in Docket No. TC98-184. Signature does not indicate agreement with all aspects of the arbitrator's decision, nor does it waive any of U S WEST's right to seek judicial review of all or part of the agreement, or to reform the agreement as the result of successful judicial review.

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

INTERCONNECTION - LOCAL EXCHANGE

	Recurring	Nonrecurring
Entrance Facility		
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

	Price
Call Termination	
Average Per Minute of Use	$0.003469

	Fixed	Per Mile
Call Transport		
Direct Trunked Transport		
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.95
DS1 - Over 8 to 25	$34.76	$1.32
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.83
DS3 - Over 25 to 50	$236.71	$8.91
DS3 - Over 50	$243.94	$24.44

	Price
Tandem-Switched Transport	
Tandem Switching, Per Minute Of Use	$0.001748

	Fixed	Per Mile
Tandem Transmission		
0 Mile	None	None
Over 0 - 8 Miles	$0.000412	$0.000012
Over 8 - 25 Miles	$0.000406	$0.000014
Over 25 - 50 Miles	$0.000408	$0.000013
Over 50 Miles	$0.000410	$0.000009

	Recurring	Nonrecurring
Multiplexing, per arrangement		
DS3 to DS1	$191.32	$287.45
DS1 to DS0	$181.29	$280.77

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

COMMON CHANNEL SIGNALING ACCESS SERVICE

	Recurring	Nonrecurring
Entrance Facility		
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

	Fixed	Per Mile
Direct Link Transport		
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.95
DS1 - Over 8 to 25	$34.76	$1.62
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23
Direct Link Transport		
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.33	$10.80
DS3 - Over 25 to 50	$236.71	$9.91
DS3 - Over 50	$243.54	$24.44

	Recurring	Nonrecurring
CCS Link – First Link	To Be Negotiated	To Be Negotiated
CCS Link – Each additional Link	To Be Negotiated	To Be Negotiated
STP Port – Per Port	To Be Negotiated	To Be Negotiated
Multiplexing		
DS3 to DS1	$181.32	$287.40
DS1 to DS0	$181.26	$286.77

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

PHYSICAL AND VIRTUAL COLLOCATION

Common Elements	Recurring	Nonrecurring
Quote Preparation Fee	To Be Negotiated	$1,000.00
Entrance Facility - 2 fibers (Note 1)	$107.83	$1,000.00
EICT Channel Terminations		
2-wire DS0 EICT	$1.14	$274.65
4-wire DS0 EICT	$1.45	$274.65
DS1 EICT	$12.57	$311.69
DS3 EICT	$36.56	$313.28
EICT Regeneration		
DS1, Regeneration	$12.21	$311.69
DS3, Regeneration	$75.61	$313.28
Cable Splicing		
Per setup	None	$474.70
Per Fiber Spliced	None	$37.93
48 Volt Power, per ampere, per month	$15.24	None
48 Volt Power Cable, per foot (Note 7)		
20 Ampere Capacity - Recurring	$0.11	$70.21
40 Ampere Capacity - Recurring	$0.15	$95.20
60 Ampere Capacity - Recurring	$0.17	$107.22

	Regular Hours	After Hours
Inspector per 1/2 Hour	$27.70	$35.99

Virtual Collocation	Recurring	Nonrecurring
Equipment Bay, Per Shelf	$3.88	None

	Regular Hours	After Hours
Training per 1/2 Hour	$24.34	None
Engineering per 1/2 Hour	$23.93	$31.01
Installation per 1/2 Hour	$27.70	$35.99
Maintenance per 1/2 Hour	$24.54	$32.84

Physical Collocation	Recurring	Nonrecurring
Cage/Hard Wall Enclosure	ICB	ICB
Rent (w/ Maintenance) - per square foot, Zone 1 (Note 2)	$2.75	None
Rent (w/ Maintenance) - per square foot, Zone 2 (Note 2)	$2.26	None
Rent (w/ Maintenance) - per square foot, Zone 3 (Note 2)	$2.05	None

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

Issue 1-2 Parked
Pursuant to Eighth Circuit Decision, U S WEST proposes the following.

Spot Frame, Per Termination	Recurring	Nonrecurring
DSO	0.01	5.18
DS1	0.02	12.20
DS3	0.32	105.76

Spot Frame, Block Termination	Recurring	Nonrecurring
DSO, Per 100	1.00	617.50
DS1, Per 28	0.79	449.30
DS3, Per each Termination	30.43	$248.07

AT&T proposes deletion of this section.

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

ANCILLARY SERVICES

	Price
Directory Assistance	
Price per Call – Facilities-Based Providers	$0.31
Listings	
Primary Listings, Directory Assistance, White & Yellow Pages	No Charge
E911	
LEC and AECs recover costs from PSAP	No Charge
Interim Number Portability	Price
	New York Method
Assignment of Numbers	Price
Assignments per industry guidelines	No Charge
Busy Line Verification	
Per Call	$0.75
Busy Line Interrupt	
Per Call	$0.92
Operator Assistance	
Per activity	$0.36

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

ACCESS TO UNBUNDLED ELEMENTS

Unbundled Loops	Recurring	Nonrecurring
2-Wire LIS-Link, Statewide	$21.09	
4-Wire LIS-Link, Statewide	$39.34	
ISDN Extension Increment, Per Loop (Note 3)	$21.49	
Basic Installation, First LIS-Link		$105.29
Basic Installation, Each Additional LIS-Link		$56.44
Installation with Conformance Testing, First LIS-Link		$170.79
Installation with Conformance Testing, Each Additional LIS-Link		$86.91
Coordinated Installation with Testing, First LIS-Link		$218.00
Coordinated Installation with Testing, Each Additional LIS-Link		$130.81
Network Interface Device (Note 4)		$50.50
Cable Unloading and Bridge Tap Removal (Note 5)		$59.50

Unbundled Ports	Recurring	Nonrecurring
End Office Port, Per First Port	$1.84	$101.15
End Office Port, Per Each Additional Port	$1.84	$54.45
Average Per Minute of Use, Per Port	$0.003469	

Vertical Features	Recurring	Nonrecurring
Vertical Features - Analog		
Call Hold	$0.0569	
Call Transfer	$0.2161	
Three Way Calling	$0.0963	
Call Pickup	$0.0577	
Call Waiting/Cancel Call Waiting	$0.1330	
Distinctive Ringing	$0.0797	
Speed Call Long – Customer Changeable	$0.0654	
Station Dial Conferencing (6-way)	$1.0508	
Call Forwarding Busy Line	$0.1386	
Call Forwarding Don't Answer	$0.1690	
Call Forwarding Variable	$0.1414	
Call Forwarding Variable Remote	$0.1128	
CLASS - Call Waiting ID	$0.0819	
CLASS - Calling Name & Number	$0.1915	
CLASS - Calling Number Delivery	$0.0806	
CLASS - Calling Number Delivery - Block	$0.3822	
CLASS - Continuous Redial	$0.5005	
CLASS - Last Call Return	$0.4258	
CLASS - Priority Calling	$1.0409	

ACCESS TO UNBUNDLED ELEMENTS (continued)

	Recurring	Nonrecurring
CLASS - Selective Call Forwarding	$0.2306	

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

CLASS - Selective Call Rejection	$1.7651	
CLASS - Anonymous Call Rejection	$0.3937	
Call Park (Store & Retrieve)	$0.1289	
Message Waiting Indication Audible/Visual	$0.0662	
Subsequent Order Charge		$12.75

Note: Any other vertical features requested by AT&T will be priced on an individual case basis.

Vertical Features - BRI ISDN	
2 B + D	under development
2 Primary Directory Numbers (PDNs)	under development
D - Channel Packet	under development
Call Appearance - Two per terminal	under development
Normal Ringing	under development
Caller ID Blocking - per call	under development
Subsequent Order Charge	under development

Note: Any other vertical features requested by AT&T will be priced on an individual case basis.

RESALE

	Nonrecurring
Customer Transfer Charge	$5.00

	Wholesale Discount Rate
USWC Resold Services (Note 6)	
Includes billing and collections, operator services, and directory assistance	15.55%
If CLEC provides its own billing and collections	15.61%
If CLEC provides its own operator services and directory assistance	18.23%
If CLEC provides its own operator services, directory assistance, and billing and collections	18.29%

Notes

1 Pursuant to Order TC 96-184 the recurring rate is applicable for the first two years of the agreement. After that period, the Entrance Enclosure recurring rate is $2.83.
2 Zones per NECA 4 Tariff
3 This charge applies when a CLEC requests ISDN capability on an unbundled loop greater than 18 kft.
4 This charge applies when USW must install a Network Interface Device for a CLEC or when USW must connect a CLEC's loop to the USW Network Interface Device.
5 This charge applies only when loop unbundling is necessary.
6 Pursuant to Order TC 96-184 U S WEST is not required to make its enhanced services available for resale.
7 Price subject retroactive upon final resolution to Cost docket.

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RATES and CHARGES

1. General Principles

1.1 All rates provided under this Agreement shall remain in effect for the term of this Agreement unless they are not in accordance with all applicable provisions of the Act, the rules and regulations of the FCC, or the Commission's rules and regulations.

1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

1.3 The rates, terms and conditions in this Attachment 1 (including Appendix A[1]) are interim in nature. Permanent rates will be established by the Commission in its generic costing and pricing docket. [2]

2. Resale Rates and Charges

All services that U S WEST provides at retail to subscribers who are not Telecommunications Carriers shall be provided at wholesale rates as provided in the Pricing Schedule.

2.1 A Customer Transfer Charge (CTC) of $5.00 applies when transferring any resale customer to another reseller.[3]

2.2 All services that U S WEST provides at retail to subscribers who are not telecommunications carriers shall be provided at a resale discount rate of 15.55% for the services subject wholesale discount. If AT&T provides its own operator services and directory assistance the discount rate will be 10.23%[4]. If AT&T provides its own billing and collections, the discount rate will be 15.61%.[5] If AT&T provides its own operator services, directory assistance and billing and collections, the discount rate will be 19.29%.[6]

2.3 If the resold services are purchased pursuant to tariffs and the tariff rates change,

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[1] The Order on Reconsideration required U S WEST to rerun its models and adjust its price list. U S WEST submitted its revised price list to AT&T on September 10, 1997 and, consequently, the price list is under review at the time.

[2] Per Order on Reconsideration at page 5, Paragraph 1

[3] Per First Order at page 22, Paragraph 182.

[4] Per Reconsideration Order at page 4.

[5] Per First Order at page 24, Paragraph 196.

[6] Per First Order at page 24, Paragraph 196.

charges billed to AT&T for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. The new rate will be effective upon the tariff effective date.

2.4 *A Subscriber Line Charge (SLC) will continue to be paid by AT&T without discount for each local exchange line resold under this Agreement. All federal and state rules and regulations associated with SLC or as found in the applicable tariffs also apply.*

2.5 *AT&T will pay to U S WEST the PIC change charge without discount associated with AT&T end user changes of inter-exchange or intraLATA carriers.*

2.6 *AT&T agrees to pay U S WEST at the wholesale discounted rate when its end user activates any services or features that are billed on a per use or per activation basis (e.g., continuous redial, last call return, call back calling, call trace, etc.). U S WEST shall provide AT&T with detailed billing information per applicable CBF standards unless otherwise agreed to by the Parties as necessary to permit AT&T to bill its end users such charges.*

2.7 *(Intentionally left blank for numbering consistency.)*

2.8 *Nonrecurring charges will be billed as approved by the Commission.*

2.9 *(Intentionally left blank for numbering consistency.)*

2.10 *(Intentionally left blank for numbering consistency.)*

Issue 1-1 Parked

[U S WEST proposes the following]

2.11 *Resale prices shall be wholesale rates determined* [on the basis of retail rates charged to subscribers for the Telecommunications Service requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by U S WEST,] *as specified in the Act, and by the Commission.* **U S WEST shall be obligated to offer its volume and term discount service plans to AT&T provided that AT&T complies with the volume and term requirements contained therein. If selected by AT&T, an appropriate wholesale discount shall also be applied to such plans.**[7] *With the exception of the preceding, AT&T shall not be required to agree to volume or term commitments as a condition for obtaining Local Resale.*

2.12 *U S WEST shall bill AT&T and AT&T is responsible for all applicable charges for the resold services. AT&T shall be responsible for all charges associated with services that AT&T resells to an end user.*

3. Construction and Implementation Costs

3.1 **U S WEST shall be obligated to modify its network to the extent necessary to accommodate AT&T's request for interconnection and access to network elements. U S WEST shall construct when necessary to meet its general obligations as an incumbent LEC as ordered by the Commission or federal law. All other**

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[7] Per First Order at page 20, Paragraph 163.

construction shall be at the discretion of U S WEST.

3.2 **AT&T shall only pay those nonrecurring charges of construction that U S WEST charges an end user.** [8]

3.3 (Intentionally left blank for numbering consistency.)

3.4 Quote Preparation Procedures

A quote for AT&T's request will be provided in writing to AT&T. The quote shall provide a timeline for the construction and shall specify the payment or charges required. The construction charges shall be calculated using existing intrastate pricing methodology. The quote will be binding for ninety (90) days after the issue date. When accepted, AT&T will be billed the quoted price and construction will commence after receipt of payment in accordance with the payment provision of Section 3.5 below. If AT&T chooses not to have U S WEST construct the facilities, U S WEST reserves the right to bill AT&T for the expense incurred for producing the engineered job design.

3.5 Payment

AT&T shall make payment of fifty percent (50%) of the nonrecurring charges and fees upon acceptance of the quotation with the remainder due upon completion of the construction. In the event that AT&T disputes the amount of U S WEST's proposed construction costs, AT&T shall deposit fifty percent (50%) of the quoted construction costs into an interest bearing escrow account prior to the commencement of construction. The remainder of the quoted construction costs shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance with the resolution of such dispute, and any interest that has accrued with respect to amounts in the account shall be distributed proportionately to the Parties. The pendency of any such dispute shall not affect the obligation of U S WEST to complete the requested construction.

4. Network Elements

4.1 **Unbundled Network Elements prices shall not be deaveraged unless retail prices are deaveraged.**[9]

4.2 Interim rates for vertical switching features are set forth in Appendix A.

4.3 [Intentionally left blank for numbering consistency]

4.4 **The rates and charges to be paid by AT&T for unbundled Network Elements are shown on Appendix A hereto.**[10]

4.5 Pricing for Toll and Assistance Operator Services shall be determined upon request.

4.6 **U S WEST may charge a fee of $53.50 for conditioning of loops at the request of AT&T for loops which, at the time requested by AT&T, have not been**

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[8] Per First Order, at page 22, Paragraph 178.

[9] Per First Order at page 12, Paragraph 88.

[10] Per First Order at pages 9-18, Paragraphs 63-141.

conditioned.[11]

4.7 AT&T shall pay for the cost or redesigning and reconfiguring the loop facilities in the requested location to allow for access to subloop elements.[12]

5. Transport and Termination

5.1 U S WEST may charge for three functions associated with transport and termination: call termination within a given month, call transport and call transit. U S WEST shall waive reciprocal compensation call termination charges if traffic exchanged between AT&T and U S WEST is within +/- 5%.[13]

5.2 U S WEST may charge for three rate elements associated with call transport: direct trunked transport based on a fixed per month charge and per mile charge, tandem switching based on per minute use, and tandem transmission based upon a fixed per minute charge and per mile charge.[14]

5.3 Except as otherwise specifically outlined in this Agreement, U S WEST may not charge AT&T switched access tariff prices for local exchange access.[15]

5.4 AT&T shall not receive the tandem switched rate for terminating calls.[16]

6. Number Portability

6.1 *AT&T may request U S WEST to provide AT&T call detail records identifying each IXC which are sufficient to allow AT&T to render bills to IXCs for calls IXCs place to ported numbers in the U S WEST network which U S WEST forwards to AT&T for termination. To the extent that U S WEST is unable to provide billing detail information within a reasonable time frame, the Parties may agree on an interim method to share access revenues pursuant to a mutually agreed upon surrogate approach.*

6.2 Cost for number portability will be allocated on the basis of the "New York Method" as described in the FCC's First Report and Order and Further Notice of Rulemaking in CC Docket No. 95-116, In the Matter of Telephone Number Portability (Number Portability Order), at Paragraph 136.[17]

6.3 Each Party, when it is the terminating carrier, shall receive the common carrier line and local switching charges. Transport charges shall be shared based on meet point billing arrangement.[18]

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[11] Per First Order at page 15, Paragraph 114.
[12] Per First Order at page 10, Paragraph 68.
[13] Per First Order at page 29, Paragraphs 235 and 238
[14] Per First Order at page 29, Paragraph 236.
[15] Per First Order at page 29, Paragraph 239.
[16] Per First Order at pages 29-30, Paragraphs 240-241.
[17] Per First Order at page 26, Paragraphs 213-215.
[18] Per First Order at page 27, Paragraph 218.

7. Collocation – Physical and Virtual

See Appendix A, attached to this Attachment.

8. Rate Structure

See Appendix A attached to this Attachment.

9. Unbundled Switching

9.1 U S WEST may charge a nonrecurring charge of $101.15 for the first port and $54.43 for each additional port requested by AT&T. Additionally, AT&T shall pay U S WEST the amount set forth in Appendix A per month per port utilized by AT&T and $.003334 per minute of use of such port.[19]

10. Operational Support Systems

10.1 A company shall be allowed to assess users of its gateway systems used to access its databases a per transaction charge. The costs used to derive the transaction charge may include the costs incurred for the development of the gateway and recurring costs associated with use of the gateway.[20]

11. Poles, Conduits, Ducts and Rights-of-Ways

11.1 AT&T shall pay U S WEST a just and reasonable rate[21] for access to poles, conduits, ducts and rights-of-ways, the following fees , which shall be based upon Commission based rules and as follows:[22]

11.1.1 Annual usage fee for the use of poles and conduit.
11.1.2 Make ready charges for facility arrangements.
11.1.3 Charge for inspection or supervision of facility.

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19 Per First Order at pages 15-16, Paragraphs 116 and 120.
20 Per First Order at page 25, Paragraph 209.
21 Per First Order at page 28, Paragraph 227.
22 Per First Order at page 28, Paragraphs 226-231.

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RESALE

1. Description

1.1 *U S WEST will make the following services available for resale: residence basic exchange, Centrex Plus, Operator Services, Directory Assistance, Optional Calling Plans, Volume Discount Plans, Discounted Feature Packages, Private Line Transport, negotiated contract arrangements, Business Basic Exchange, PBX Trunks, Frame Relay Service, ISDN, listings, features, IntraLATA toll, AIN Services and WATS. This list of services is neither all inclusive nor exclusive. U S WEST will not prohibit, nor impose unreasonable or discriminatory conditions or limitations on the resale of its Telecommunications Services.*

1.2 **AT&T may resell to any and all classes of end-users Telecommunications Services obtained from U S WEST under this Agreement, except that (i) services U S WEST makes available only to residential customers or to a limited class of residential customers may not be resold to classes of customers who are not eligible to subscribe to such services from U S WEST,[1] and (ii) Lifeline Assistance and Link-up Services may be resold only to those customers eligible for those services.[2]** *The foregoing shall permit, without limitation, the resale of Telecommunications Services to another Reseller.*

1.3 *At the request of AT&T, and pursuant to the requirements of the Act, and FCC rules and state regulations, U S WEST shall make available to AT&T for resale any Telecommunications Services that U S WEST currently provides or may offer hereafter, including, but not limited to,* **Telecommunications Services offered through promotions of more than ninety (90) days duration, contract service arrangements, special arrangements, and discount plans.**[3] *Resale discounts may vary from the standard resale discount, subject to the approval of the Commission.*

1.4 *This Section describes several services which U S WEST shall make available to AT&T for resale pursuant to this Agreement. This description of services is neither all inclusive nor exclusive. Except as may be noted elsewhere in this Agreement, all services or offerings of U S WEST which are to be offered for resale pursuant to the Act are subject to the terms herein, even though they are not specifically enumerated or described. U S West shall also provide Service Functions, as agreed to in this Attachment 2. The Telecommunications Services and Service Functions provided by U S WEST to AT&T pursuant to this Attachment 2 are collectively referred to as "Local Resale."*

1.5 **U S WEST is not required to make enhanced services, including voice mail, available for resale.[4]**

1.5.1 *Voice Mail*

U S WEST shall make available the SMDI-E ("Station Message Desk Interface-Enhanced"), where available, or SMDI (Station Message Desk Interface), where SMDI-E is not available, feature capability allowing for Voice Mail Services. U S WEST shall make available, where available, the MWI (Message Waiting Indicator) stutter dialtone and message waiting light feature capabilities. U S WEST shall make available CF-B/DA (Call Forward on Busy/Don't Answer), CF/B (Call Forward on Busy), and CF/DA (Call Forward Don't Answer) feature

[1] Per First Order at page 19, Paragraph 145.
[2] Per First Order at page 19, Paragraph 152.
[3] Per First Order at page 20, Paragraph 157.
[4] Per First Order at page 19, Paragraph 151.

capabilities allowing for Voice Mail services.

1.6 **Grandfathered Services.**

U S WEST shall offer for resale to AT&T all grandfathered services. AT&T may resell such services only to the same limited group of customers that have purchased such services in the past. For purposes of this Agreement, a grandfathered service is a service that U S WEST no longer offers to new subscribers or a class of new subscribers. AT&T shall be notified of any U S WEST request for the termination of service and/or its grandfathering filed with the Commission or U S WEST's intent to grandfather/withdraw a service at least thirty (30) calendar days prior to the effective date of such grandfathering or intended termination. The form of notification may be either in written or electronic form.

1.7 **N11 Service.**

AT&T shall have the right to resell any N11 service, including, but not limited to, 411 and 911 services.

1.8 **Promotions.**

Promotions of ninety (90) days or less need not be made available to AT&T at the wholesale discount rate.[5]

1.9 The specific business process requirements and systems interface requirements are set forth in Attachment 5 and Attachment 6.

2. General Terms and Conditions for Resale

2.1 ***Primary Local Exchange Carrier Selection.*** U S WEST shall apply the principles set forth in Section 64.1100 of the FCC Rules, 47 C.F.R. § 64.1100, as implemented, to the process for end-user selection of a primary local exchange carrier. In accordance with the customer authorization process described elsewhere in this Agreement, U S WEST shall not require notification from the customer, another carrier, or another entity, in order to process an AT&T order for Local Resale for a customer.

2.2 Except where otherwise provided, AT&T, or AT&T's agent, shall act as the single point of contact for its end users' service needs, including, without limitation, sales, service design, order taking, provision, change orders, training, maintenance, trouble reports, repair, post-sale servicing, billing, collection and inquiry. AT&T shall inform its end users that they are customers of AT&T for resold services. AT&T's end users who inadvertently contact U S WEST with questions regarding their AT&T service will be instructed to contact AT&T. U S WEST end users who inadvertently contact AT&T with questions regarding their U S WEST service will be instructed to contact U S WEST. Nothing in this Agreement shall be deemed to prohibit either Party from discussing its products and services with customers of the other Party who solicit such information or who are directly contacted by a Party.

3. Basic Service Requirements

3.1 Call Types

3.1.1 U S WEST shall provide the following call types, features and functions to AT&T and its end users with no loss of feature or functionality: (a) dial tone and ringing; (b) capability for either dial pulse or touch tone; (c) flat and measured services; (d)

[5] Per First Order at page 20, Paragraph 157.

speech recognition as available with other custom calling and CLASS features; (e) same extended area service free calling area; (f) 1 + intraLATA toll calling; (g) access to interLATA toll calling; (h) access to international calling; (i) lines as well as trunks (DID, DOD); (j) analog and digital private line - all speeds; (k) off-premises extensions; (l) CENTREX; and (m) ISDN.

3.2 U S WEST will provide access for AT&T and all its end user customers to all call types, including, but not limited to, 500, 700, 800, 900, exchanges and dial around services (10XXX).

3.3 U S WEST shall impose no restrictions on customer's calling (e.g., there should not be a 750 minute limit on flat rate calling).

3.4 U S WEST will provide pre-subscription services for intraLATA, when the Commission orders the provision of 1+ pre-subscription, and interLATA toll services in accordance with currently accepted methods and procedures.

3.5 Features Requirements

3.5.1 U S WEST will provide AT&T the ability to suspend and restore customer service, including vacation suspension service, at the direction of AT&T.

3.5.2 End Office Features. U S WEST will provide to AT&T the same end office features available to U S WEST's end users, including, but not limited to, CLASS features, Custom Calling features, and AIN features.

3.5.3 Call Blocking Features. U S WEST will provide to AT&T the same call blocking features as are available to U S WEST's own customers.

3.6 Upon request by AT&T, U S WEST shall provide AT&T a list, in an agreed upon format by central office, of all the Telecommunications Services, features and functions offered by U S WEST and shall provide updates to such lists as further described in Attachment 5. U S WEST shall also provide an electronic access method for AT&T to ascertain the service availability of a particular USOC in a given central office.

4. Requirements for Specific Services

4.1 IntraLATA Toll

U S WEST will provide AT&T its intraLATA toll service to AT&T for resale where 1+ intraLATA toll presubscription is not available.

4.2 Private Line Services

The following private line services shall be made available without restriction from U S WEST: (a) voice grade private line services; (b) off premise extensions; (c) foreign exchange line service; (d) point-to-point and multi-point digital services (e.g., 9.6 kbps-56 kbps; fractional DS-1); (e) DS-1 Services; (f) DS-3 services; (g) OC-3 service (where available); (h) frame relay service; (i) packet switched services; (j) switched digital services; and (k) other private line services as they are made available.

4.2.1 Special access services are not required to be offered for resale at the wholesale discount rate.[6]

4.3 CENTREX Requirements

4.3.1 At AT&T's option and as they are available to U S WEST's own end users via interstate tariffs and state tariffs, price lists, price schedules, catalogs, or Individual Case Basis, AT&T may purchase a single, any combination, or the entire set of CENTREX features, including CENTREX Management System (CMS) or its equivalent as described in Attachment 5. The CENTREX Service provided for resale will meet the requirements set forth in the following provisions of this Section.

4.3.2 All service levels and features of CENTREX Service provided by U S WEST for resale by AT&T shall be at parity with levels and features provided to U S WEST's own customers or as mutually agreed upon by the Parties.

4.3.3 AT&T may aggregate the CENTREX local exchange and intraLATA traffic usage of AT&T subscribers to the extent U S WEST makes such aggregation available to itself or to U S WEST end users, Customers, or Affiliates.

4.3.4 AT&T may aggregate multiple AT&T customers on dedicated access facilities.

4.3.5 U S WEST shall make CMS information available to AT&T at the common block level via an electronic interface, as provided to U S WEST's own end users.

4.3.6 AT&T may use remote call forwarding in conjunction with CENTREX Service to provide service to AT&T Local Service Customers residing outside of the geographic territory in which U S WEST provides local exchange service. However, U S WEST is not obligated to provide facilities outside its service territory.

4.3.7 AT&T may purchase any and all levels of CENTREX Service for resale without restriction on the minimum or maximum number of lines that may be purchased for any one level of service, equivalent to what is offered to U S WEST's own end users.

4.3.8 U S WEST will provide to AT&T the ability to suppress the need for AT&T customers to dial "9" when placing calls outside the CENTREX system.

4.3.9 U S WEST shall make available to AT&T for resale, at no additional charge, intercom calling among all AT&T customers within a common block who utilize resold CENTREX Service.

4.4 CLASS and Custom Features Requirements

*AT&T may purchase a single, any combination, or the entire set of CLASS and custom features and functions, on a customer-specific basis. CLASS features shall include, but not be limited to: caller identification, name and number; call screening; call tracing; and automatic call back on busy (*69). U S WEST shall provide to AT&T a list of all such CLASS and custom features and functions within ten (10) days of a request by AT&T and shall provide updates to such list when new features and functions become available.*

4.5 Customer Financial Assistance Programs

4.5.1 Local Services provided to low-income subscribers, pursuant to requirements

[6] Per First Order at page 20, Paragraph 155.

established by the appropriate state regulatory body, include programs such as Lifeline, Voluntary Federal Customer Financial Assistance Program, and Link-Up America ("Voluntary Federal Customer Financial Assistance Programs"). When a U S WEST subscriber eligible for the Voluntary Federal Subscriber Financial Assistance Programs or other similar state programs chooses to obtain local service from AT&T, U S WEST shall forward information available to U S WEST regarding such subscriber's eligibility to participate in such programs to AT&T and in electronic format when available in accordance with the procedures set forth herein.

4.5.2 **U S WEST shall offer for resale Lifeline and Link-Up Service; provided, however, that AT&T may only resell Lifeline and Link-Up Service to those Customers eligible to receive such services.**[7] *U S WEST will provide information about the certification process for the provisioning of Lifeline, Link-up, and similar services. U S WEST will forward to AT&T, in electronic format (when available) information available to U S WEST regarding a subscriber's program eligibility, status and certification when a U S WEST subscriber currently on any U S WEST telephone assistance program changes service to AT&T as their local exchange carrier. U S WEST will cooperate in obtaining any subsidy associated with a subscriber transfer to AT&T.*

4.5.2.1 In connection with the transfer of a customer from U S WEST to AT&T, U S WEST shall provide to AT&T customer profile, including customer name, billing and residence address, billing telephone number(s), eligibility for Voluntary Federal Customer Financial Assistance Program and other similar services, and identification of U S WEST features and services subscribed to by the customer.

4.6 **Discount Plans and Services**

4.6.1 **AT&T can utilize any volume discounts that U S WEST makes available to its end user customers. U S WEST's volume discounts are subject to the wholesale discount set forth in Attachment 1 to this Agreement.**[8]

4.7 **Hospitality Service.**

U S WEST shall provide all blocking, screening, and all other applicable functions available for hospitality lines utilized as such.

4.8 **Telephone Line Number Calling Cards.** *Effective ten (10) Business Days after the date of an end-user's subscription to AT&T Service or within twenty-four (24) hours after AT&T has notified U S WEST that it has replaced the subscriber's calling card, whichever is earlier, U S WEST will terminate its existing telephone line number-based calling cards and remove any U S WEST-assigned telephone line calling card number subaccount and PIN (including area code) ("TLN") from the LIDB. AT&T may issue a new telephone calling card to such customer, utilizing the same TLN, and AT&T shall have the right to enter such TLN in the LIDB for calling card validation purposes. U S WEST will assume responsibility for billing its calling card calls that appear before the card is terminated. Nothing in this section shall prohibit U S WEST from terminating calling card service to U S WEST customers who have been determined to be a credit risk, according to U S WEST's normal business practices.*

4.8.1 Except as provided above, the Parties will cooperate in the deactivation and activation of calling cards and will make reasonable efforts to minimize the time a

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[7] Per First Order at page 19, Paragraph 152.
[8] Per First Order at page 20, Paragraph 163.

customer is without an active calling card.

4.8.2 U S WEST shall not prohibit AT&T from issuing a new telephone calling card to an AT&T customer utilizing the same TLN and AT&T shall have the right to enter the TLN in the LIDB for calling card verification purposes.

4.8.3 U S WEST will provide AT&T the ability to utilize U S WEST's LIDB for calling card validation.

4.9 U S WEST shall make engineering support available to AT&T for resold services on the same basis as it provides such support for U S WEST end users. To the extent the cost of such engineering support has been considered an avoided cost in the development of the avoided cost discount, the cost of such engineering support shall be borne by AT&T.

4.10 Payphone Services

U S WEST agrees to sell for resale all tariffed PAL Services at an appropriate wholesale discount to be determined by the Commission.

4.10.1 U S WEST shall offer for resale, at a minimum, the following Coin Line, PAL, and PAL Coinless features:

Billed Number Screening
Ability to "freeze" PIC selection
One (1) bill per line and/or multiple lines per BAN
Point of demarcation at the Network Interface location
Detailed billing showing all 1+ traffic on paper, diskette or electronic format
Touch-tone service
Option for listed or non-listed numbers
Access to 911 service
One (1) directory per line

4.10.2 At a minimum, U S WEST shall offer for resale the following Coin Line features:

Access to all Central Office intelligence required to perform answer detection, coin collection, coin return, and disconnect
Answer Detection
Option to block all 1+ calls to international destinations
IntraLATA Call Timing
Option of one-way or two-way service on line
Flat Rate Service, where available
Originating line screening
U S WEST central office intelligence for rating and other functions
Option of measured service, where available
Ability to block any 1+ service that cannot be rated by the coin circuits/IGPS/OSPS to the extent provided on U S WEST coin lines
Protect against clip on fraud to the extent provided on U S WEST coin lines
Protect against blue box fraud to the extent provided on U S WEST coin lines
Provision of Information Digit 27

4.10.3 At a minimum, U S WEST shall offer for resale the following PAL and PAL Coinless features:

Originating line screening
Two-way service option
Flat rate service based on rate groups, where available

Option of one-way service on the line, where available
Option of measured service, where available
Ability to keep existing serving telephone numbers if cutover to AT&T resale line incoming/outgoing screening
Provision of Information Digit 07
Provision of International Toll Denial Recognition Tone, when available

4.10.4 At a minimum, U S WEST shall offer for resale the following PAL Coin feature:

Blocking for 1+ international, 10XXXX1 + international, 101XXXX1 + international, 1+900, N11, 976 and option to block all 1-700 and 1-500 calls
Line side supervision option

4.10.5 At a minimum, U S WEST shall offer for resale the following PAL Coinless feature:

Blocking for 1 + international, 10XXXX1 + international, 101XXXX1 +international, 1+900, N11, 976, and 7 digit local

4.10.6 U S WEST shall provide installation intervals to AT&T for ordering, call transfer, billing, and PIC changes in accordance with performance standards that are established by the Commission, pursuant to subsequent agreement between the Parties or as provided to any other Person.

5. Service Functions

5.1 U S WEST shall provide AT&T with the information available to U S WEST that AT&T will need to certify subscribers who transfer from U S WEST as exempt from charges (including taxes), or eligible for reduced charges associated with providing services.

5.2 U S WEST shall provide AT&T with appropriate notification of all area transfers with line level detail one hundred twenty (120) days before service transfer, and will also notify AT&T within one hundred twenty (120) days before such change of any LATA boundary changes.

5.3 U S WEST will work cooperatively with AT&T in practices and procedures regarding the handling of law enforcement and service annoyance calls.

5.4 Support Functions

5.4.1 Routing to Directory Assistance, Operator and Other Services:

5.4.1.1 U S WEST shall make available to AT&T the ability to route:

(a) all Local Directory Assistance calls (411, (NPA) 555-1212) dialed by AT&T Customers directly to the AT&T Directory Assistance Services platform, where technically feasible and consistent with FCC rules; and

(b) Local Operator Services calls (O+, O-) dialed by AT&T Customers directly to the AT&T Local Operator Services platform, where technically feasible and consistent with FCC rules. Such traffic shall be routed over trunk groups between U S WEST end offices and the AT&T Local Operator Services Platform, using standard Operator Services dialing protocols of O+ or O-.

5.4.1.2 All direct routing capabilities described herein shall permit AT&T Customers to dial the same telephone numbers for AT&T Directory Assistance and Local Operator Service as U S WEST customers use to access similar

services.

6. Security and Law

6.1 U S WEST will maintain and safeguard all AT&T customer information according to CPNI privacy guidelines.

6.2 U S WEST and AT&T will work jointly in security matters as they relate to AT&T customers in a resale environment including, but not limited to, harassment and annoyance calls.

6.3 U S WEST and AT&T will work jointly to support law enforcement agency requirements including, but not limited to, taps, traces and court orders.

6.4 U S WEST will work jointly with AT&T with respect to prevention and settlement of fraud.

6.5 U S WEST and AT&T will work jointly to provide access to lines in a hostage situation.

7. Ordering and Maintenance

7.1 AT&T shall transmit to U S WEST the information necessary for the installation (billing, listing and other information), repair, maintenance and post-installation servicing according to U S WEST's standard procedures, as described in the U S WEST resale operations guide that will be provided to AT&T. When U S WEST's end user or the end user's new service provider discontinues the end user's service in anticipation of moving to another service provider, U S WEST will render its closing bill to the end user effective with the disconnection. Should AT&T's end user, a new service provider or AT&T request service be discontinued to the end user, U S WEST will issue a bill to AT&T for that portion of the service provided to the AT&T end user. In no event, shall the transition of an end user from U S WEST to AT&T cause a disconnection of service other than as specifically provided for in this Agreement. It is understood that AT&T's decision to request a change in class of service (or a conversion to a re-used unbundled loop) at "transition" may involve a few minutes out-of-service. The preceding may be modified by agreement of the Parties.

7.2 U S WEST will notify AT&T by Fax or other processes as agreed to by the Parties, when an end user moves to another service provider.

7.3 The new service provider shall be responsible for issuing either a transfer of service or disconnect/new connect order, as appropriate.

7.4 The Parties agree that they will work cooperatively to develop the standards and processes applicable to the transfer of such accounts that are in arrears.

8. Changes in Retail Service

8.1 U S WEST will notify AT&T of any changes in the terms and conditions under which it offers Telecommunications Services at retail to subscribers who are not telecommunications service providers or carriers, including, but not limited to, the introduction or discontinuance of any features, functions, services or promotions.

8.2 U S WEST will provide to AT&T advance notice of the availability of new Telecommunication Services in accordance with Part A, Section 23.2 of this Agreement.

8.3 In the event U S WEST intends to terminate the provisioning of any resold services to AT&T for any reason, AT&T shall be responsible for providing any and all necessary notice to its end users of the termination. In no case shall U S WEST be responsible for providing such

notice to AT&T's end users. U S WEST will provide sufficient written notice to AT&T of U S WEST's intent to terminate a resold service so that AT&T may notify its customers or intervene in the proceedings on a timely basis consistent with Commission rules and notice requirements.

9. Customer Authorization Process

9.1 U S WEST and AT&T will use the existing PIC process as a model, and the same or similar procedures for changes of local providers. For a local carrier change initiated by AT&T or an agent of AT&T to a customer, one of the following four (4) procedures will constitute authorization for the change: (a) Obtain the customer's written authorization (letter of authorization or LOA); (b) Obtain the customer's electronic authorization by use of an toll-free number; (c) Have the customer's oral authorization verified by an independent third party (third party verification); or (d) Send an information package, including a prepaid, returnable postcard, within three (3) days of the customer's request for a local carrier change, and wait fourteen (14) days before submitting the local carrier change to the previous carrier.

9.2 It is understood by U S WEST and AT&T that these procedures may be superseded or modified by FCC rules, state law or industry standards.[9]

9.3 U S WEST will provide AT&T authorization for a local carrier change that is initiated by a customer call to AT&T. In this case AT&T will: (a) maintain internal records verifying the customer's stated intent to switch carriers; and (b) produce the record in case of a slamming dispute consistent with the FCC rules.

9.4 Should an end user dispute or a discrepancy arise regarding the authority of AT&T to act on behalf of the end user, AT&T is responsible for providing a written response evidencing its authority to U S WEST within five (5) Business Days of receipt of a written request from U S WEST describing the basis of the dispute or discrepancy. If there is a conflict between the end user designation or AT&T does not provide a response within five (5) Business Days, U S WEST shall honor the designation of the end user. In the event the end user designation is honored by U S WEST as described above then AT&T shall remit a slamming charge, if any, in accordance with Section 258 of the Act and Commission Rules.

9.5 Should an end user dispute or a discrepancy arise regarding the authority of U S WEST to act on behalf of the end user, U S WEST is responsible for providing a written response evidencing its authority to AT&T within five (5) Business Days of receipt of a written request from AT&T describing the basis of the dispute or discrepancy. If there is a conflict between the end user designation or U S WEST does not provide a response within five (5) Business Days, AT&T shall honor the designation of the end user. In the event the end user designation is honored by AT&T as described above then U S WEST shall remit a slamming charge, if any, in accordance with Section 258 of the Act and Commission rules.

9.6 AT&T shall designate the Primary Interexchange Carrier (PIC) assignments on behalf of its end users for interLATA services and for intraLATA services when intraLATA presubscription is implemented.

9.6.1 U S WEST shall not be required to assign central office codes in a U S WEST central office for the exclusive use of AT&T.[10]

9.7 When Customers switch from U S WEST to AT&T, or to AT&T from any other service

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[9] Per First Order at page 6, Paragraph 32 and Reconsideration Order at page 5.
[10] Per First Order at page 31, Paragraph 250.

provider, such Customers shall be permitted to retain their current telephone numbers if they so desire and if they do not change their service address to an address served by a different central office. U S WEST shall take no action to prevent AT&T customers from retaining their current telephone numbers.

10. AT&T Responsibilities

10.1 AT&T must send to U S WEST either (a) complete and accurate end user listing information for Directory Assistance and 911 Emergency Services using processes mutually agreed to by the Parties, or (b) notification of as is migration. AT&T must provide to U S WEST accurate end user information to ensure appropriate listings in any databases in which U S WEST retains and/or maintains end user information. AT&T assumes liability for the accuracy of information provided to U S WEST. After receiving accurate information from AT&T, U S WEST assumes liability for the accuracy of transmission of such information to the database provider (e.g., SCC).

10.2 U S WEST shall provide AT&T with the capability to assign large quantities (i.e., greater than ten (10)) telephone numbers for multiple line and PBX customers in accordance with U S WEST's tariffs and/or its own internal practices.

10.3 AT&T will provide a three (3) year non-binding forecast within ninety (90) days of a request by U S WEST.. The forecast shall be updated and provided to U S WEST on a quarterly basis. The initial forecast will provide:

The date service will be offered (by city and/or state)
The type and quantity of service(s) which will be offered
AT&T's anticipated order volume
AT&T's key contact personnel

11. Pricing

The wholesale discount rate charged to AT&T for Local Resale is set forth in Attachment 1 of this Agreement.

12. Deposit

12.1 U S WEST may require a suitable deposit to be held by U S WEST as a guarantee for payment of U S WEST's charges for companies which cannot demonstrate sufficient financial integrity based on commercially reasonable standards, which may include a satisfactory credit rating as determined by a recognized credit rating agency reasonably acceptable to U S WEST.

12.2 **For purposes of this Agreement, a deposit will not be required from AT&T**[11] regardless of whether a deposit may be required from any other CLEC.

[11] Per First Order at page 22, Paragraph 176.

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[U S WEST proposed language]

19 AT&T Re-combining of Unbundled Network Elements - Packet

UNBUNDLED ACCESS/ELEMENTS

1. Introduction

The following standards shall apply to each provision in Attachment 3. Failure to specifically reference this standard, or individual subsections 1.1 - 1.3 below, shall not be construed to mean this standard does not apply.

1.1 Pursuant to the Act, U S WEST shall provide nondiscriminatory access to the network elements specified in this Attachment 3 at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory.

1.2 For purposes of this Attachment 3, "rates, terms and conditions that are just, reasonable and nondiscriminatory" shall mean that (i) such terms and conditions are equal in quality to the terms and conditions that U S WEST provides to itself, or, (ii) where it is technically infeasible to provide such terms and conditions to AT&T, such terms and conditions are offered equally to all requesting carriers.

1.3 Notwithstanding any performance standard set forth in this Attachment, U S WEST will provide the services set forth in this Attachment to AT&T with the level of service quality set forth in Section 5C, Part A of this Agreement.

1.4 U S WEST shall provide unbundled Network Elements in accordance with the requirements of the Act, FCC rules and regulations, and state rules, regulations and orders. The price for each Network Element is set forth in Attachment 1 of this Agreement. Except as otherwise set forth in this Attachment, AT&T may order Network Elements as of the Effective Date of this Agreement.

1.5 General Terms

1.5.1 U S WEST agrees to make available the following unbundled Network Elements which are addressed in more detail in the following sections of this Attachment: (a) local loop, (b) local and tandem switches (including all vertical switching features provided by such switches);,[1] (c) interoffice transmission facilities, (d) network interface devices, (e) signaling and call-related database facilities, (f) operations support systems functions, and (g) operator and directory assistance facilities.

Issue 3-1 - Period

[AT&T proposed provision]

1.5.2 U S WEST shall offer each Network Element individually and in Combination with any other Network Element or Network Elements in order to permit AT&T to combine such Network Elements or Network Elements obtained from U S WEST with network components provided by itself or by third parties to provide Telecommunications Services to its subscribers. U S WEST shall combine unbundled Network Elements in any manner requested by AT&T, unless U S WEST can prove that a request is not technically feasible or would undermine the ability of other carriers to obtain unbundled Network Elements and interconnect. AT&T may purchase

[1] Per First Order at page 11, Paragraph 76.

unbundled Network Elements to it locally or to Centralized without restriction as to how these elements may be recombined.

[U S WEST proposes the following:]

1.5.2 U S WEST shall offer each Network Element individually and any other individual Network Element or Network Elements in order to permit AT&T to combine such Network Element or Network Elements obtained from U S WEST or with network components provided by itself or by third parties to provide Telecommunications Services to its subscribers. U S WEST is not obligated to provide AT&T two or more unbundled network elements in combination. U S WEST will enable AT&T to combine two or more network elements pursuant to the unbundling provisions of Section 19 of this Agreement.

2. Unbundled Network Elements

2.1 *U S WEST shall offer Network Elements to AT&T on an unbundled basis on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of this Agreement.*

2.2 *U S WEST shall permit AT&T to connect AT&T's facilities or facilities provided to AT&T by third parties with each of U S WEST's unbundled Network Elements at any technically feasible point designated by AT&T.*

2.3 *AT&T may use one or more Network Elements to provide any feature, function, network or service option such Network Element(s) is capable of providing or any feature, function, capability, or service option described in the technical references identified herein, or as may otherwise be determined by AT&T.*

2.3.1 AT&T may, at its option, designate any technically feasible point of access to unbundled Network Elements.
Issue 3-2 - Parked

[U S WEST proposes the following:]

2.4 For each Network Element, U S WEST shall provide the Single Point of Termination ("SPOT") frame or a functionally equivalent point as described in Section 19 below.

[AT&T proposes the following:]

2.4 For each Network Element, U S WEST shall provide a demarcation point (e.g., at a Digital Signal Cross Connect, DCS, Light Guide Cross Connect panel or a Voice Termination Frame) and if necessary, access to the AT&T side of such demarcation point, which AT&T agrees is suitable. Where U S WEST provides combined Network Elements at AT&T's direction, however, no demarcation point shall exist between such contiguous Network Elements.

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[2] Per First Order at page 12, Paragraph 40.

2.5 *[Intentionally left blank for numbering consistency.]*

2.6 *This Attachment describes the initial set of Network Elements which AT&T and U S WEST have identified as of the Effective Date of this Agreement:*

Loop
Network Interface Device
Distribution (subject to the BFR)
Local Switching
Operator Systems
Shared Transport
Dedicated Transport
Signaling Link Transport
Signaling Transfer Points
Service Control Points/Databases
Tandem Switching
911
Directory Assistance
Operational Support Systems[3]

2.7 *AT&T and U S WEST agree that the Network Elements identified in this Attachment are not all of the possible Network Elements.*

2.8 *AT&T may identify additional or revised Network Elements as necessary to provide Telecommunications Services to its subscribers, to improve network or service efficiencies or to accommodate changing technologies, customer demands, or other requirements.*

3. Standards for Network Elements

3.1 *Each Network Element shall be furnished at a performance level equal to the performance level that U S WEST provides itself as to*[4] *the requirements set forth in the technical references identified herein for each such Network Element, as well as any performance or other requirements, identified in this Attachment, subject to Sections 52.3.1 and 52.3.2 of Part A of this Agreement.*

3.2 *If one or more of the requirements set forth in this Agreement are in conflict, the Parties agree to resolve such conflict in accordance with Section 27, Dispute Resolution, of Part A of this Agreement.*

3.2.1 *U S WEST shall provide to AT&T, upon request, engineering, design, performance and other network data sufficient for AT&T to determine that the requirements of this Section 3 are being met. In the event that such data indicates that the requirements set forth herein are not being met, U S WEST shall, within ten (10) days, cure any design, performance or other deficiency and provide new data sufficient for AT&T to determine that such deficiencies have been cured.*

3.2.2 *U S WEST agrees to work cooperatively with AT&T to provide Network Elements that will meet AT&T's needs in providing Telecommunications Services to its subscribers.*

Description of Unbundled Elements

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[3] Pursuant to the Eighth Circuit Decision, the Parties agree to this revision.
[4] Pursuant to the Eighth Circuit Decision, the Parties have agreed to this modification.

4. Tandem Switching

U S WEST will provide a tandem switching element ("Tandem Switching") on an unbundled basis. The tandem switch element includes the facilities connecting the trunk to the distribution frames in the switch, and all the functions of the switch itself, including those facilities that establish a temporary transmission path between two other switches. The definition of the tandem switching element also includes the functions centralized in tandems rather than in separate end office switches, such as call recording, the routing of calls to Operator Services, and signaling conversion functions.

4.1 Definition:

Tandem Switching is the function that establishes a communications path between two switching offices through a third switching office (the tandem switch) including, but not limited to, those of AT&T, U S WEST, independent telephone companies (ICOs), IXCs and wireless carriers.

4.2 Technical Requirements

4.2.1 Tandem Switching provided by U S WEST to AT&T shall have the same capabilities or equivalent capabilities as those described in Bell Communications Research TR-TSY-000540 Issue 2R2, Tandem Supplement, June 1, 1990. The requirements for Tandem Switching include, but are not limited to, the following:

4.2.1.1 Tandem Switching shall provide signaling to establish a tandem connection;

4.2.1.2 When provided with Custom Routing, Tandem Switching shall provide screening (digit analysis) and routing as designated by AT&T;

4.2.1.3 Where technically feasible, U S WEST shall modify tandem switching to the recording of billable events to the extent necessary to accommodate interconnection and access to unbundled network elements;

4.2.1.4 [Intentionally left blank for numbering consistency.]

4.2.1.5 Tandem Switching shall provide connectivity to Operator Systems, as designated by AT&T;

4.2.1.6 Tandem Switching shall provide access to toll free number portability database where AT&T sends such traffic to a tandem;

4.2.1.7 Tandem Switching shall allow the passing of all function is available with traffic for all trunk interconnection discussed under the "Network Interconnection" section of this Agreement (e.g., SS7, MF, DTMF, Dial Pulse, PRI-ISDN, DID, and CAMA-ANI (if appropriate for 911));

4.2.1.8 Tandem Switching shall provide connectivity to PSAP's where 911 solutions are deployed and the tandem is used for 911; and

4.2.1.9 Tandem Switching shall provide connectivity to Transit Traffic to and from other carriers.

4.2.2 Tandem Switching shall accept connections (including the necessary signaling and trunking interconnections) between end offices, other tandems, IXCs, ICOs, CAPs and CLEC switches.

4.2.3 Tandem Switching shall provide local tandeming functionality between two (2) end offices including two (2) offices belonging to different CLECs (e.g., between an AT&T end office and the end office of another CLEC).

4.2.4 Tandem Switching shall preserve CLASS/LASS features and Caller ID as traffic is processed. Additional signaling information and requirements are provided in Section 15 of this Attachment.

4.2.5 Tandem Switching shall record billable events and send them to the appropriate billing centers designated by AT&T. Billing requirements are specified in Attachment 5 of this Agreement.

4.2.6 U S WEST shall perform routine testing and fault isolation on the underlying switch providing Tandem Switching and all its interconnections. When requested by AT&T, the results and reports of the testing shall be made immediately available to AT&T.

4.2.7 When requested by AT&T, U S WEST shall provide to AT&T for review performance data regarding traffic characteristics or other measurable elements with respect to AT&T traffic.

4.2.8 Tandem Switching shall control congestion using capabilities such as Automatic Congestion Control and Network Routing Overflow. Congestion control provided or imposed on AT&T traffic shall be at parity with controls being provided or imposed on U S WEST traffic (e.g., U S WEST shall not block AT&T traffic and leave its own traffic unaffected or less affected).

4.2.9 Tandem Switching shall route calls to U S WEST or AT&T endpoints or platforms (e.g., Operator Services and PSAPs) on a per call basis as designated by AT&T. Detailed primary and overflow routing plans for all interfaces available within the U S WEST switching network shall be mutually agreed to by AT&T and U S WEST. Such plans shall meet AT&T requirements for routing calls through the local network.

4.2.10 Tandem Switching shall process originating toll free traffic received from an AT&T local switch.

4.2.11 In support of AIN triggers and features, Tandem Switching shall provide SSP capabilities when those capabilities are not available from the Local Switching Network Element.

4.2.12 The Local Switching and Tandem Switching functions may be combined in an office. If this is done, both Local Switching and Tandem Switching shall provide all of the functionality required of each of those Network Elements in this Agreement.

4.3 Interface Requirements

4.3.1 Tandem Switching shall provide interconnection to the E911 PSAP where the underlying Tandem is acting as the E911 Tandem.

4.3.2 Tandem Switching shall interconnect, with direct trunks, to all carriers with which U S WEST interconnects.

4.3.3 U S WEST shall provide all signaling necessary to provide Tandem Switching with no loss of feature functionality.

4.3.4 For applicable call types, Tandem Switching shall interconnect with AT&T's switch using two-way trunks, for traffic that is transiting via the U S WEST network to interLATA or intraLATA carriers. At AT&T's request, Tandem Switching shall record and keep records of traffic for billing.

4.3.5 At AT&T's request, Tandem Switching shall provide overflow routing of traffic from a given trunk group or groups onto another trunk group or groups according to the methodology employed by U S WEST as designated by AT&T.

4.4 Tandem Switching shall meet or be at the performance level that U S WEST provides itself as to[5] each of the requirements for Tandem Switching set forth in the following technical references:

4.4.1 Bell Communications Research TR-TSY-000540 Issue 2R2, Tandem Supplement, June 1, 1990;

4.4.2 GR-905-CORE covering CCSNIS;

4.4.3 GR-1429-CORE for call management features; and

4.4.4 GR-2863-CORE and GR-2902-CORE for CCS AIN interconnection.

5. Shared Transport

5.1 U S WEST will provide unbundled access to U S WEST transmission facilities between end offices, end offices and the tandem switch, and the tandem switch and end offices for completing local calls. Such transmission facilities would be shared with U S WEST and as applicable with other CLECS. Transport routing shall be on an identical basis as routing is performed by U S WEST, providing the same efficiencies that U S WEST employs for itself. Shared transport shall meet the technical specifications as itemized below for Common Transport.

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[AT&T proposes the following] [U S WEST opposes the addition]

Costs for shared transport will be allocated appropriately based upon the transmission path taken by each call.

5.2 Technical Requirements

5.2.1 U S WEST shall be responsible for the engineering, provisioning, and maintenance of the underlying equipment and facilities used to provide Shared Transport.

5.2.2 In accordance with Part A, Sections 52.5.1 and 52.5.2, of this Agreement, at a minimum, Shared Transport shall meet all of the requirements set forth in the following technical references (as applicable for the transport technology being used):

5.2.3 ANSI T1.101-1994, American National Standard for Telecommunications - Synchronization Interface Standard Performance and Availability.

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[5] Pursuant to the Eighth Circuit Decision, the Parties agree to this modification.

5.2.3.1 *ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;*

5.2.3.2 *ANSI T1.102.01-199x, American National Standard for Telecommunications - Digital Hierarchy - VT1.5;*

5.2.3.3 *ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;*

5.2.3.4 *ANSI T1.105.01-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Automatic Protection Switching;*

5.2.3.5 *ANSI T1.105.02-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Payload Mappings;*

5.2.3.6 *ANSI T1.105.03-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Jitter at Network Interfaces;*

5.2.3.7 *ANSI T1.105.03a-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Jitter at Network Interfaces - DS-1 Supplement;*

5.2.3.8 *ANSI T1.105.05-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Tandem Connection;*

5.2.3.9 *ANSI T1.105.06-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Physical Layer Specifications;*

5.2.3.10 *ANSI T1.105.07-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Sub STS-1 Interface Rates and Formats;*

5.2.3.11 *ANSI T1.105.09-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Network Element Timing and Synchronization;*

5.2.3.12 *ANSI T1.106-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode);*

5.2.3.13 *ANSI T1.107-1988, American National Standard for Telecommunications - Digital Hierarchy - Formats Specifications;*

5.2.3.14 *ANSI T1.107a-1990, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications (DS3 Format Applications);*

5.2.3.15 *ANSI T1.107b-1991, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications;*

5.2.3.16 *ANSI T1.117-1991, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (SONET) (Single Mode - Short Reach);*

5.2.3.17 *ANSI T1.403-1989, Carrier to Subscriber Installation, DS-1 Metallic Interface Specification;*

5.2.3.18 *ANSI T1.404-1994, Network-to-Subscriber Installation - DS-3 Metallic Interface Specification;*

5.2.3.19 *ITU Recommendation G.707, Network node interface for the synchronous digital hierarchy (SDH);*

5.2.3.20 *ITU Recommendation G.704, Synchronous frame structures used at 1544, 6312, 2048, 8488 and 44735 kbit/s hierarchical levels;*

5.2.3.21 *Bellcore FR-440 and TR-NWT-000499, Transport Systems Generic Requirements (TSGR): Common Requirements;*

5.2.3.22 *Bellcore GR-820-CORE, Generic Transmission Surveillance: DS-1 & DS-3 Performance;*

5.2.3.23 *Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET); Common Generic Criteria;*

5.2.3.24 *Bellcore TR-NWT 000507, Transmission, Section 7, Issue 5 (Bellcore December 1993) (A module of LSSGR, FR-NWT-000064.);*

5.2.3.25 *Bellcore TR-NWT-000776, Network Interface Description for ISDN Subscriber Access;*

5.2.3.26 *Bellcore TR-INS-000342, High-Capacity Digital Special Access Service-Transmission Parameter Limits and Interface Combinations, Issue 1, February 1991;*

5.2.3.27 *Bellcore ST-TEC-000052, Telecommunications Transmission Engineering Textbook, Volume 2: Facilities, Third Edition, Issue 1, May 1999;and*

5.2.3.28 *Bellcore ST-TEC-000051, Telecommunications Transmission Engineering Textbook Volume 1: Principles, Third Edition, Issue 1, August 138.*

6. *[Intentionally left blank for numbering consistency.]*

7. **Dedicated Transport**

7.1 *Definition:*

7.1.1 Dedicated Transport is a transmission path between any of the following: U S WEST's end offices, US WEST Serving Wire Centers, U S WEST tandem switches, AT&T meet point, AT&T switches or wire centers and interexchange carrier POPs.

7.1.2 U S WEST shall offer Dedicated Transport in each of the following manners:

7.1.2.1 as capacity on a shared facility;

7.1.2.2. as a circuit (e.g., DS-1, DS-3, STS-1) dedicated to AT&T;

7.1.2.3 provisioned on a system (i.e., the equipment and facilities used to provide Dedicated Transport such as SONET ring).

7.1.3 When Dedicated Transport is provided as a circuit or as capacity on a shared facility, it shall include, as appropriate:

7.1.3.1 multiplexing functionality;

7.1.3.2 grooming functionality; and,

7.1.3.3 redundant equipment and facilities necessary to support protection and restoration.

7.1.4 When Dedicated Transport is provided it shall include:

7.1.4.1 transmission equipment such as multiplexers, line terminating equipment, amplifiers, and regenerators;

7.1.4.2 inter-office transmission facilities such as optical fiber, copper twisted pair, and coaxial cable;

7.1.4.3 redundant equipment and facilities necessary to support protection and restoration; and

7.1.4.4 access to the Digital Cross-Connect System (DCS) functionality as an option in the same manner provided to IXCs that purchase transport services. DCS is described below in Section 7.5 of this Attachment.

7.2 Technical Requirements

This Section sets forth technical requirements for all Dedicated Transport.

7.2.1 When U S WEST provides Dedicated Transport (e.g., DS-1, DS-3, STS-N) such transport shall be AT&T designated traffic.

7.2.2 U S WEST shall offer Dedicated Transport using currently available technologies including, but not limited to, DS-1 and DS-3 transport systems, SONET Bi-directional Line Switched Rings, SONET Unidirectional Path Switched Rings, and SONET point-to-point transport systems (including linear add-drop systems), at all available transmission bit rates.

7.2.3 When requested by AT&T, Dedicated Transport shall provide physical diversity. Physical diversity means that two (2) circuits are provisioned in such a way that no single failure of facilities or equipment will cause a failure on both circuits.

7.2.4 When physical diversity is requested by AT&T, U S WEST shall provide the maximum feasible physical separation between transmission paths for all facilities and equipment (unless otherwise agreed to by AT&T).

7.2.5 Upon AT&T's written request and where technically feasible and available in the U S WEST network, U S WEST shall provide real time and continuous remote access to performance monitoring and alarm data affecting, or potentially affecting, AT&T's traffic.

7.2.6 U S WEST shall offer the following interface transmission rates for Dedicated Transport:

7.2.6.1 DS-1 (Extended SuperFrame - ESF/B8ZS, D4, and unframed applications shall be provided, except for those local/EAS tandems as designated by U S WEST);

7.2.6.2 DS-3 (C-bit Parity, M13, and unframed applications shall be provided);

7.2.6.3 SONET standard interface rates in accordance with ANSI T1.105 and ANSI T1.105.07 and physical interfaces per ANSI T1.105.06 (including referenced interfaces). In particular, VT1.5 based STS-1s will be the interface at an AT&T service node; and

7.2.6.4 where available, SONET standard interface rates in accordance with International Telecommunications Union ("ITU") Recommendation G.707 and Plesiochronous Digital Hierarchy ("PDH") rates per ITU Recommendation G.704.

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[U S WEST proposes the following]

7.2.7 U S WEST shall provide intraoffice wiring up to a suitable Single Point of Termination ("SPOT") between Dedicated Transport and AT&T designated equipment. U S WEST shall provide the following equipment for the physical SPOT:

7.2.7.1 DSX1 or DCS for DS-1s or VT1.5s;

7.2.7.2 DSX3 or DCS for DS-3s or STS-1s; and

7.2.7.3 Light guide cross-connect for optical signals (e.g., OC-3 and OC-12).

7.2.8 For Dedicated Transport U S WEST shall design such transport (including, but not limited to, facility routing and termination points) according to AT&T specifications.

7.2.9 Upon AT&T's request and where available, U S WEST shall provide AT&T with electronic provisioning control, of AT&T specified Dedicated Transport via Command-A-Link or equivalent interface in the same manner as is provided to interexchange carriers.

7.2.10 U S WEST shall offer Dedicated Transport together with and separately from DCS.

7.3 Technical Requirements for Dedicated Transport Using SONET Technology

This Section sets forth additional technical requirements for Dedicated Transport using SONET technology including rings, point-to-point systems, and linear add-drop systems.

7.3.1 All SONET Dedicated Transport provided as a system shall:

7.3.1.1 be synchronized with a primary Stratum 1 level timing source;

7.3.1.2 where technically feasible, provide SONET standard interfaces as available in the U S WEST network and consistent with generally accepted industry standards which properly interwork with SONET standard equipment from other vendors, including, but not limited to, SONET standard section, line and path performance monitoring, maintenance signals, alarms, and data channels;

7.3.1.3 provide Data Communications Channel ("DCC") or equivalent connectivity through the SONET transport system. Dedicated Transport provided over a SONET transport system shall be capable of routing DCC messages between AT&T and SONET network components connected to the Dedicated Transport. For example, if AT&T leases a SONET ring from U S WEST, that ring shall support DCC message routing between AT&T and SONET network components connected to the ring; and

7.3.1.4 support the following performance requirements for each circuit (STS-1, DS-1, DS-3, etc.):

7.3.1.4.1 no more than ten (10) Errored Seconds Per Day (Errored Seconds are defined in the technical reference at Section 7.4.5); and

7.3.1.4.2 no more than one (1) Severely Errored Second Per Day (Severely Errored Seconds are defined in the technical reference at Section 7.4.5).

7.3.2 SONET rings shall:

7.3.2.1 be provisioned on physically diverse fiber optic cables (including separate building entrances where available). "Diversely routed" shall be interpreted as the maximum feasible physical separation between transmission paths, unless otherwise agreed to by AT&T;

7.3.2.2 support dual ring interworking per SONET Standards where available in the U S WEST network;

7.3.2.3 provide the necessary redundancy in optics, electronics, and transmission paths such that no single failure will cause a service interruption;

7.3.2.4 where available, provide the ability to disable ring protection switching at AT&T's direction (selective protection lock-out). This requirement applies to line switched rings only;

7.3.2.5 where available, provide the ability to use the protection channels to carry extra traffic. This requirement applies to line switched rings only;

7.3.2.6 provide 50 millisecond restoration as defined in SONET standards;

7.3.2.7 where available, have settable ring protection switching thresholds that shall be set in accordance with AT&T's specifications;

7.3.2.8 where available, provide revertive protection switching with a settable wait to restore delay with a default setting of five (5) minutes. This requirement applies to line switched rings only;

7.3.2.9 provide non-revertive protection switching. This requirement applies to path switched rings only; and

7.3.2.10 adhere to the following availability requirements, where availability is defined in the technical reference set forth in Section 7.4.5:

7.3.2.10.1 no more than 0.25 minutes of unavailability per month; and

7.3.2.10.2 no more than 0.5 minutes of unavailability per year.

7.4 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, at a minimum, Dedicated Transport shall meet each of the requirements set forth in Section 7.2.3 of this Attachment and in the following technical references:

7.4.1 ANSI T1.105.04-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Data Communication Channel Protocols and Architectures;

7.4.2 ANSI T1.119-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Operations, Administration, Maintenance and Provisioning (OAM&P) Communications;

7.4.3 ANSI T1.119.01-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Operations, Administration, Maintenance, and Provisioning (OAM&P) Communications Protection Switching Fragment;

7.4.4 ANSI T1.119.02-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Operations, Administration, Maintenance and Provisioning (OAM&P) Communications Performance Monitoring Fragment; and

7.4.5 ANSI T1.231-1993 -American National Standard for Telecommunications - Digital Hierarchy - Layer 1 In-Service Digital Transmission Performance Monitoring

7.5 Digital Cross-Connect System (DCS)

7.5.1 Definition

7.5.1.1 Digital Cross-Connect System ("DCS") is a function which provides automated cross connection of Digital Signal level 0 (DS-0) or higher transmission bit rate digital channels within physical interface facilities. Types of DCSs include but are not limited to DCS 1/0s, DCS 2/1s, and DCS 3/3s, where the nomenclature 1/0 denotes interfaces typically at the DS-1 rate or greater with cross-connection typically at the DS-0 rate. The same nomenclature, at the appropriate rate substitution, extends to the other types of DCSs specifically cited as 3/1 and 3/3. Types of DCSs that cross-connect Synchronous Transport Signal level 1 (STS-1) or other Synchronous Optical Network ("SONET") signals (e.g., STS-3) are also DCSs, although not denoted by this same type of nomenclature. DCS may provide the functionality of more than one of the aforementioned DCS types (e.g., DCS 3/3/1 which combines functionality of DCS 3/3 and DCS 3/1).

For such DCSs, the requirements will be, at least, the aggregation of requirements on the "component" DCSs.

7.5.1.2 In locations where automated cross connection capability does not exist, a Digital Signal Cross-Connect ("DSX") or light guide cross-connect patch panels and D4 channel banks or other DS-0 and above multiplexing equipment used to provide the function of a manual cross connection will be made available.

7.5.1.3 Interconnection between a DSX or light guide cross-connect, to a switch, another cross-connect, or other service platform device, is included as part of DCS.

7.6 DCS Technical Requirements

7.6.1 DCS shall provide completed end-to-end cross connection of the channels designated by AT&T.

7.6.2 DCS shall perform facility grooming, multipoint bridging, one-way broadcast, two-way broadcast, and facility test functions, where such technology is available.[6]

7.6.3 DCS shall provide multiplexing, format conversion, signaling conversion, or other functions, where such technology is available.[7]

7.6.4 The end-to-end cross connection shall be input to the underlying device used to provide DCS from an operator at a terminal or via an intermediate system. The cross connection assignment shall remain in effect whether or not the circuit is in use.

7.6.5 U S WEST shall administer and maintain DCS.

7.6.6 Where available, U S WEST shall provide various types of DCS, including:

7.6.6.1 DS-0 cross-connects (typically termed DCS 1/0);

7.6.6.2 DS1/VT1.5 (Virtual Tributaries at the 1.5Mbps rate) cross-connects (typically termed DCS 3/1);

7.6.6.3 DS-3 cross-connects (typically termed DCS 3/3);

7.6.6.4 STS-1 cross-connects; and

7.6.6.5 other technically feasible cross-connects designated by AT&T.

7.6.7 U S WEST shall provide immediate and continuous configuration and reconfiguration of the channels between the physical interfaces (i.e., U S WEST shall establish the processes to implement cross connects on demand) where available based on engineering forecasts.

7.6.8 U S WEST shall provide scheduled configuration and reconfiguration of the AT&T channels between the physical interfaces (i.e., U S WEST shall establish the

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[6] Pursuant to the Eighth Circuit Decision, the Parties agree to the deletion of the following: "technically feasible"

[7] Pursuant to the Eighth Circuit Decision, the Parties agree to the deletion of the following: "technically feasible".

processes to implement AT&T cross connects on the schedule designated by AT&T) or, at AT&T's option, permit AT&T to control such configurations and reconfigurations where available based on engineering forecasts.

7.6.9 DCS shall continuously monitor protected circuit packs and redundant common equipment.

7.6.10 DCS shall automatically switch to a protection circuit pack on detection of a failure or degradation of normal operation.

7.6.11 DCS equipment shall be equipped with a redundant power supply or a battery back-up.

7.6.12 U S WEST shall have available and utilize spare maintenance facilities and equipment necessary for provisioning repairs.

7.6.13 At AT&T's option, U S WEST shall provide, where available, AT&T with real time performance monitoring and alarm data on the signals and the components of the underlying equipment used to provide DCS that actually impact or might impact AT&T's services. For example, this may include hardware alarm data and facility alarm data on a DS-3 in which an AT&T DS-1 is traversing.

7.6.14 At AT&T's option, U S WEST shall provide AT&T with real time ability to initiate tests on integrated equipment used to test the signals and the underlying equipment used to provide DCS, as well as other integrated functionality for routine testing and fault isolation where available.

7.6.15 Where available, DCS shall provide SONET to asynchronous gateway functionality (e.g., STS-1 to DS-1 or STS-1 to DS-3).

7.6.16 Where available, DCS shall perform optical to electrical conversion where the underlying equipment used to provide DCS contains optical interfaces or terminations (e.g., Optical Carrier level 3, i.e., OC-3 interfaces on a DCS 3/1).

7.6.17 Where available, DCS shall have SONET ring terminal functionality where the underlying equipment used to provide DCS acts as a terminal on a SONET ring.

7.6.18 DCS shall provide multipoint bridging of multiple channels to other DCSs. AT&T may designate multipoint bridging to be one-way broadcast from a single master to multiple tributaries, or two-way broadcast between a single master and multiple tributaries.

7.6.19 DCS shall multiplex lower speed channels onto a higher speed interface and demultiplex higher speed channels onto lower speed interfaces as designated by AT&T.

7.7 DCS Interface Requirements

7.7.1 U S WEST shall provide physical interfaces on DS-0, DS-1, and VT1.5 channel cross-connect devices at the DS-1 rate or higher. In all such cases, these interfaces shall be in compliance with applicable Bellcore, ANSI, and ITU[8] standards.

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[8] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and AT&T".

7.7.2 U S WEST shall provide physical interfaces on DS-3 channel cross-connect devices at the DS-3 rate or higher. In all such cases, these interfaces shall be in compliance with applicable Bellcore, ANSI, and ITU[9] standards.

7.7.3 U S WEST shall provide physical interfaces on STS-1 cross-connect devices at the OC-3 rate or higher. In all such cases, these interfaces shall in compliance with applicable Bellcore, ANSI, ITU[10] standards.

7.7.4 Interfaces on all other cross-connect devices shall be in compliance with applicable Bellcore, ANSI, and ITU[11] standards.

7.8 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, DCS shall, at a minimum, meet all the requirements set forth in the following technical references:

7.8.1 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;

7.8.2 ANSI T1.102.01-199x, American National Standard for Telecommunications - Digital Hierarchy - VT1.5;

7.8.3 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;

7.8.4 ANSI T1.105.03-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Jitter at Network Interfaces;

7.8.5 ANSI T1.105.03a-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET): Jitter at Network Interfaces - DS-1 Supplement;

7.8.6 ANSI T1.105.06-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Physical Layer Specifications;

7.8.7 ANSI T1.106-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode);

7.8.8 ANSI T1.107-1988, American National Standard for Telecommunications - Digital Hierarchy - Formats Specifications;

7.8.9 ANSI T1.107a-1990, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications (DS-3 Format Applications);

7.8.10 ANSI T1.107b-1991, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications;

7.8.11 ANSI T1.117-1991, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (SONET) (Single Mode - Short Reach);

7.8.12 ANSI T1.403-1989, Carrier to Subscriber Installation, DS-1 Metallic Interface Specification;

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[9] Pursuant to the Eighth Circuit decision, the Parties agree to delete the following: "and AT&T".
[10] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and AT&T".
[11] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and AT&T".

7.8.13 ANSI T1.404-1994, Network-to-Subscriber Installation - DS-3 Metallic Interface Specification;

7.8.14 ITU Recommendation G.707, Network node interface for the synchronous digital hierarchy (SDH);

7.8.15 ITU Recommendation G.704, Synchronous frame structures used at 1544, 6312, 2048, 8488 and 44736 kbit/s hierarchical levels;

7.8.16 FR-440 and TR-NWT-000499, Transport Systems Generic Requirements (TSGR): Common Requirements;

7.8.17 GR-820-CORE, Generic Transmission Surveillance: DS1 & DS3 Performance;

7.8.18 GR-253-CORE, Synchronous Optical Network Systems (SONET): Common Generic Criteria; and

7.8.19 TR-NWT-000776, Network Interface Description for ISDN Subscriber Access.

8. Loop

8.1 Definition

8.1.1 A Loop is a transmission facility between a distribution frame, or its equivalent, in a U S WEST central office or wire center, and the Network Interface Device (as defined herein) or network interface at a subscriber's premises, to which AT&T is granted exclusive use. This includes, but is not limited to, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide ISDN, ADSL, HDSL, and DS 1 level signals. A Loop may be composed of the following components:

Loop Concentrator / Multiplexer
Loop Feeder
Network Interface Device (NID)
Distribution

8.1.1.1 AT&T may purchase Loop and NID on an unbundled basis. AT&T shall use the Bona Fide Request Process set forth in Part A of this Agreement to request unbundling of Loop Concentrator/Multiplexer, Loop Feeder and Distribution.

8.1.2 If U S WEST uses Integrated Digital Loop Carrier ("IDLCs") systems to provide the local Loop, U S WEST will make alternate arrangements, equal in quality, to permit AT&T to order a contiguous unbundled local loop. These arrangements may, at U S WEST's option, include the following: providing AT&T with copper facilities or universal DLC that meet established technical parameters, deploying Virtual Remote Terminals, allowing AT&T to purchase the entire Integrated DLC, or converting integrated IDLCs to non-integrated systems.

8.1.3 U S WEST shall provide the BRI U interface using 2 wire copper loops in accordance with TR-NWT-000393, January 1991, Generic Requirements for ISDN Basic Access Digital Subscriber Lines.

8.2 Technical Requirements

Subdivided to each component as detailed below.

8.3 *Interface Requirements*

Subdivided to each component as detailed below.

8.4 *Loop Components*

8.4.1 *Loop Concentrator/Multiplexer*

8.4.1.1 *Definition:*

8.4.1.1.1 *The Loop Concentrator/Multiplexer is the Network Element that: (a) aggregates lower bit rate or bandwidth signals to higher bit rate or bandwidth signals (multiplexing); (b) disaggregates higher bit rate or bandwidth signals to lower bit rate or bandwidth signals (demultiplexing); (c) aggregates a specified number of signals or channels to fewer channels (concentrating); (d) performs signal conversion, including encoding of signals (e.g. analog to digital and digital to analog signal conversion); and (e) in some instances performs electrical to optical (E/O) conversion.*

8.4.1.1.2 *The Loop Concentrator/Multiplexer function may be provided through a Digital Loop Carrier (DLC) system, channel bank, multiplexer or other equipment at which traffic is encoded and decoded, multiplexed and demultiplexed, or concentrated.*

8.4.1.2 *Technical Requirements*

8.4.1.2.1 *The Loop Concentrator/Multiplexer shall be capable of performing its functions on the signals for the following services, as needed by AT&T to provide end-to-end service capability to its subscriber, including, but not limited to:*

8.4.1.2.1.1 *two-wire & four-wire analog voice grade loops;*

8.4.1.2.1.2 *two-wire & four-wire loops conditioned to transmit the digital signals needed to provide digital services;*

8.4.1.2.1.3 *4-wire digital data (2.4Kbps through 64Kbps and "n" times 64Kbps (where n < 24));*

8.4.1.2.1.4 *DS 3 rate private lines where available; and*

8.4.1.2.1.5 *Optical SONET rate private lines where available.*

8.4.1.2.2 *The Loop Concentrator/Multiplexer shall perform the following functions as appropriate:*

8.4.1.2.2.1 *analog to digital signal conversion of both incoming and outgoing (upstream and downstream) analog signals;*

8.4.1.2.2.2 *multiplexing of the individual digital signals up to higher transmission bit rate signals (e.g., DS-0, DS-1, DS-3, or optical SONET rates) for transport to the U S WEST central office through the Loop Feeder; and*

8.4.1.2.2.3 concentration of end-user subscriber signals onto fewer channels of a Loop Feeder (when available the concentration ratio shall be as specified from time to time by AT&T.)

8.4.1.2.2.4 Concentration ratios shall not impair analog or digital performance.

8.4.1.2.3 AT&T may request U S WEST to provide power for the Loop Concentrator /Multiplexer through a non-interruptible source, if the function is performed in a central office, or from a commercial AC power source with battery backup, if the equipment is located outside a central office. Such power shall also adhere to the requirements stated herein.

8.4.1.2.4 In accordance with Sections 12.5.1 and 52.5.2 of Part A of this Agreement, the Loop Concentrator /Multiplexer shall be provided to AT&T in accordance with the following Technical References:

8.4.1.2.4.1 Bellcore TR-NWT-000057, Functional Criteria for Digital Loop Carrier Systems, Issue 2, January 1993.

8.4.1.2.4.2 Bellcore TR-NWT-000393, Generic Requirements for ISDN Basic Access Digital Subscriber Lines.

8.4.1.2.4.3 T1.103 - 1993, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode).

8.4.1.2.4.4 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure Rates and Formats.

8.4.1.2.4.5 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces.

8.4.1.2.4.6 ANSI T1.403-1999, American National Standard for Telecommunications - Carrier to Customer Installation, DS-1 Metallic Interface Specification.

8.4.1.2.4.7 Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET), Common Generic Criteria.

8.4.1.2.4.8 Bellcore TR-TSY-000008, Digital Interface Between the SLC 96 Digital Loop Carrier System and a Local Digital Switch, Issue 2, August 1987.

8.4.1.2.4.9 Bellcore TR-NWT-000303, Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, Issue 2, December 1992; Rev. 1 December 1993, Supplement 1, December 1992.

8.4.1.2.4.10 Bellcore TR-TSY-000573, Operations Systems Interface for an IDLC System, (LSSGR) FSD 20-02-2100, Issue 1, September 1989; and

8.4.1.2.4.11 Bellcore Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, GR-303-CORE, Issue 1, September 1995

8.4.1.3 Requirements for an Intelligent Loop Concentrator/ Multiplexer

8.4.1.3.1 In addition to the basic functions described above for the Loop Concentrator/Multiplexer, the Intelligent Loop Concentrator/Multiplexer ("ICM") shall provide facility grooming, facility test functions, format conversion and signaling conversion, as appropriate.

8.4.1.3.2 The underlying equipment that provides such ICM function shall continuously monitor protected circuit packs and redundant common equipment.

8.4.1.3.3 The underlying equipment that provides such ICM function shall automatically switch to a protection circuit pack on detection of a failure or degradation of normal operation.

8.4.1.3.4 The underlying equipment that provides such ICM function shall be equipped with a redundant power supply or a battery back-up.

8.4.1.3.5 AT&T may request U S WEST to provide AT&T with real time performance monitoring and alarm data on ICM elements that may affect AT&T's traffic. This includes ICM hardware alarm data and facility alarm data on the underlying device that provides such ICM function.

8.4.1.3.6 AT&T may request U S WEST to provide AT&T with real time ability to initiate tests on the underlying device that provides such ICM function integrated test equipment as well as other integrated functionality for routine testing and fault isolation.

8.4.1.4 Interface Requirements

8.4.1.4.1 The Loop Concentrator/Multiplexer shall meet the following interface requirements, as appropriate for the configuration that AT&T designates:

8.4.1.4.2 The Loop Concentrator/Multiplexer shall provide an analog voice frequency copper twisted pair interface at the serving wire center.

8.4.1.4.3 The Loop Concentrator/Multiplexer shall provide digital 4-wire electrical interfaces at the serving wire center.

8.4.1.4.4 The Loop Concentrator/Multiplexer shall provide optical SONET interfaces at rates of OC-3, OC-12, OC-48, and OC-N.

8.4.1.4.5 The Loop Concentrator/Multiplexer shall provide the Bellcore TR-303 DS 1 level interface at the serving wire center. Loop Concentrator/ Multiplexer shall provide Bellcore TR-08 mode 1&2 DS1 interfaces when designated by AT&T.

8.4.1.4.6 The Intelligent Loop Concentrator/Multiplexer shall be provided to AT&T in accordance with the Technical References set forth in Sections 8.4.1.2.4.8 through 8.4.1.2.4.11 above.

8.4.2 Loop Feeder

8.4.2.1 Definition:

8.4.2.1.1 The Loop Feeder is the Network Element that provides connectivity between (a) a Feeder Distribution Interface ("FDI") associated with Loop Distribution and a termination point appropriate for the media in a central office, or (b) a Loop Concentrator/Multiplexer provided in a remote terminal and a termination point appropriate for the media in a central office.

8.4.2.1.2 Pursuant to a Bona Fide Request for unbundled feeder or distribution, U S WEST shall provide AT&T physical access to the FDI and the right to connect the Loop Feeder to the FDI.

8.4.2.1.3 Upon request from AT&T requesting a specific area, U S WEST shall provide information on Feeder Distribution Interface ("FDI") within a reasonable time. If such information is available as part of U S WEST's operations support system, it must be made available to AT&T on the same terms and conditions as it is available to U S WEST.

8.4.2.1.4 The physical medium of the Loop Feeder may be copper twisted pair, or single or multi-mode fiber or other existing technologies. To the extent U S WEST agrees to provide facilities that differ from the existing, the imposition of special construction charges shall be applied as specified in Attachment 1.[12]

8.4.2.2 Requirements for Loop Feeder

8.4.2.2.1 The Loop Feeder shall be capable of transmitting analog voice frequency, basic rate ISDN, digital data, or, where available in the network, analog radio frequency signals, as appropriate.

8.4.2.2.2 U S WEST shall provide appropriate power for all active elements in the Loop Feeder. U S WEST will provide AC commercial power from a central office source, or from a commercial AC source with rectifiers for AC to DC conversion and 8 hour battery back-up when the equipment is located in an outside plant Remote Terminal ("RT").

8.4.2.3 Additional Requirements for Special Copper Loop Feeder Medium

[12] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

In addition to requirements set forth in the above, AT&T may require U S WEST to provide copper twisted pair Loop Feeder unaltered by any intervening equipment (e.g., filters, load coils, and range extenders), so that AT&T can use these Loop Feeders for a variety of services by attaching appropriate terminal equipment at the ends.

8.4.2.4 Additional Technical Requirements for DS-1 Conditioned Loop Feeder

In addition to the requirements set forth in the above, AT&T may designate that the Loop Feeder be conditioned to transport a DS-1 signal. The requirements for such transport are defined in the references below in Section 8.4.2.6.

8.4.2.5 Additional Technical Requirements for Optical Loop Feeder

In addition to the requirements set forth in the above, AT&T may designate that Loop Feeder will transport DS-3 and OC-n (where "n" is defined in the technical reference in Section 8.4.1.2.4.4). The requirements for such transport are defined in the references below in Section 8.4.2.6.

8.4.2.6 In accordance with Sections 52.5.1 and 52.5.2 of Part A of the Agreement, U S WEST shall offer Loop Feeder in compliance with the requirements set forth in the following Technical References:

8.4.2.6.1 Bellcore Technical Requirement TR-NWT-000160, Issue 5, December 1993, section 7 for DS-1 interfaces.

8.4.2.6.2 Bellcore TR-NWT-000057, Functional Criteria for Digital Loop Carrier Systems, Issue 2, January 1993.

8.4.2.6.3 Bellcore TR-NWT-000393, Generic Requirements for ISDN Basic Access Digital Subscriber Lines.

8.4.2.6.4 ANSI T1.105-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode).

8.4.2.6.5 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats.

8.4.2.6.6 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces.

8.4.2.6.7 ANSI T1.403-1999, American National Standard for Telecommunications - Carrier to Customer Installation, DS-1 Metallic Interface Specification; and

8.4.2.6.8 Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET), Common Generic Criteria.

8.4.2.7 Interface Requirements

8.4.2.7.1 The Loop Feeder point of termination ("POT") within a U S WEST central office will be as follows:

8.4.2.7.1.1 Copper twisted pairs shall terminate on the MDF;

8.4.2.7.1.2 DS-1 Loop Feeder shall terminate on a DSX-1, DCS/0 or DCS/1; and

8.4.2.7.1.3 Fiber Optic cable shall terminate on a light guide termination panel or equivalent.

8.4.2.7.2 In accordance with Sections 51.5.1 and 51.5.2 of Part 4 of this Agreement, Loop Feeder shall be equal to or at the same level as U S WEST provides to itself[13] for each of the applicable interface requirements set forth in the following technical references:

8.4.2.7.2.1 Bellcore TR-TSY-000008, Digital Interface Between the SLC 96 Digital Loop Carrier System and a Local Digital Switch, Issue 2, August 1987;

8.4.2.7.2.2 Bellcore TR-NWT-000303, Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, Issue 2, December 1992; Rev. 1, December 1992; Supplement 1, December 1993; and

8.4.2.7.2.3 Bellcore Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, (IDLC-2000 CORE, Issue 1, September 1995.

9. Distribution

9.1 Definition:

9.1.1 Distribution provides connectivity between the MDF component of Loop Distribution and the terminal block on the subscriber side of an FDI. The FDI is a device that terminates the Distribution Media and the Loop Feeder, and cross-connects them in order to provide a continuous transmission path between the MDF and a remote unit or company central office. There are three (3) basic types of feeder-distribution connections: (a) multiple (splicing of multiple distribution pairs to one (1) feeder pair); (b) dedicated ("home run"); and (c) combined ("cross-connect"). While older plant uses multiple and dedicated methods, newer plant and all plant that uses DLC or other pair-gain technology necessarily uses the cross-connect method. The feeder-distribution interface ("FDI") in the interconnect design makes use of a manual cross-connection, typically located inside or outside plant as a box ("green box") or in a vault or manhole.

9.1.2 The Distribution may be copper twisted pair, coaxial cable, single or multi-mode fiber optic cable or other technologies. A combination that includes two (2) or more of these media is also possible. In certain cases, AT&T may request a copper twisted pair Distribution even in instances where the Distribution for services that U S WEST offers is other than a copper facility. To the extent U S WEST agrees to provide additional facilities, special construction charges and disaggregation rules will apply in accordance with the Construction section of Attachment 1.

9.2 Requirements for All Distribution

[13] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

9.2.1 Distribution shall be capable of transmitting signals for the following services as requested by AT&T:

9.2.1.1 two-wire & four-wire analog voice grade loops; and

9.2.1.2 two-wire & four-wire loops conditioned to transmit the digital signals needed to provide digital services.

9.2.2 Distribution shall transmit all signaling messages or tones. Where the Distribution includes any active elements that terminate any of the signaling messages or tones, these messages or tones shall be reproduced by the Distribution at the interfaces to an adjacent Network Element in a format that maintains the integrity of the signaling messages or tones. U S WEST shall not interfere with AT&T's ability to support functions associated with provisioning, maintenance, performance monitoring and testing of unbundled distribution.

9.2.3 U S WEST shall not interfere with AT&T's ability to support functions associated with provisioning, maintenance, performance monitoring and testing of the unbundled Distribution.

9.2.4 Distribution shall be equal to or at the same level as U S WEST provides to itself for all of the applicable requirements set forth in the following technical references:

9.2.4.1 Bellcore TR-TSY-000057, "Functional Criteria for Digital Loop Carrier Systems"; and

9.2.4.2 Bellcore TR-NWT-000393, "Generic Requirements for ISDN Basic Access Digital Subscriber Lines."

9.3 Additional Requirements for Special Copper Distribution

In addition to Distribution that supports the requirements set forth in Section 9.2 above, AT&T may designate Distribution to be copper twisted pair unfettered by any intervening equipment (e.g., filters, load coils, range extenders) so that AT&T can use these loops for a variety of services by attaching appropriate terminal equipment at the ends.

9.4 Additional Requirements for Fiber Distribution

Fiber optic cable Distribution shall be capable of transmitting signals for the following services in addition to the those set forth in Section 9.2.1 above:

9.4.1 DS-3 rate private line service;

9.4.2 Optical SONET OC-n rate private lines (where "n" is defined in the technical reference in Section 8.4.1.2.4.4); and

9.4.3 Where available in the U S WEST network, Analog Radio Frequency based services (e.g., Cable Television (CATV)).

9.5 Additional Requirements for Coaxial Cable Distribution

Where available in the U S WEST network, Coaxial Cable (coax) Distribution shall be capable of transmitting signals for the following services in addition to those set forth in Section 9.2.1 above:

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[14] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

9.5.1 Broadband data, either one way or bi-directional, symmetric or asymmetric, at rates between 1.5 Mb/s and 45 Mb/s; and

9.5.2 Analog Radio Frequency based services (e.g., CATV).

9.6 Interface Requirements

9.6.1 Signal transfers between the Distribution and the NID and an adjacent Network Element shall have levels of degradation that are within the performance requirements set forth in Section 18.2 of this Attachment.

9.6.2 Distribution shall be equal to or at the same level as U S WEST provides to itself[15] as to each of the applicable interface requirements set forth in the following technical references:

9.6.2.1 Bellcore TR-NWT-000049, "Generic Requirements for Outdoor Telephone Network Interface Devices" issued December 1, 1994;

9.6.2.2 Bellcore TR-NWT-000057, "Functional Criteria for Digital Loop Carrier Systems", issued January 2, 1993;

9.6.2.3 Bellcore TR-NWT-000393, "Generic Requirements for ISDN Basic Access Digital Subscriber Lines"; and

9.6.2.4 Bellcore TR-NWT-000253, SONET Transport Systems: Common Criteria (A module of TSGR, FR-NWT-000440), Issue 2, December 1991.

10. Local Switching

10.1 Definition:

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[U S WEST proposes the following]

10.1.1 Local Switching is the Network Element that provides the functionality required to connect the appropriate lines or trunks via the Main [wired to the Main Distributing] Frame [("MDF") or Digital Cross Connect ("DCS") panel to a desired line or trunk.] The desired connection path for each call type will vary by subscriber and will be specified by AT&T as a routing solution that will be implemented in advance as part of or after the purchase of the unbundled Local Switching. All of the vertical features that the switch is capable of providing shall be available to AT&T as separate unbundled Network Elements[16] and priced separately. The Local Switching function also provides the ability to access transport, signaling (SS7 User Part ("ISUP") and Transaction Capabilities Application Part ("TCAP"), and platforms such as, but not limited to, Public Safety Systems (911), Operator Services, Directory Services and Advanced Intelligent Network ("AIN"). Remote Switching Module functionality is included in the Local Switching function. Local Switching shall also be capable of routing Local, intraLATA, interLATA, and international calls to the subscriber's preferred carrier

[15] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.
[16] Per First Order at page 11, Paragraph 78.

[call features (e.g., call forwarding) and Centrex capabilities].

10.1.2 Local Switching, including the ability to route to AT&T's transport facilities shall be unbundled from all other unbundled Network Elements.

10.2 Technical Requirements

10.2.1 Local Switching shall be equal to or at the same level as U S WEST provides to itself as to[17] the requirements for Local Switching set forth in Bellcore's Local Switching Systems General Requirements FR-NWT-000064.

10.2.1.1 U S WEST shall route calls to the appropriate trunk or lines for call origination or termination.

10.2.1.2 U S WEST shall route calls on a per line or per screening class basis to (a) U S WEST platforms providing Network Elements or additional requirements, (b) AT&T designated platforms, or (c) third party platforms.

10.2.1.3 U S WEST shall provide to AT&T recorded announcements as furnished by AT&T and call progress tones to alert callers of call progress and disposition. The installation cost shall be borne by AT&T for such announcements and call progress tones to the extent they are different than those standardly used by U S WEST.

10.2.1.4 U S WEST shall change a subscriber from U S WEST's services to AT&T's services without loss of feature functionality, unless designated otherwise by AT&T.

10.2.1.5 U S WEST shall perform routine testing (e.g., Mechanized Loop Tests ("MLT") and test calls such as 105, 107 and 108 type calls) and fault isolation on AT&T's unbundled Network Elements as designated by AT&T.

10.2.1.6 U S WEST shall repair and restore any equipment or any other maintainable component that may adversely impact AT&T's use of unbundled Local Switching.

10.2.1.7 U S WEST shall control congestion points such as mass calling events and network routing abnormalities using capabilities such as Automatic Call Gapping, Automatic Congestion Control, and Network Routing Overflow. Application of such control shall be competitively neutral and not favor any user of unbundled switching or U S WEST.

10.2.1.8 U S WEST shall perform manual call trace as designated by AT&T and shall permit subscriber originated call trace.

10.2.1.9 U S WEST shall record all billable events, including usage of the Network Element, and send the appropriate recording data to AT&T as further described in Attachment 5.

10.2.1.10 For Local Switching used as E911 tandems, U S WEST shall allow interconnection with AT&T switches in that same local switch used as a E911 tandem and shall route calls to the appropriate Public Safety Access Point

[17] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

("PSAP"). In the event the Local Switching element and the E911 tandem are contained within the same U S WEST switch, such trunking shall be provided on an intra-switch basis.

10.2.1.11 Where U S WEST provides the following special services, it shall provide to AT&T:

10.2.1.11.1 essential Service Lines;

10.2.1.11.2 Telephone Service Prioritization ("TSP");

10.2.1.11.3 related services for handicapped;

10.2.1.11.4 Where U S WEST provides soft dial tone, it shall do so on a competitively-neutral basis; and

10.2.1.11.5 any other service required by law or regulation.

10.2.1.12 U S WEST shall provide Switching Service Point ("SSP") capabilities and signaling software to interconnect the signaling links destined to the Signaling Transfer Point Switch ("STPs"). In the event Local Switching is provided out of a switch without SS7 capability, the Tandem shall provide this capability as further described in Section 4 of this Attachment on Tandem Switching. These capabilities shall adhere to Bellcore specifications TCAP (GR-1432-CORE) ISUP (GR-905-CORE), Call Management (GR-1429-CORE), Switched Fractional DS1 (GR-1357-CORE), Toll Free Service (GR-1428-CORE), Calling Name (GR-1597-CORE), Line Information Database (GR-954-CORE), and Advanced Intelligent Network (GR-2863-CORE).

10.2.1.13 U S WEST shall provide interfaces to adjuncts through industry standard and Bellcore interfaces. These adjuncts may include, but are not limited to, Service Node, Service Circuit Node, Voice Mail and Automatic Call Distributors. Examples of existing interfaces are ANSI ISDN standards Q.931 and Q.932.

10.2.1.14 Upon AT&T's request, U S WEST shall provide performance data regarding a subscriber line, traffic characteristics or other measurable elements to AT&T.

10.2.1.15 U S WEST shall offer all Local Switching features resident in a particular switch and, in providing such features, do so at parity with those provided by U S WEST to itself or any other Person.

10.2.1.15.1 Such feature offerings shall include, but are not limited to:

Basic and primary rate ISDN;
Residential features;
Custom Local Area Signaling Services (CLASS/LASS);
Custom Calling Features; and
Centrex (including equivalent administrative capabilities, such as subscriber accessible reconfiguration and detailed message recording).

10.2.1.15.2 AT&T may use the BFR Process set forth in Part A of this Agreement to request unbundling of Advanced Intelligent Network ("AIN") triggers supporting AT&T and U S WEST service applications in U S WEST's SCPs. U S WEST shall offer AIN-based services in accordance with applicable technical references. Such services may include, but are not limited to:

10.2.1.15.2.1 Off-Hook Immediate;

10.2.1.15.2.2 Off-Hook Delay;

10.2.1.15.2.3 Private EAMF Trunk;

10.2.1.15.2.4 Shared Interoffice Trunk (EAMF, SS7);

10.2.1.15.2.5 Termination Attempt;

10.2.1.15.2.6 3/6/10;

10.2.1.15.2.7 N11;

10.2.1.15.2.8 Feature Code Dialing;

10.2.1.15.2.9 Custom Dialing Plan(s), including 555 services and

10.2.1.15.2.10 Automatic Route Selection.

10.2.1.16 U S WEST shall assign each AT&T subscriber line the class of service designated by AT&T (e.g., using line class codes or other switch specific provisioning methods), and at AT&T's option shall route Directory Assistance calls from AT&T subscribers as directed by AT&T. This includes each of the following call types:

10.2.1.16.1 0+/0- calls;

10.2.1.16.2 911 calls;

10.2.1.16.3 411/DA calls;

10.2.1.16.4 InterLATA calls specific to PIC

10.2.1.16.5 IntraLATA calls specific to PIC

10.2.1.16.6 Toll Free calls, prior to database query;

10.2.1.16.7 Call forwarding of any type supported on the switch, to a line or a trunk; and

10.2.1.16.8 Any other customized routing that may be supported by the U S WEST switch.

10.2.1.17 U S WEST shall assign each AT&T subscriber line the class of service designated by AT&T (e.g., using line class codes or other switch specific provisioning methods) and shall route operator calls from AT&T subscribers as directed by AT&T at AT&T's option. For example, U S WEST may translate 0- and 0+ intraLATA traffic, and route the call through appropriate trunks to an AT&T Operator Services Position System ("OSPS"). Calls from Local Switching must pass the ANI-II digits unchanged.

10.2.1.18 If an AT&T customer subscribes to AT&T provided voice mail and messaging services, U S WEST shall redirect incoming calls to the AT&T system based upon designated service arrangements (e.g., busy, don't

answer, number of rings). In addition, U S WEST shall provide a Standard Message Desk Interface-Enhanced (SMDI-E) interface to the AT&T system. U S WEST shall support the Inter-switch Voice Messaging Service (IVMS) capability.

10.2.1.19 Local Switching shall be offered in accordance with the requirements of the following technical references and their future releases:

10.2.1.19.1 GR-1298-CORE, AIN Switching System Generic Requirements;

10.2.1.19.2 GR-1299-CORE, AIN Switch-Service Control Point (SCP)/Adjunct Interface Generic Requirements;

10.2.1.19.3 TR-NWT-001284, AIN 0.1 Switching System Generic Requirements; and

10.2.1.19.4 SR-NWT-002247, AIN Release 1 Update.

10.2.2 Interface Requirements:

10.2.2.1 U S WEST shall provide the following interfaces to Loops:

10.2.2.1.1 Standard Tip/Ring interface ,including loopstart or groundstart, on-hook signaling (e.g., for calling number, calling name and message waiting lamp);

10.2.2.1.2 Coin phone signaling provided through a U S WEST coin phone port;

10.2.2.1.3 Basic Rate Interface ISDN adhering to ANSI standards Q.931, Q.932 and appropriate Bellcore Technical Requirements;

10.2.2.1.4 Two-wire analog interface to PBX to include reverse battery, E&M, wink start and DID;

10.2.2.1.5 Four-wire analog interface to PBX to include reverse battery, E&M, wink start and DID;

10.2.2.1.6 Four-wire DS-1 interface to PBX or subscriber provided equipment (e.g., computers and voice response systems);

10.2.2.1.7 Primary Rate ISDN to PBX adhering to ANSI standards Q.931, Q.932 and appropriate Bellcore Technical Requirements;

10.2.2.1.8 Switched Fractional DS-1 with capabilities to configure Nx64 channels (where "n" = 1 to 24); and

10.2.2.1.9 Loops adhering to Bellcore TR-NWT-08 and TR-NWT-303 specifications to interconnect Digital Loop Carriers.

10.2.2.2 U S WEST shall provide access to the following, but not limited to:

10.2.2.2.1 SS7 Signaling Network or Multi-Frequency trunking, if requested by AT&T;

In addition to requirements set forth in the above, AT&T may require U S WEST to provide copper twisted pair Loop Feeder unfettered by any intervening equipment (e.g., filters, load coils, and range extenders), so that AT&T can use these Loop Feeders for a variety of services by attaching appropriate terminal equipment at the ends.

8.4.2.4 Additional Technical Requirements for DS-1 Conditioned Loop Feeder

In addition to the requirements set forth in the above, AT&T may designate that the Loop Feeder be conditioned to transport a DS-1 signal. The requirements for such transport are defined in the references below in Section 8.4.2.6.

8.4.2.5 Additional Technical Requirements for Optical Loop Feeder

In addition to the requirements set forth in the above, AT&T may designate that Loop Feeder will transport DS-3 and OC-n (where "n" is defined in the technical reference in Section 8.4.1.2.4.4). The requirements for such transport are defined in the references below in Section 8.4.2.6.

8.4.2.6 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, U S WEST shall offer Loop Feeder in compliance with the requirements set forth in the following Technical References:

8.4.2.6.1 Bellcore Technical Requirement TR-NWT-000439, Issue 5, December 1993, section 7 for DS-1 interfaces;

8.4.2.6.2 Bellcore TR-NWT-000057, Functional Criteria for Digital Loop Carrier Systems, Issue 2, January 1993;

8.4.2.6.3 Bellcore TR-NWT-000393, Generic Requirements for ISDN Basic Access Digital Subscriber Lines;

8.4.2.6.4 ANSI T1.105-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode),

8.4.2.6.5 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;

8.4.2.6.6 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;

8.4.2.6.7 ANSI T1.403-1989, American National Standard for Telecommunications - Carrier to Subscriber Installation, DS-1 Metallic Interface Specification; and

8.4.2.6.8 Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET), Common Generic Criteria.

8.4.2.7 Interface Requirements

8.4.2.7.1 The Loop Feeder point of termination ("POT") within a U S WEST central office will be as follows:

8.4.2.7.1.1 Copper twisted pairs shall terminate on the MDF;

8.4.2.7.1.2 DS-1 Loop Feeder shall terminate on a DSX1, DCS1/0 or DCS3/1; and

8.4.2.7.1.3 Fiber Optic cable shall terminate on a light guide termination panel or equivalent.

8.4.2.7.2 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, Loop Feeder shall be equal to or at the same level as U S WEST provides to itself[13] for each of the applicable interface requirements set forth in the following technical references:

8.4.2.7.2.1 Bellcore TR-TSY-000008, Digital Interface Between the SLC 96 Digital Loop Carrier System and a Local Digital Switch, Issue 2, August 1987;

8.4.2.7.2.2 Bellcore TR-NWT-000303, Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, Issue 2, December 1992; Rev. 1, December 1993; Supplement 1, December 1993; and

8.4.2.7.2.3 Bellcore Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, GR-303-CORE, Issue 1, September 1995.

9. Distribution

9.1 Definition:

9.1.1 Distribution provides connectivity between the NID component of Loop Distribution and the terminal block on the subscriber-side of an FDI. The FDI is a device that terminates the Distribution Media and the Loop Feeder, and cross-connects them in order to provide a continuous transmission path between the NID and a telephone company central office. There are three (3) basic types of feeder-distribution connections: (a) multiple (splicing of multiple distribution pairs onto one (1) feeder pair); (b) dedicated ("home run"); and (c) interfaced ("cross-connected"). While older plant uses multiple and dedicated methods, newer plant and all plant that uses DLC or other pair-gain technology necessarily uses the interfaced connection method. The feeder-distribution interface ("FDI") in the interfaced design makes use of a manual cross-connection, typically housed inside an outside plant device ("green box") or in a vault or manhole.

9.1.2 The Distribution may be copper twisted pair, coax cable, single or multi-mode fiber optic cable or other technologies. A combination that includes two (2) or more of these media is also possible. In certain cases, AT&T may request a copper twisted pair Distribution even in instances where the Distribution for services that U S WEST offers is other than a copper facility. To the extent U S WEST agrees to provide additional facilities, special construction charges and development costs will apply in accordance with the Construction section of Attachment 1.

9.2 Requirements for All Distribution

[13] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

9.2.1 Distribution shall be capable of transmitting signals for the following services, as requested by AT&T:

9.2.1.1 two-wire & four-wire analog voice grade loops; and

9.2.1.2 two-wire & four-wire loops conditioned to transmit the digital signals needed to provide digital services.

9.2.2 Distribution shall transmit all signaling messages or tones. Where the Distribution includes any active elements that terminate any of the signaling messages or tones, these messages or tones shall be reproduced by the Distribution at the interfaces to an adjacent Network Element in a format that maintains the integrity of the signaling messages or tones. U S WEST shall not interfere with AT&T's ability to support functions associated with provisioning, maintenance, performance monitoring and testing of unbundled distribution

9.2.3 U S WEST shall not interfere with AT&T's ability to support functions associated with provisioning, maintenance, performance monitoring and testing of the unbundled Distribution.

9.2.4 Distribution shall be equal to or at the same level as U S WEST provides to itself[14] for all of the applicable requirements set forth in the following technical references:

9.2.4.1 Bellcore TR-TSY-000057, "Functional Criteria for Digital Loop Carrier Systems"; and

9.2.4.2 Bellcore TR-NWT-000393, "Generic Requirements for ISDN Basic Access Digital Subscriber Lines."

9.3 Additional Requirements for Special Copper Distribution

In addition to Distribution that supports the requirements set forth in Section 9.2. above, AT&T may designate Distribution to be copper twisted pair unfettered by any intervening equipment (e.g., filters, load coils, range extenders) so that AT&T can use these loops for a variety of services by attaching appropriate terminal equipment at the ends.

9.4 Additional Requirements for Fiber Distribution

Fiber optic cable Distribution shall be capable of transmitting signals for the following services in addition to the those set forth in Section 9.2.1 above:

9.4.1 DS-3 rate private line service;

9.4.2 Optical SONET OC-n rate private lines (where "n" is defined in the technical reference in Section 8.4.1.2.4.4); and

9.4.3 Where available in the U S WEST network, Analog Radio Frequency based services (e.g., Cable Television (CATV)).

9.5 Additional Requirements for Coaxial Cable Distribution

Where available in the U S WEST network, Coaxial Cable (coax) Distribution shall be capable of transmitting signals for the following services in addition to those set forth in Section 9.2.1 above:

[14] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

9.5.1 Broadband data, either one way or bi-directional, symmetric or asymmetric, at rates between 1.5 Mb/s and 45 Mb/s; and

9.5.2 Analog Radio Frequency based services (e.g., CATV).

9.6 Interface Requirements

9.6.1 Signal transfers between the Distribution and the NID and an adjacent Network Element shall have levels of degradation that are within the performance requirements set forth in Section 18.2 of this Attachment.

9.6.2 Distribution shall be equal to or at the same level as U S WEST provides to itself[15] as to each of the applicable interface requirements set forth in the following technical references:

9.6.2.1 Bellcore TR-NWT-000049, "Generic Requirements for Outdoor Telephone Network Interface Devices" issued December 1, 1994;

9.6.2.2 Bellcore TR-NWT-000057, "Functional Criteria for Digital Loop Carrier Systems", issued January 2, 1993;

9.6.2.3 Bellcore TR-NWT-000393, "Generic Requirements for ISDN Basic Access Digital Subscriber Lines"; and

9.6.2.4 Bellcore TR-NWT-000253, SONET Transport Systems: Common Criteria (A module of TSGR, FR-NWT-000440), Issue 2, December 1991.

10. Local Switching

10.1 Definition:

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[U S WEST proposes the following]

10.1.1 Local Switching is the Network Element that provides the functionality required to connect the appropriate lines or trunks via the SP/T [wired to the Main Distributing] *Frame* [("MDF") or Digital Cross Connect ("DSX") panel to a desired line or trunk] *The desired connection path for each call type will vary by subscriber and will be specified by AT&T as a routing scenario that will be implemented in advance as part of or after the purchases of the unbundled Local Switching.* **All of the vertical features that the switch is capable of providing shall be available to AT&T as separate unbundled Network Elements[16]** and priced separately. *The Local Switching function also provides the ability to access transport, signaling (ISDN User Part ("ISUP") and Transaction Capabilities Application Part ("TCAP"), and platforms such as adjuncts, Public Safety Systems (911), Operator Services, Directory Services and Advanced Intelligent Network ("AIN"). Remote Switching Module functionality is included in the Local Switching function. Local Switching shall also be capable of routing local, intraLATA, interLATA, and international calls to the subscriber's preferred carrier*

[15] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.
[16] Per First Order at page 11, Paragraph 78.

[,call features (e.g., call forwarding) and Centrex capabilities].

10.1.2 Local Switching, including the ability to route to AT&T's transport facilities shall be unbundled from all other unbundled Network Elements.

10.2 Technical Requirements

10.2.1 Local Switching shall be equal to or at the same level as U S WEST provides to itself as to[17] the requirements for Local Switching set forth in Bellcore's Local Switching Systems General Requirements FR-NWT-000064.

10.2.1.1 U S WEST shall route calls to the appropriate trunk or lines for call origination or termination.

10.2.1.2 U S WEST shall route calls on a per line or per screening class basis to (a) U S WEST platforms providing Network Elements or additional requirements, (b) AT&T designated platforms, or (c) third-party platforms.

10.2.1.3 U S WEST shall provide to AT&T recorded announcements as furnished by AT&T and call progress tones to alert callers of call progress and disposition. The installation cost shall be borne by AT&T for such announcements and call progress tones to the extent they are different than those standardly used by U S WEST.

10.2.1.4 U S WEST shall change a subscriber from U S WEST's services to AT&T's services without loss of feature functionality, unless designated otherwise by AT&T.

10.2.1.5 U S WEST shall perform routine testing (e.g., Mechanized Loop Tests ("MLT") and test calls such as 105, 107 and 108 type calls) and fault isolation on AT&T's unbundled Network Elements as designated by AT&T.

10.2.1.6 U S WEST shall repair and restore any equipment or any other maintainable component that may adversely impact AT&T's use of unbundled Local Switching.

10.2.1.7 U S WEST shall control congestion points such as mass calling events and network routing abnormalities using capabilities such as Automatic Call Gapping, Automatic Congestion Control, and Network Routing Overflow. Application of such control shall be competitively neutral and not favor any user of unbundled switching or U S WEST.

10.2.1.8 U S WEST shall perform manual call trace as designated by AT&T and shall permit subscriber originated call trace.

10.2.1.9 U S WEST shall record all billable events, involving usage of the Network Element, and send the appropriate recording data to AT&T as further described in Attachment 5.

10.2.1.10 For Local Switching used as E911 tandems, U S WEST shall allow interconnection with AT&T switches in that same local switch used as a E911 tandem and shall route calls to the appropriate Public Safety Access Point

[17] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

("PSAP"). In the event the Local Switching element and the E911 tandem are contained within the same U S WEST switch, such trunking shall be provided on an intra-switch basis.

10.2.1.11 Where U S WEST provides the following special services, it shall provide to AT&T:

10.2.1.11.1 essential Service Lines;

10.2.1.11.2 Telephone Service Prioritization ("TSP");

10.2.1.11.3 related services for handicapped;

10.2.1.11.4 Where U S WEST provides soft dial tone, it shall do so on a competitively-neutral basis; and

10.2.1.11.5 any other service required by law or regulation.

10.2.1.12 U S WEST shall provide Switching Service Point ("SSP") capabilities and signaling software to interconnect the signaling links destined to the Signaling Transfer Point Switch ("STPs"). In the event Local Switching is provided out of a switch without SS7 capability, the Tandem shall provide this capability as further described in Section 4 of this Attachment on Tandem Switching. These capabilities shall adhere to Bellcore specifications TCAP (GR-1432-CORE), ISUP (GR-905-CORE), Call Management (GR-1429-CORE), Switched Fractional DS1 (GR-1357-CORE), Toll Free Service (GR-1428-CORE), Calling Name (GR-1597-CORE), Line Information Database (GR-954-CORE), and Advanced Intelligent Network (GR-2863-CORE).

10.2.1.13 U S WEST shall provide interfaces to adjuncts through industry standard and Bellcore interfaces. These adjuncts may include, but are not limited to, Service Node, Service Circuit Node, Voice Mail and Automatic Call Distributors. Examples of existing interfaces are ANSI ISDN standards Q.931 and Q.932.

10.2.1.14 Upon AT&T's request, U S WEST shall provide performance data regarding a subscriber line, traffic characteristics or other measurable elements to AT&T.

10.2.1.15 U S WEST shall offer all Local Switching features resident in a particular switch, and, in providing such features, do so at parity with those provided by U S WEST to itself or any other Person.

10.2.1.15.1 Such feature offerings shall include, but are not limited to:

Basic and primary rate ISDN;
Residential features;
Custom Local Area Signaling Services (CLASS/LASS);
Custom Calling Features; and
Centrex (including equivalent administrative capabilities, such as subscriber accessible reconfiguration and detailed message recording).

10.2.1.15.2 AT&T may use the BFR Process set forth in Part A of this Agreement to request unbundling of Advanced Intelligent Network ("AIN") triggers supporting AT&T and U S WEST service applications in U S WEST's SCPs. U S WEST shall offer AIN-based services in accordance with applicable technical references. Such services may include, but are not limited to:

10.2.1.15.2.1 Off-Hook Immediate;

10.2.1.15.2.2 Off-Hook Delay;

10.2.1.15.2.3 Private EAMF Trunk;

10.2.1.15.2.4 Shared Interoffice Trunk (EAMF, SS7);

10.2.1.15.2.5 Termination Attempt;

10.2.1.15.2.6 3/6/10;

10.2.1.15.2.7 N11;

10.2.1.15.2.8 Feature Code Dialing;

10.2.1.15.2.9 Custom Dialing Plan(s), including 555 services; and

10.2.1.15.2.10 Automatic Route Selection.

10.2.1.16 U S WEST shall assign each AT&T subscriber line the class of service designated by AT&T (e.g., using line class codes or other switch specific provisioning methods), and at AT&T's option shall route Directory Assistance calls from AT&T subscribers as directed by AT&T. This includes each of the following call types:

10.2.1.16.1 0+/0- calls;

10.2.1.16.2 911 calls;

10.2.1.16.3 411/DA calls;

10.2.1.16.4 InterLATA calls specific to PIC

10.2.1.16.5 IntraLATA calls specific to PIC

10.2.1.16.6 Toll Free calls, prior to database query;

10.2.1.16.7 Call forwarding of any type supported on the switch, to a line or a trunk; and

10.2.1.16.8 Any other customized routing that may be supported by the U S WEST switch.

10.2.1.17 U S WEST shall assign each AT&T subscriber line the class of service designated by AT&T (e.g., using line class codes or other switch specific provisioning methods) and shall route operator calls from AT&T subscribers as directed by AT&T at AT&T's option. For example, U S WEST may translate 0- and 0+ intraLATA traffic, and route the call through appropriate trunks to an AT&T Operator Services Position System ("OSPS"). Calls from Local Switching must pass the ANI-II digits unchanged.

10.2.1.18 If an AT&T customer subscribes to AT&T provided voice mail and messaging services, U S WEST shall redirect incoming calls to the AT&T system based upon designated service arrangements (e.g., busy, don't

answer, number of rings). In addition, U S WEST shall provide a Standard Message Desk Interface-Enhanced (SMDI-E) interface to the AT&T system. U S WEST shall support the Inter-switch Voice Messaging Service (IVMS) capability.

10.2.1.19 Local Switching shall be offered in accordance with the requirements of the following technical references and their future releases:

10.2.1.19.1 GR-1298-CORE, AIN Switching System Generic Requirements;

10.2.1.19.2 GR-1299-CORE, AIN Switch-Service Control Point (SCP)/Adjunct Interface Generic Requirements;

10.2.1.19.3 TR-NWT-001284, AIN 0.1 Switching System Generic Requirements; and

10.2.1.19.4 SR-NWT-002247, AIN Release 1 Update.

10.2.2 Interface Requirements:

10.2.2.1 U S WEST shall provide the following interfaces to Loops:

10.2.2.1.1 Standard Tip/Ring interface ,including loopstart or groundstart, on-hook signaling (e.g., for calling number, calling name and message waiting lamp);

10.2.2.1.2 Coin phone signaling provided through a U S WEST coin phone port;

10.2.2.1.3 Basic Rate Interface ISDN adhering to ANSI standards Q.931, Q.932 and appropriate Bellcore Technical Requirements;

10.2.2.1.4 Two-wire analog interface to PBX to include reverse battery, E&M, wink start and DID;

10.2.2.1.5 Four-wire analog interface to PBX to include reverse battery, E&M, wink start and DID;

10.2.2.1.6 Four-wire DS-1 interface to PBX or subscriber provided equipment (e.g., computers and voice response systems);

10.2.2.1.7 Primary Rate ISDN to PBX adhering to ANSI standards Q.931, Q.932 and appropriate Bellcore Technical Requirements;

10.2.2.1.8 Switched Fractional DS-1 with capabilities to configure Nx64 channels (where "n" = 1 to 24); and

10.2.2.1.9 Loops adhering to Bellcore TR-NWT-08 and TR-NWT-303 specifications to interconnect Digital Loop Carriers.

10.2.2.2 U S WEST shall provide access to the following, but not limited to:

10.2.2.2.1 SS7 Signaling Network or Multi-Frequency trunking, if requested by AT&T;

10.2.2.2.2 Interface to AT&T operator services systems or Operator Services through appropriate trunk interconnections for the system; and

10.2.2.2.3 Interface to AT&T Directory Assistance Services through the AT&T switched network or to Directory Services through the appropriate trunk interconnections for the system; and 950 access or other AT&T required access to interexchange carriers as requested through appropriate trunk interfaces.

10.3 Customized Routing

10.3.1 Description

Customized routing will enable AT&T to direct particular classes of calls to particular outgoing trunks based upon line class codes. AT&T may use customized routing to direct its customers' calls to 411, 555-1212, 0+ or 0-, to its own Operator Services platform Directory Assistance platform.

10.3.2 Limitations

Because there is a limitation in the technical feasibility of offering custom routing beyond the capacity of the 1A ESS switch, custom routing will be offered to CLECs on a first-come, first-served basis.

10.4 Integrated Services Digital Network (ISDN)

10.4.1 Integrated Services Digital Network ("ISDN") is defined in two (2) variations. The first variation is Basic Rate ISDN ("BRI"). BRI consists of 2 Bearer (B) Channels and one Data (D) Channel. The second variation is Primary Rate ISDN ("PRI"). PRI consists of 23 B Channels and one D Channel. Both BRI and PRI B Channels may be used for voice, Circuit Switched Data ("CSD") or Packet Switched Data ("PSD"). The BRI D Channel may be used for call related signaling, non-call related signaling or packet switched data. The PRI D Channel may be used for call related signaling.

10.4.2 Technical Requirements — ISDN

10.4.2.1 U S WEST shall offer ISDN that

10.4.2.2 provides integrated Packet handling capabilities;

10.4.2.3 allows for full 2B+D Channel functionality for BRI; and

10.4.2.4 allows for full 23B+D Channel functionality for PRI.

10.4.2.5 Each B Channel shall allow for voice, 64 Kbps CSD, and PSD of 128 logical channels at minimum speeds of 19 Kbps throughput of each logical channel up to the total capacity of the B Channel.

10.4.2.6 Each B Channel shall provide capabilities for alternate voice and data on a per call basis.

10.4.2.7 The BRI D Channel shall allow for call associated signaling, non-call associated signaling and PSD of 16 logical channels at minimum speeds of 9.6 Kbps throughput of each logical channel up to the total capacity of the D channel.

10.4.2.8 The PRI D Channel shall allow for call associated signaling.

10.4.3 Interface Requirements — ISDN

10.4.3.1 U S WEST shall provide the BRI interface using Digital Subscriber Loops adhering to Bellcore TR-NWT-303 Specifications to interconnect Digital Loop Carriers.

10.4.3.2 U S WEST shall offer PSD interfaces adhering to the X.25, X.75 and X.75' ANSI and Bellcore requirements.

10.4.3.3 U S WEST shall offer PSD trunk interfaces operating at 56 Kbps.

11. Network Interface Device

11.1 Definition:

11.1.1 The Network Interface Device ("NID") is a single-line termination device or that portion of a multiple-line termination device required to terminate a single line or circuit . One of the functions of the NID is to establish the network demarcation point between a carrier and its subscriber. The NID features two (2) independent chambers or divisions which separate the service provider's network from the subscriber's inside wiring. Each chamber or division contains the appropriate connection points or posts to which the service provider and the subscriber each make their connections.

11.1.2 AT&T may connect its NID to U S WEST's NID.

11.1.3 U S WEST will allow AT&T to locate dropwires, other than U S WEST's drop wires, inside an existing U S WEST combination NID used in the provisioning of telephone service for single tenant end users subject to the following conditions:

11.1.3.1 Sufficient space exists inside the combination NID to allow proper installation of equipment in accordance with the NID manufacturers specifications and per the National Electric Code;

11.1.3.2 In order to maintain maintenance integrity for the NID, AT&T will install their own overvoltage protection and customer bridging equipment, terminate the dropwires to that equipment, and assume all operational responsibilities and liabilities for that equipment;

In the event that sufficient space is not available in the existing U S WEST NID, to accommodate additional drops, AT&T will be allowed to install and additional NID, at its own expense and the AT&T's NID can be connected to the existing U S WEST NID;

If the existing NID is not the new generation modular type, AT&T may install a new NID. U S WEST will be allowed to move its drop wire to the new NID and remove the old NID;

Upon request by AT&T, the Parties agree to jointly develop a satisfactory process to address the issues with access to single and multi party NIDs.

11.1.4 With respect to multiple-line termination devices, AT&T shall specify the quantity of NIDs it requires within such device.

11.2 Technical Requirements

11.2.1 The NID shall provide a clean, accessible point of connection for the inside wiring and for the Distribution Media and/or cross connect to AT&T's NID and shall maintain a connection to ground meeting the requirements as set forth below.

11.2.2 The NID shall be capable of transferring electrical analog or digital signals between the subscriber's inside wiring and the Distribution Media and/or cross connect to AT&T's NID.

11.2.3 All NID posts or connecting points shall be in place, secure, usable and free of any rust or corrosion. The protective ground connection shall exist and be properly installed. The ground wire shall be free of rust and corrosion and have continuity to ground.

11.2.4 The NID shall be capable of withstanding all normal local environmental variations.

11.2.5 Where the NID is not located in a larger, secure cabinet or closet, the NID shall be reasonably protected from vandalism. The NID shall be accessible to AT&T designated personnel. In cases where entrance to the subscriber premises is required to give access to the NID, AT&T shall obtain entrance permission directly from the subscriber.

11.2.6 U S WEST shall offer the NID together with, and separately from, the Distribution Media component of Loop Distribution.

11.3 Interface Requirements

11.3.1 The NID shall be the interface to subscribers' premises wiring for all loops.

11.3.2 The NID shall be at least equal to all the industry standards for NIDs set forth in the following technical references:

11.3.2.1 Bellcore Technical Advisory TA-TSY-000120 "Subscriber Premises or Network Ground Wire";

11.3.2.2 Bellcore Generic Requirement GR-49-CORE "Generic Requirements for Outdoor Telephone Network Interface Devices";

11.3.2.3 Bellcore Technical Requirement TR-NWT-00239 "Indoor Telephone Network Interfaces";

11.3.2.4 Bellcore Technical Requirement TR-NWT-000937 "Generic Requirements for Outdoor and Indoor Building Entrance"; and

11.3.2.5 Bellcore Technical Requirement TR-NWT-000133 "Generic Requirements for Network Inside Wiring."

12. Operator Systems

See Part A.

13. E911

See Part A.

14. Directory Assistance Data

See Part A.

15. Signaling Link Transport

15.1 Definition:

Signaling Link Transport is a set of two (2) or four (4) dedicated 56 Kbps transmission paths between AT&T-designated Signaling Points of Interconnection ("SPOI") that provides appropriate physical diversity and a cross connect at a U S WEST STP site.

15.2 Technical Requirements

15.2.1 Signaling Link Transport shall consist of full duplex mode 56 Kbps transmission paths.

15.2.2 Of the various options available, Signaling Link Transport shall perform in the following two ways:

15.2.1.1 as an "A-link" which is a connection between a switch or SCP and a home Signaling Transfer Point Switch ("STPs") pair; and

15.2.1.2 as a "D-link" which is a connection between two (2) STP pairs in different company networks (e.g., between two (2) STP pairs for two (2) (CLECs)).

15.2.3 Signaling Link Transport shall consist of two (2) or more signaling link layers as follows:

15.2.3.1 An A-link layer shall consist of two (2) links.

15.2.3.2 A D-link layer shall consist of four (4) links.

15.2.4 A signaling link layer shall satisfy a performance objective such that:

15.2.4.1 there shall be no more than two (2) minutes down time per year for an A-link layer transport only, and

15.2.4.2 there shall be negligible (less than 2 seconds) down time per year for a D-link layer transport only.

15.2.5 Where available, a signaling link layer shall satisfy interoffice and interoffice diversity of facilities and equipment, such that:

15.2.5.1 no single failure of facilities or equipment causes the failure of both links in an A-link layer (i.e., the links should be provided on a minimum of two (2) separate physical paths end-to-end); and

15.2.5.2 no two concurrent failures of facilities or equipment shall cause the failure of all four (4) links in a D-link layer (i.e., the links should be provided on a minimum of three (3) separate physical paths end-to-end).

15.2.6 For requested link layers, U S WEST will provide AT&T with the level of diversity available.

15.3 *Interface Requirements*

15.3.1 *There shall be a DS-1 (1.544 Mbps) interface at the AT&T-designated SPOIs. Each 56 Kbps transmission path shall appear as a DS-0 channel within the DS-1 interface.*

16. Signaling Transfer Points (STPs)

16.1 *Definition:*

Signaling Transfer Points ("STPs") provide functionality that enable the exchange of SS7 messages among and between switching elements, database elements and signaling transfer points.

16.2 *Technical Requirements*

16.2.1 *STPs shall provide signaling access to all other Network Elements connected to the U S WEST SS7 network. These include:*

16.2.1.1 *U S WEST Local Switching or Tandem Switching;*

16.2.1.2 *U S WEST Service Control Points/DataBases connected to or resident on service control points;*

16.2.1.3 *Third-party local or tandem switching systems connected to the U S WEST signaling network; and*

16.2.1.4 *Third-party-provided STPs connected to the U S WEST signaling network.*

16.2.2 *The connectivity provided by STPs shall fully support the functions of all other Network Elements connected to U S WEST's SS7 network. This includes the use of U S WEST's SS7 network to convey messages which neither originate nor terminate at a signaling end point directly connected to the U S WEST SS7 network (i.e., transit messages). When the U S WEST SS7 network is used to convey transit messages, there shall be no alteration of the Integrated Services Digital Network User Part ("ISDNUP") or Transaction Capabilities Application Part ("TCAP") user data that constitutes the content of the message.*

16.2.3 *If a U S WEST tandem switch routes traffic, based on dialed or translated digits, on SS7 trunks between an AT&T local switch and third party local switch, U S WEST's SS7 network shall convey the TCAP messages necessary to provide Call Management features (automatic callback, automatic recall, and screening list editing) between the AT&T local STPs and the STP's that provide connectivity with the third party local switch, even if the third party local switch is not directly connected to U S WEST's STPs.*

16.2.4 *STPs shall provide all functions of the MTP as specified in ANSI T1.111 (Reference 12.5.2). This includes:*

16.2.4.1 *Signaling Data Link functions, as specified in ANSI T1.111.2;*

16.2.4.2 *Signaling Link functions, as specified in ANSI T1.111.3; and*

16.2.4.3 *Signaling Network Management functions, as specified in ANSI T1.111.4.*

16.2.5 *STPs shall provide all functions of the SCCP necessary for Class 0 (basic connectionless) service, as specified in ANSI T1.112. In particular, this includes Global Title Translation ("GTT") and SCCP Management procedures, as specified in ANSI T1.112.4.*

16.2.6 *In cases where the destination signaling point is either a U S WEST local or tandem switching system or data base, or is an AT&T or third party local or tandem switching system directly connected to U S WEST's SS7 network, U S WEST STPs shall perform final GTT of messages to the destination and SCCP Subsystem Management of the destination. In all other cases, STPs shall perform intermediate GTT of messages to a gateway pair of STPs in an SS7 network connected with the U S WEST SS7 network, and shall not perform SCCP Subsystem Management of the destination.*

16.2.7 *STPs shall also provide the capability to route SCCP messages based on ISNI, as specified in ANSI T1.118, when this capability becomes available on U S WEST STPs.*

16.2.8 *STPs shall provide all functions of the OMAP commonly provided by STPs, as specified in the reference in Section 16.5.6. This includes:*

16.2.8.1 *MTP Routing Verification Test ("MRVT"); and,*

16.2.8.2 *SCCP Routing Verification Test ("SRVT").*

16.2.9 *In cases where the destination signaling point is either a U S WEST local or tandem switching system or database, or is an AT&T or third party local or tandem switching system directly connected to the U S WEST SS7 network, STPs shall perform MRVT and SRVT to the destination signaling point. In all other cases, STPs shall perform MRVT and SRVT to a gateway pair of STPs in an SS7 network connected with the U S WEST SS7 network. This requirement shall be superseded by the specifications for Inter-network MRVT and SRVT if and when these become approved ANSI standards and available capabilities of U S WEST STPs.*

16.2.10 *STPs shall be equal to or at the same level as U S WEST provides to itself[18] as to the following performance requirements:*

16.2.10.1 *MTP Performance, as specified in ANSI T1.111.6; and*

16.2.10.2 *SCCP Performance, as specified in ANSI T1.112.5.*

16.3 *Interface Requirements*

16.3.1 *U S WEST shall provide the following STPs options to connect AT&T or AT&T-designated local switching systems or STPs to the U S WEST SS7 network:*

16.3.1.1 *An A-link interface from AT&T local switching systems.*

16.3.2 *Each type of interface shall be provided by one or more sets (layers) of signaling links, as follows:*

[18] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

16.3.2.1 An A-link layer shall consist of two (2) links.

16.3.3 The Signaling Point of Interconnection (SPOI) for each link shall be located at a cross-connect element, such as a DSX-1, in the Central Office where the U S WEST STPs are located. There shall be a DS-1 or higher rate transport interface at each of the SPOIs. Each signaling link shall appear as a DS-0 channel within the DS-1 or higher rate interface.

16.3.3.1 U S WEST shall offer higher rate DS-1 signaling for interconnecting AT&T local switching systems or STPs with U S WEST STPs as soon as these become approved ANSI standards and available capabilities in U S WEST's network.

16.3.4 U S WEST shall provide MTP and SCCP protocol interfaces that shall conform to all relevant sections in the following specifications:

16.3.4.1 Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP); and

16.3.4.2 Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).

16.4 Message Screening

16.4.1 U S WEST shall set message screening parameters in order to accept messages from AT&T local or tandem switching systems destined to any signaling point in the U S WEST SS7 network with which the AT&T switching system has a signaling relation.

16.4.2 U S WEST shall set message screening parameters in order to accept messages from AT&T local or tandem switching systems destined to any signaling point or network interconnected to the U S WEST SS7 network with which the AT&T switching system has a signaling relation.

16.4.3 U S WEST shall set message screening parameters in order to accept messages destined to an AT&T local or tandem switching system from any signaling point or network interconnected to the U S WEST SS7 network with which the AT&T switching system has a signaling relation.

16.4.4 U S WEST shall set message screening parameters in order to accept and send messages destined to an AT&T SCP from any signaling point or network interconnected to the U S WEST SS7 network with which the AT&T SCP has a signaling relation.

16.5 STP Requirements

16.5.1 Subject to the provisions of Section 52.5.1 and 52.5.2 of Part A of this Agreement, STPs shall be equal to or at the same level as U S WEST provides to itself as to[19] all of the requirements for STPs set forth in the following technical references

[19] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language

16.5.2 *ANSI T1.111-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP);*

16.5.3 *ANSI T1.111A-1994 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP) Supplement;*

16.5.4 *ANSI T1.112-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Signaling Connection Control Part (SCCP);*

16.5.5 *ANSI T1.115-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Monitoring and Measurements for Networks;*

16.5.6 *ANSI T1.116-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Operations, Maintenance and Administration Part (OMAP);*

16.5.7 *ANSI T1.118-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Intermediate Signaling Network Identification (ISNI);*

16.5.8 *Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP); and*

16.5.9 *Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).*

17. Service Control Points/Databases

17.1 *Definition:*

17.1.1 *Databases are the Network Elements that provide the functionality for storage of, access to, and manipulation of information required to offer a particular service and/or capability. Databases include, but are not limited to: Number Portability, LIDB, Toll Free Number Database, Automatic Location Identification/Data Management System and AIN.*

17.1.2 *A Service Control Point ("SCP") is a specific type of Database Network Element functionality deployed in a Signaling System 7 ("SS7") network that executes service application logic in response to SS7 queries sent to it by a switching system also connected to the SS7 network. SCPs also provide operational interfaces to allow for provisioning, administration and maintenance of subscriber data and service application data. (e.g., a toll free database stores subscriber record data that provides information necessary to route toll free calls).*

17.2 *Technical Requirements for SCPs/Databases*

Requirements for SCPs/Databases within this section address storage of information, access to information (e.g., signaling protocols and response times), and administration of information (e.g., provisioning, administration, and maintenance). All SCPs/Databases shall be provided to AT&T in accordance with the following requirements, except where such a requirement is superseded by specific requirements set forth in Subparagraphs 17.3 through 17.7 of this Attachment:

17.2.1 U S WEST shall provide interconnection to SCPs through the U S WEST designated STPs using SS7 network and protocols, as specified in Section 16 of this Attachment, with TCAP as the application layer protocol.

17.2.2 Regional SCP pairs shall be available pursuant to applicable technical reference documents.

17.2.3 U S WEST shall provide to AT&T database provisioning consistent with the provisioning requirements of this Agreement (e.g., data required, edits, acknowledgments, data format and transmission medium and notification of order completion).

17.2.4 The operational interface provided by U S WEST shall complete Database transactions (i.e., add, modify, delete) for AT&T subscriber records stored in U S WEST databases at parity with which U S WEST provisions its own subscriber records.

17.2.5 U S WEST shall provide Database maintenance consistent with the maintenance requirements as specified in this Agreement (e.g., notification of U S WEST network affecting events, testing, dispatch schedule and measurement and exception reports).

17.2.6 When and where available, U S WEST shall provide billing and recording information to track Database usage consistent with Connectivity Billing and recording requirements as specified in this Agreement (e.g., recorded message format and content, timeliness of feed, data format and transmission medium).

17.2.7 U S WEST shall provide SCPs/Databases in accordance with the physical security requirements specified in this Agreement.

17.2.8 U S WEST shall provide SCPs/Databases in accordance with the logical security requirements specified in this Agreement.

17.3 Number Portability Database

17.3.1 Definition:

The Number Portability ("NP") database supplies routing numbers for calls involving numbers that have been ported from one local service provider to another. NP database functionality shall also include Global Title Translations ("GTT") for calls involving ported numbers even if U S WEST provides GTT functionality in another Network Element. This Section 17.3 supplements the requirements of Sections 18.2 and 18.7. U S WEST shall provide the NP database in accordance with industry standards which shall supersede the following as needed.

17.3.2 Requirements

17.3.2.1 U S WEST shall make U S WEST NP Database available for AT&T switches to query to obtain the appropriate routing number on calls to ported numbers or the industry specified indication that the number is not ported for non-ported numbers in NPA-NXXs that are opened to portability. The specified indication will also be provided when the NPA-NXX is not open to portability.

17.3.2.2 *Query responses shall provide such additional information (e.g., Service Provider identification) as may be specified in the NP implementation in the relevant regulatory jurisdiction.*

17.3.2.3 *U S WEST shall complete CLASS or LIDB queries routed to the U S WEST network by AT&T switches and return the appropriate response to the querying source.*

17.3.2.4 *The NP database shall provide such other functionality as has been specified in the regulatory jurisdiction in which portability has been implemented.*

17.3.2.5 *Unavailability of the NP database query and GTT applications shall not exceed four (4) minutes per year.*

17.3.2.6 *The U S WEST NP database shall respond to a round trip query within 500 milliseconds or as amended by industry standards.*

17.3.3 *Interface Requirements*

U S WEST shall interconnect the signaling interface between the AT&T or other local switch and the NP database using the TCAP protocol as specified in the technical references in this Agreement, together with the signaling network interface as specified in the technical references in this Agreement, and such further requirements (e.g., AIN or IN protocols) as may be specified by regulatory or other bodies responsible for implementation of number portability.

17.4 *Line Information Database (LIDB)*

This Section 17.4 defines and sets forth additional requirements for the Line Information Database.

17.4.1 *Definition:*

The Line Information Database ("LIDB") is a transaction-oriented database accessible through Common Channel Signaling ("CCS") networks. It contains records associated with subscriber Line Numbers and Special Billing Numbers (in accordance with the requirements in the technical reference in Section 17.5.5). LIDB accepts queries from other Network Elements, or AT&T's network, and provides appropriate responses. The query originator need not be the owner of LIDB data. LIDB queries include functions, such as screening billed numbers, that provide the ability to accept Collect or Third Number Billing calls and validation of Telephone Line Number based non-proprietary calling cards. The interface for the LIDB functionality is the interface between the U S WEST CCS network and other CCS networks. LIDB also interfaces to administrative systems. The administrative system interface provides work centers with an interface to LIDB for functions such as provisioning, auditing of data, access to LIDB measurements and reports.

17.4.2 *Technical Requirements*

17.4.2.1 *U S WEST shall enable AT&T to store in U S WEST's LIDB any line number or special billing number. AT&T will provide U S WEST a non-binding LIDB forecast. Prior to the availability of permanent NP, U S WEST shall enable AT&T to store in U S WEST's LIDB any subscriber Line Number or Special Billing Number record for AT&T resale, unbundled Network Elements and facility based customers, in accordance with the*

technical reference in Section 17.6.5, whether ported or not, for which the NPA-NXX or NXX-0/1XX Group is supported by that LIDB.

17.4.2.2 Prior to the availability of permanent NP, U S WEST shall enable AT&T to store in U S WEST's LIDB any subscriber Line Number or Special Billing Number record for AT&T resale, unbundled Network Elements and facility based customers, in accordance with the technical reference in Section 17.6.5, whether ported or not, and NPA-NXX and NXX-0/1XX Group Records, belonging to an NPA-NXX or NXX-0/1 XX owned by AT&T.

17.4.2.3 Subsequent to the availability of permanent NP, U S WEST shall enable AT&T to store in U S WEST's LIDB any subscriber Line Number or Special Billing Number record for AT&T resale, unbundled Network Elements and facility based customers, in accordance with the technical reference in Section 17.6.5, whether ported or not, regardless of the number's NPA-NXX or NXX-0/1XX.

17.4.2.4 U S WEST shall perform the following LIDB functions (i.e., processing of the following query types as defined in the technical reference in Section 17.6.5) for AT&T's subscriber records in LIDB:

17.4.2.4.1 Billed Number Screening (provides information such as whether the Billed Number may accept Collect or Third Number Billing calls);

17.4.2.4.2 Calling Card Validation; and

17.4.2.4.3 Originating Line Number Screening (OLNS), when available.

17.4.2.5 U S WEST shall process AT&T's subscriber records in LIDB at least at parity with U S WEST subscriber records, with respect to other LIDB functions (as defined in the technical reference in Section 17.6). U S WEST shall indicate to AT&T what additional functions, if any are performed by LIDB in its network. Upon request by AT&T, the Parties shall develop an interim procedure to process AT&T subscriber records.

17.4.2.6 Within two (2) weeks after a request by AT&T, U S WEST shall provide AT&T with a list of the subscriber data items which AT&T would have to provide in order to support each required LIDB function. The list shall indicate which data items are essential to LIDB function, and which are required only to support certain services. For each data item, the list shall show the data formats, the acceptable values of the data item and the meaning of those values.

17.4.2.7 U S WEST shall provide LIDB performance in accordance with section 17.6.5.

17.4.2.8 U S WEST shall provide AT&T with the capability to provision (e.g., to add, update, and delete) NPA-NXX and NXX-0/1XX Group Records, and Line Number and Special Billing Number Records, associated with AT&T subscribers, directly into U S WEST's LIDB provisioning process. Upon request by AT&T, the Parties shall establish an interim process to meet the requirements of this Section.

17.4.2.9 Unless directed otherwise by AT&T, in the event end user subscribers change their local service provider to AT&T, U S WEST shall maintain

subscriber data (for line numbers, card numbers, and for any other types of data maintained in LIDB) so that such subscribers shall not experience any interruption of service due to the lack of such maintenance of subscriber data.

17.4.2.10 *All additions, updates and deletions of AT&T data to the LIDB shall be made solely at the direction of AT&T.*

17.4.2.11 *U S WEST shall provide priority updates to LIDB for AT&T data upon AT&T's request (e.g., to support fraud protection).*

17.4.2.12 *When available, U S WEST shall provide AT&T the capability to directly obtain, through an electronic interface, reports of all AT&T data in LIDB. Upon request by AT&T, the Parties shall establish an interim process to meet the requirements of this Section.*

17.4.2.13 *[Intentionally left blank for numbering consistency]*

17.4.2.14 *U S WEST shall perform backup and recovery of all of AT&T's data in LIDB as frequently as U S WEST performs backup and recovery for itself and any other Person, including sending to LIDB all changes made since the date of the most recent backup copy. Backup will be performed weekly. When needed, recovery will take place within twenty-four (24) hours.*

17.4.2.15 *U S WEST shall provide to AT&T access to LIDB measurements and reports at least at parity with the capability U S WEST has for its own subscriber records and that U S WEST provides to any other party. Such access shall be electronic. Upon request by AT&T, the Parties shall establish an interim process to meet the requirements of this Section.*

17.4.2.16 *U S WEST shall provide AT&T with LIDB reports of data which are missing or contain errors, as well as any misroute errors, within the same time period as U S WEST provides such reports to itself. Upon request by AT&T, the Parties shall establish a process to meet the requirements of this Section.*

17.4.2.17 *U S WEST shall prevent any access to or use of AT&T data in LIDB by U S WEST personnel or by any other party not authorized in writing by AT&T.*

17.4.2.18 *If and when available[20], U S WEST shall provide AT&T performance of the LIDB Data Screening function, which allows a LIDB to completely or partially deny specific query originators access to LIDB data owned by specific data owners, (in accordance with the technical references in Section 17.6.5) for subscriber data that is part of an NPA-NXX or NXX-0/1XX wholly or partially owned by AT&T at least at parity with U S WEST subscriber data. U S WEST shall obtain from AT&T the screening information associated with LIDB Data Screening of AT&T data in accordance with this requirement.*

17.4.2.18.1 The Parties agree to investigate technical feasibility of variable LIDB database screening to accomplish 17.4.2.18 above.

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[20] Pursuant to the Eighth Circuit Decision, the Parties agree to the deletion of the following "technically feasible".

17.4.2.19 U S WEST shall accept queries to LIDB associated with AT&T subscriber records, and shall return responses in accordance with the requirements of this Section 17.

17.4.3 Interface Requirements

U S WEST shall offer LIDB in accordance with the requirements of this Section 17.4.3.

17.4.3.1 The interface to LIDB shall be in accordance with the technical reference in Section 17.6.3.

17.4.3.2 The CCS interface to LIDB shall be the standard interface described in Section 17.6.3.

17.4.3.3 The LIDB Data Base interpretation of the ANSI-TCAP messages shall comply with the technical reference in Section 17.6.4. Global Title Translation shall be maintained in the signaling network in order to support signaling network routing to the LIDB.

17.5 Toll Free Number Database

The Toll Free Number Database is an SCP that provides functionality necessary for toll free (e.g., 800 and 888) number services by providing routing information and additional vertical features during call set-up in response to queries from SSPs. This Section 17.5 supplements the requirements of Section 17.2 and 17.7. U S WEST shall provide the Toll Free Number Database in accordance with the following subsections.:

17.5.1 Technical Requirements

17.5.1.1 U S WEST shall make the U S WEST Toll Free Number Database available, through its STPs, for AT&T to query from AT&T's designated switch including U S WEST unbundled Local Switching.

17.5.1.2 The Toll Free Number Database shall return carrier identification and, where applicable, the queried toll free number, translated numbers and instructions as it would in response to a query from a U S WEST switch.

17.5.2 Interface Requirements

The signaling interface between the AT&T or other local switch and the Toll-Free Number Database shall use the TCAP protocol as specified in the technical reference in Section 17.6.1, together with the signaling network interface as specified in the technical references in Sections 17.6.2 and 17.6.6.

17.6 SCPs/Databases shall be at least equal to all of the requirements for SCPs/Databases set forth in the following technical references:

17.6.1 GR-246-CORE, Bell Communications Research Specification of Signaling System Number 7, Issue 1 (Bellcore, December 199X);

17.6.2 GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP) (Bellcore, March 1994);

17.6.3 GR-954-CORE, CCS Network Interface Specification (CCSNIS) Supporting Line Information Database (LIDB) Service 6, issue 1, Rev. 1 (Bellcore, October 1995);

17.6.4 GR-1149-CORE, OSSGR Section 10: System Interfaces, Issue 1 (Bellcore, October 1995) (Replaces TR-NWT-001149);

17.6.5 GR-1158-CORE, OSSGR Section 22.3: Line Information Database 6, Issue (Bellcore, October 1995); and

17.6.6 GR-1428-CORE, CCS Network Interface Specification (CCSNIS) Supporting Toll Free Service (Bellcore, May 1995).

17.7 Advanced Intelligent Network ("AIN") Access, Service Creation Environment and Service Management System ("SCE/SMS") Advanced Intelligent Network Access

17.7.1 U S WEST shall provide mediated access to all U S WEST service applications, (if available)[21], resident in U S WEST's SCP through U S WEST's STPs. Such access may be from AT&T's switch or U S WEST's unbundled local switch.

17.7.2 SCE/SMS AIN Access shall provide AT&T the ability to create service applications in the U S WEST SCE and deploy those applications via the U S WEST SMS to the U S WEST SCP. This interconnection arrangement shall provide AT&T access to the U S WEST development environment and administrative system in a manner at least at parity with U S WEST's ability to deliver its own AIN-based services. SCE AIN Access is the development of service applications within the U S WEST Service Creation Environment capability. SMS AIN Access is the provisioning of service applications via the U S WEST Service Management System capability. AIN trigger provisioning will be accomplished through the U S WEST local unbundled switching.

17.7.3 Services Available. U S WEST shall make SCE hardware, software, testing and technical support (e.g., technical contacts, system administrator) resources available to AT&T. Scheduling of SCE resources shall allow AT&T at least equal priority to U S WEST.

17.7.4 Multi-user Access. The U S WEST SCE/SMS shall allow for multi-user access with proper source code management and other logical security functions.

17.7.5 Partitioning. When available, the U S WEST SCP shall partition and protect AT&T service logic and data from unauthorized SMS capability and SCE capability access, execution or other types of compromise.

17.7.6 Training and Documentation. U S WEST shall provide training and documentation for AT&T development staff only in cases in which such training or documentation is not reasonably available from another source. If training or documentation is required in accordance with this Section, it will be provided in a manner at least at parity with that provided by U S WEST to its development staff. Training will be conducted at a mutually agreed upon location.

17.7.7 Access Environment. When AT&T selects SCE/SMS AIN Access, U S WEST shall provide for a secure, controlled access environment on-site. When available AT&T may request mutually agreed upon remote data connections (e.g., dial up, LAN, WAN).

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[21] Pursuant to the Eighth Circuit Decision, the Parties agree to the following deletion: "current or future (if technically feasible)".

17.7.8 Data Exchange. When AT&T selects SMS AIN Access, U S WEST shall allow AT&T to download data forms and/or tables to the U S WEST SCP, via the U S WEST SMS capability, in the same fashion as U S WEST downloads such forms and/or tables for itself.

17.7.9 Certification Testing. Certification testing is typically a two step process that includes an off-line unit test followed by an on-line controlled introduction testing into one of each of the U S WEST switch types capable of supporting the service. Services created by AT&T will require certification testing by U S WEST before the services can be provisioned in the network. The scheduling of U S WEST certification testing resources for new AT&T services will be jointly coordinated and prioritized between U S WEST and AT&T. AT&T testing requirements will be given equal priority with both U S WEST and other provider's requirements. In most circumstances, such testing will be completed within sixty (60) days from the date the application is submitted by AT&T to U S WEST for certification. In circumstances involving complex applications requiring additional time for testing, U S WEST may request additional time and AT&T will not unreasonably withhold approval of such request. The certification testing procedures described in this Section may be augmented as mutually agreed to by the Parties.

17.7.10 Access Standard. SCPs/Databases shall offer SCE/SMS AIN Access in accordance with the requirements of GR-1280-CORE, AIN Service Control Point (SCP) Generic Requirements.

17.8 [Intentionally left blank for numbering consistency]

17.9 AT&T will provide to U S WEST timely non-binding forecasts of SS7 call transactions, link requirements, database query volumes, etc., as needed for sizing the individual network capabilities that AT&T will utilize under the terms of this Agreement.

17.10 CCS Service includes:

17.10.1 Entrance Facility - The entrance facility connects AT&T's signaling point of interface with the U S WEST serving wire center ("SWC").

17.10.2 Direct Link Transport ("DLT") - The DLT connects the AT&T SWC to the U S WEST STP.

17.10.3 STP Port - The STP port provides the switching function at the STP. One (1) STP Port is required for each DLT Link. The Port provides access to the Service Control Point (SCP).

17.11 Advanced Intelligent Network ("AIN") triggers will be provided only to access U S WEST databases. Access to Advanced Intelligent Network (AIN) functions is available only through the Signaling Transfer Point (STP). If AT&T requires other access, it will submit a Bona Fide Request.

18. Additional Requirements

This Section 18 of Attachment 3 sets forth the additional requirements for unbundled Network Elements which U S WEST agrees to offer to AT&T under this Agreement.

18.1 Cooperative Testing

[U S WEST proposes the following]

18.1.1 Definition:

Cooperative Testing means that U S WEST shall cooperate with AT&T upon request or as needed to (a) ensure that the Network Elements and Ancillary Functions and additional requirements being provided to AT&T by U S WEST are in compliance with the requirements of this Agreement, (b) test the overall functionality of various Network Elements and Ancillary Functions provided by U S WEST to AT&T [in combination with each other or] in combination with other equipment and facilities provided by AT&T or third parties, and (c) ensure that all operational interfaces and processes are in place and functioning properly and efficiently for the provisioning and maintenance of Network Elements and Ancillary Functions and so that all appropriate billing data can be provided to AT&T.

18.1.2 Requirements

Upon request by AT&T, the Parties will agree upon a process to resolve technical issues relating to interconnection of AT&T's network to U S WEST's network and Network Elements and Ancillary Functions. The agreed upon process shall include procedures for escalating disputes and unresolved issues up through higher levels of each Party's management. If AT&T and U S WEST do not reach agreement on such a process within the 45-day time period, any issues that have not been resolved by the Parties with respect to such process shall be submitted to the dispute resolution procedures set forth in Part A of this Agreement unless both Parties agree to extend the time to reach agreement on such issues.

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[U S WEST proposes the following]

18.1.2.1 U S WEST shall provide AT&T access for testing at any interface between [a] the U S WEST and AT&T Network [Element or Combinations and AT&T equipment or facilities]. Such test access shall be sufficient to ensure that the applicable requirements can be tested by AT&T. This access shall be available seven (7) days per week, twenty-four (24) hours per day.

18.1.2.2 AT&T may test any interfaces, Network Elements or Ancillary Functions and additional requirements provided by U S WEST to AT&T pursuant to this Agreement.

18.1.2.3 U S WEST shall provide engineering data as requested by AT&T for the loop components as set forth in Sections 2, 3 and 4 of this Attachment which AT&T may desire to test. Such data shall include equipment engineering and cable specifications, signaling and transmission path data.

18.1.2.4 The Parties shall establish a process to provide engineering/office support information on unbundled Network Elements (e.g., central office layout and design records and drawings, system engineering and other applicable documentation) pertaining to a Network Element or Ancillary Function or the underlying equipment that is then providing a Network Element or Ancillary Function to AT&T.

18.1.2.5 *Upon request from AT&T, U S WEST shall provide to AT&T all applicable test results from U S WEST testing activities on a Network Element or Ancillary Function or additional requirement or the underlying equipment providing a Network Element or Ancillary Function or additional requirements. AT&T may review such test results and may notify U S WEST of any detected deficiencies.*

18.1.2.6 *U S WEST shall temporarily provision AT&T designated Local Switching features for testing. Upon request by AT&T, the Parties shall mutually agree on the procedures to be established between U S WEST and AT&T to expedite such provisioning processes for feature testing.*

18.1.2.7 *Upon AT&T's request, U S WEST shall make available technical support to meet with AT&T representatives to provide required support for Cooperative Testing. U S WEST shall define the process to gain access to such technical support.*

18.1.2.8 *Dedicated Transport and Loop Feeder may experience alarm conditions due to in-progress tests. U S WEST shall notify AT&T upon removal of such facilities from service.*

18.1.2.9 *U S WEST shall exercise its best efforts to notify AT&T prior to conducting tests or maintenance procedures on Network Elements or Ancillary Functions or on the underlying equipment that is then providing a Network Element or Ancillary Function, that will likely cause a service interruption or degradation of service.*

18.1.2.10 *U S WEST shall provide a single point of contact to AT&T that is available seven (7) days per week, twenty-four (24) hours per day for trouble status, sectionalization, resolution, escalation, and closure. Such staff shall be adequately skilled to allow expeditious problem resolution.*

18.1.2.11 *U S WEST shall make available to AT&T access to 105 responders, 100-type test lines, or 102-type test lines associated with any circuits under test.*

18.1.2.12 *AT&T and U S WEST shall complete Cooperative Testing in accordance with the procedures set forth in Attachment 5.*

18.1.2.13 *U S WEST shall participate in Cooperative Testing requested by AT&T whenever it is deemed necessary by AT&T to insure service performance, reliability and subscriber serviceability.*

18.1.2.14 *AT&T may accept or reject the Network Element ordered by AT&T if, upon completion of cooperative acceptance testing, the tested Network Element does not meet the requirements stated herein.*

18.2 Performance

18.2.1 Scope

The issue of performance measurements and standards is to be addressed pursuant to the terms of Section 52 of Part A of this Agreement.

18.3 *[Intentionally left blank for numbering consistency]*

18.4 Synchronization

18.4.1 Definition:

Synchronization is the function which keeps all digital equipment in a communications network operating at the same average frequency. With respect to digital transmission, information is coded into discrete pulses. When these pulses are transmitted through a digital communications network, all synchronous Network Elements are traceable to a stable and accurate timing source. Network synchronization is accomplished by timing all synchronous Network Elements in the network to a stratum 1 traceable source so that transmission from these network points have the same average line rate.

18.4.2 Technical Requirements

The following requirements are applicable to the case where U S WEST provides synchronization to equipment that AT&T owns and operates within a U S WEST location. In addition, these requirements apply to synchronous equipment that is owned by U S WEST and is used to provide a Network Element to AT&T.

18.4.2.1 The synchronization of clocks within digital networks is divided into two parts: intra-building and inter-building. Within a building, a single clock is designated as the Building Integrated Timing Supply ("BITS"), which provides all of the DS-1 and DS-0 synchronization references required by other clocks in such building. This is referred to as intra-building synchronization. The BITS receives synchronization references from remotely located BITS such as a primary reference source. Synchronization of BITS between buildings is referred to as inter-building synchronization.

18.4.2.2 To implement a network synchronization plan, clocks within digital networks are divided into four stratum levels. All clocks in strata 2, 3, and 4 are synchronized to a stratum 1 clock, that is, they are traceable to a stratum 1 clock. A traceable reference is a reference that can be traced back through some number of clocks to a stratum 1 source. Clocks in different strata are distinguished by their free running accuracy or by their stability during trouble conditions such as the loss of all synchronization references.

18.4.2.2.1 Intra-Building

Within a building, there may be different kinds of equipment that require synchronization at the DS-1 and DS-0 rates. Synchronization at the DS-1 rate is accomplished by the frequency synchronizing presence of buffer stores at various DS-1 transmission interfaces. Synchronization at the DS-0 rate is accomplished by using a composite clock signal that phase synchronizes the clocks. Equipment requiring DS-0 synchronization frequently does not have adequate buffer storage to accommodate the phase variations among different equipment. Control of phase variations to an acceptable level is accomplished by externally timing all interconnecting DS-0 circuits to a single clock source and by limiting the interconnection of DS-0 equipment to less than 1,500 cable feet. Therefore, a BITS shall provide DS-1 and composite clock signals when the appropriate composite signal is a 64-kHz 5/8th duty cycle, return to zero with a bipolar violation every eighth pulse (B8RZ).

18.4.2.2.2 Inter-Building

U S WEST shall provide inter-building synchronization at the DS-1 rate and the BITS shall accept the primary and/or secondary synchronization links from BITS in other buildings where necessary. From hierarchical considerations, the BITS shall be the highest stratum clock within the building and U S WEST shall provide operations capabilities. When available such capability includes, but is not limited to: synchronization reference provisioning; synchronization reference status inquiries; timing mode status inquiries; and alarm conditions.

18.4.3 Synchronization Distribution Requirements

18.4.3.1 Central office BITS shall contain redundant clocks meeting or exceeding the requirements for a stratum 3 clock as specified in ANSI T1.101-1994 and ANSI T1.105.09 and Bellcore GR-NWT-001244 Clocks for the Synchronized Network: Common Generic Criteria.

18.4.3.2 Central office BITS shall be powered by primary and backup power sources.

18.4.3.3 If both reference inputs to the BITS are interrupted or in a degraded mode (meaning off frequency greater than twice the minimum accuracy of the BITS, loss of frame, excessive bit errors, or in Alarm Indication Signal), then the stratum clock in the BITS shall provide the necessary bridge in timing to allow the network to operate without a frame repetition or deletion (slip free) with better performance than specified in these technical references specified in 18.4.3.1.

18.4.3.4 DS-1s multiplexed into a SONET synchronous payload envelope within an STS-n (where "n" is defined in ANSI T1.105-1995) signal shall not be used as reference facilities for network synchronization.

18.4.3.5 The total number of Network Elements cascaded from the stratum 1 source shall be minimized.

18.4.3.6 A Network Element shall receive the synchronization reference signal only from another Network Element that contains a clock of equivalent or superior quality (stratum level).

18.4.3.7 U S WEST shall select for synchronization those facilities shown to have the greatest degree of availability (absence of outages).

18.4.3.8 Where possible, all primary and secondary synchronization facilities shall be physically diverse (this means the maximum feasible physical separation of synchronization equipment and cabling).

18.4.3.9 No timing loops shall be formed in any combination of primary and secondary facilities.

18.4.3.10 U S WEST shall continuously monitor the BITS for synchronization related failures.

18.4.3.11 U S WEST shall continuously monitor all equipment transporting synchronization facilities for synchronization related failures.

18.4.3.12 For non-SONET equipment, U S WEST shall provide synchronization facilities which, at a minimum, comply with the standards set forth in ANSI T1.101-1994.

18.4.3.13 For SONET equipment, U S WEST shall provide synchronization facilities that have time deviation ("TDEV") for integration times greater than 0.05 seconds and less than or equal to ten (10) seconds, that is less than or equal to 100 nanoseconds. TDEV, in nanoseconds, for integration times greater than ten (10) seconds and less than 1000 seconds, shall be less than 31.623 times the square-root of the integration time.

18.5 SS7 Network Interconnection

18.5.1 Definition:

SS7 Network Interconnection is the interconnection of AT&T local Signaling Transfer Point (STPs) with U S WEST STPs. This interconnection provides connectivity that enables the exchange of SS7 messages among U S WEST switching systems and databases, AT&T local or tandem switching systems, and other third-party switching systems directly connected to the U S WEST SS7 network.

18.5.2 Technical Requirements

18.5.2.1 SS7 Network Interconnection shall provide signaling connectivity to all components of the U S WEST SS7 network through U S WEST STPs. These include:

18.5.2.1.1 U S WEST local or tandem switching systems;

18.5.2.1.2 U S WEST databases; and

18.5.2.1.3 other third-party local or tandem switching systems.

18.5.2.2 The connectivity provided by SS7 Network Interconnection shall support the functions of U S WEST switching systems and databases and AT&T or other third-party switching systems with A-link access to the U S WEST SS7 network.

18.5.2.3 SS7 Network Interconnection shall provide transport for certain types of Transaction Capabilities Application Part ("TCAP") messages. If traffic is routed based on dialed or translated digits between an AT&T local switching system and a U S WEST or other third-party local switching system, either directly or via a U S WEST tandem switching system, then it is a requirement that the U S WEST SS7 network convey via SS7 Network Interconnection the TCAP messages necessary to provide Call Management services (Automatic Callback, Automatic Recall, and Screening List Editing) between the AT&T local STPs and the U S WEST or other third-party STPs.

18.5.2.4 When the capability to route messages based on Intermediate Signaling Network Identifier (ISNI) is generally available on U S WEST STPs, the U S WEST SS7 Network shall also convey TCAP messages using SS7 Network Interconnection in similar circumstances where the U S WEST switch routes traffic based on a Carrier Identification Code ("CIC").

18.5.2.5 SS7 Network Interconnection shall provide all functions of the MTP as specified in ANSI T1. 111. This includes:

18.5.2.5.1 Signaling Data Link functions, as specified in ANSI T1.111.2;

18.5.2.5.2 Signaling Link functions, as specified in ANSI T1.111.3; and

18.5.2.5.3 Signaling Network Management functions, as specified in ANSI T1.111.4.

18.5.2.6 SS7 Network Interconnection shall provide all functions of the SCCP necessary for Class 0 (basic connectionless) service, as specified in ANSI T1.112.

18.5.2.7 Where the destination signaling point is a U S WEST switching system a database, or is another third-party local or tandem switching system directly connected to the U S WEST STPs (SS7 network), SS7 Network Interconnection shall include final GTT of messages to the destination and SCCP Subsystem Management of the destination.

18.5.2.8 Where the destination signaling point is an AT&T local or tandem switching system, SS7 Network Interconnection shall include intermediate GTT of messages to a gateway pair of AT&T local STPs, and shall not include SCCP Subsystem Management of the destination.

18.5.2.9 SS7 Network Interconnection shall provide all functions of the Integrated Services Digital Network User Part (ISDNUP), as specified in ANSI T1.113.

18.5.2.10 SS7 Network Interconnection shall provide all functions of the TCAP, as specified in ANSI T1.114.

18.5.2.11 If and when Inter-network MTP Routing Verification Test (MRVT) and SCCP Routing Verification Test (SRVT) become approved ANSI standards and available capabilities of both U S WEST and AT&T STPs, SS7 Network Interconnection shall provide these functions of the OMAP.

18.5.2.11.1 The Parties shall develop a mutually agreed upon interim process for MRVT and SRVT upon request by AT&T. Either Party shall be allowed to shut off MRVT/SRVT for preservation of network integrity.

18.5.2.12 SS7 Network Interconnection shall be equal to or at the same level as U S WEST provides to itself as to[22] the following performance requirements:

18.5.2.12.1 MTP Performance, as specified in ANSI T1.111.6;

18.5.2.12.2 SCCP Performance, as specified in ANSI T1.112.5; and

18.5.2.12.3 ISDNUP Performance, as specified in ANSI T1.113.5.

18.5.3 Interface Requirements

[22] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

18.5.3.1 U S WEST shall offer the following SS7 Network Interconnection options to connect AT&T or AT&T-designated STPs to the U S WEST STPs (SS7 network):

18.5.3.1.1 D-link interface from AT&T STPs.

18.5.3.2 Each interface shall be provided by one or more sets (layers) of signaling links, as follows:

18.5.3.2.1 A D-link layer shall consist of four links.

18.5.3.3 The Signaling Point of Interconnection (SPOI) for each link shall be located at a cross-connect element, (e.g., DSX-1) in the central office where the U S WEST STPs is located. There shall be a DS-1 or higher rate transport interface at each of the SPOIs. Each signaling link shall appear as a DS-0 channel within the DS-1 or higher rate interface. U S WEST shall offer higher rate DS-1 signaling links for interconnecting AT&T local switching systems or STPs with U S WEST STPs as soon as these become approved ANSI standards and available capabilities of U S WEST STPs.

18.5.3.3.1 In each LATA, there will be two (2) signaling points of interconnection (SPOIs). The requirement for two SPOIs is driven by the critical importance attached by the Parties to signaling link diversity.

18.5.3.3.2 Each Party will designate one of the two SPOIs in a reasonable and efficient location in the LATA. A SPOI can be any existing cross connect point in the LATA.

18.5.3.3.3 Each signaling link requires a port on each Party's STP.

18.5.3.4 Where available, the U S WEST Central Office shall provide intraoffice diversity between the SPOIs and the U S WEST STPs, so that no single failure of intraoffice facilities or equipment shall cause the failure of both D-links in a layer connecting to U S WEST's STPs.

18.5.3.5 The protocol interface requirements for SS7 Network Interconnection include the MTP, ISDNUP, SCCP and TCAP. These protocol interfaces shall conform to the following specifications:

18.5.3.5.1 Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP);

18.5.3.5.2 Bellcore GR-1428-CORE, CCS Network Interface Specification (CCSNIS) Supporting Toll Free Service;

18.5.3.5.3 Bellcore GR-1429-CORE, CCS Network Interface Specification (CCSNIS) Supporting Call Management Services; and

18.5.3.5.4 Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).

18.5.3.6 To the extent available[23], U S WEST shall set message screening parameters to block accept messages from AT&T local or tandem switching systems destined to any signaling point in the U S WEST SS7 network with which the AT&T switching system has a legitimate signaling relation.

18.5.4 SS7 Network Interconnection shall be equal to or at the same level as U S WEST provides to itself as to[24] all of the requirements for SS7 Network Interconnection set forth in the following technical references:

18.5.4.1 ANSI T1.110-1992 American National Standard Telecommunications Signaling System Number 7 (SS7) - General Information;

18.5.4.2 ANSI T1.111-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP);

18.5.4.3 ANSI T1.111A-1994 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP) Supplement;

18.5.4.4 ANSI T1.112-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Signaling Connection Control Part (SCCP);

18.5.4.5 ANSI T1.113-1995 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Integrated Services Digital Network (ISDN) User Part;

18.5.4.6 ANSI T1.114-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Transaction Capabilities Application Part (TCAP);

18.5.4.7 ANSI T1.115-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Monitoring and Measurements for Networks;

18.5.4.8 ANSI T1.116-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Operations, Maintenance and Administration Part (OMAP);

18.5.4.9 ANSI T1.118-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Intermediate Signaling Network Identification (ISNI);

18.5.4.10 Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP);

18.5.4.11 Bellcore GR-954-CORE, CCS Network Interface Specification (CCSNIS) Supporting Line Information Database (LIDB) Service;

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[23] Pursuant to the Eighth Circuit Decision, the Parties agree to the following deletion: "technically feasible".

[24] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

18.5.4.12 Bellcore GR-1428-CORE, CCS Network Interface Specification (CCSNIS) Supporting Toll Free Service;

18.5.4.13 Bellcore GR-1429-CORE, CCS Network Interface Specification (CCSNIS) Supporting Call Management Services; and

18.5.4.14 Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).

19. AT&T Combination of Unbundled Network Elements

Issue 3-8 - Parked

[U S WEST proposes the following.]

19.1 SPOT Frame - - General Description

This section describes how U S WEST will provide AT&T with access to unbundled Network Elements. AT&T may combine these unbundled Network Elements. This section sets forth the procedures whereby AT&T may obtain access to the U S WEST Central Office(s) for the combination of unbundled Network Elements. It also describes the SPOT frame as the demarcation device at which AT&T gains access to unbundled Network Elements purchased from U S WEST, and the procedures by which AT&T will request the use of the SPOT frame.

19.1.1 Definition

The Single Point of Termination (SPOT) frame shall be located in the U S WEST Central Office and shall be used by AT&T to make cross-connections between unbundled Network Elements and/or AT&T collocated equipment. The SPOT frame provides terminations for unbundled Network Elements as well as any AT&T facilities, provided through collocation arrangements. U S WEST will extend unbundled Network Elements to the SPOT frame through the use of AT&T-requested and U S WEST-provided tie cables. Tie cables between the SPOT frame and AT&T's equipment shall be provided as a part of AT&T's collocation arrangement. Tie cables are available for DS0, DS1, DS3 and optical capacities and extend from the applicable U S WEST frame to the SPOT frame, or from AT&T's collocated space to the SPOT frame.

19.1.2 AT&T may use a SPOT frame to combine unbundled Network Elements in Central Offices where AT&T has obtained Collocation for the placement of AT&T equipment. Alternatively, AT&T may combine unbundled Network Elements within its collocated space.

19.1.3 U S WEST will provide AT&T with 24 hour access to the Central Office for the purpose of running jumpers on the SPOT frame. Such access will be in accordance with the terms and conditions applicable to physical collocation, in accordance with Section 40.3 of Part A of this Agreement. This access, including picture identification cards, access cards and/or keys, or other procedures, will be equal to the access U S WEST provides to itself for similar purposes.

19.1.4 AT&T may run jumpers on the SPOT frame to make connections in three basic types of configurations:

- U S WEST unbundled Network Elements to U S WEST unbundled Network Elements;
- U S WEST unbundled Network Elements to AT&T's equipment;
- AT&T's equipment to another CLEC's equipment.

19.1.5 The SPOT frame shall be the standard demarcation point between AT&T and U S WEST-owned network facilities and equipment as well as the demarcation between unbundled Network Elements. This demarcation point will be used as the designated test point for AT&T and U S WEST.

19.1.6 Dedicated SPOT Frame

Upon AT&T's request, U S WEST shall make available a "dedicated" SPOT frame for AT&T's sole use where existing U S WEST frame capacity will allow for such a dedicated SPOT frame.

19.1.6.1 Except as set forth below, the dedicated SPOT frame and associated tie cables will not be made available for use by any other CLEC without the express written consent of AT&T.

19.1.6.2 AT&T shall order the dedicated SPOT frame and associated tie cables through the procedures outlined in Section 40.5 of Part A of this Agreement (collocation ordering procedures).

19.1.6.3 Upon request, U S WEST will provide security doors for the maintenance and security of AT&T's dedicated SPOT frame. When such doors are requested and installed, U S WEST and AT&T shall have sole access to the dedicated portions of the SPOT frame.

19.1.6.4 AT&T shall be responsible for tie cable administration.

19.1.7 Shared SPOT Frame

U S WEST shall make available to any requesting CLEC a "shared" SPOT frame that may be used by multiple CLECs.

19.1.7.1 AT&T shall order the shared SPOT frame through the procedures outlined in Section 40.5 of Part A of this Agreement (collocation ordering procedures). Costs of the shared SPOT frame shall be set forth in Appendix A to Attachment 1 of this Agreement.

19.2 All U S WEST terminations on the SPOT frame will be given a frame address. U S WEST will establish and maintain frame address records for AT&T's terminations. U S WEST will provide the Point of Interface (POI) frame address to AT&T for each U S WEST

unbundled Network Element ordered. U S WEST will maintain assignment records of such U S WEST unbundled Network Elements (loop, local switching, etc.) and terminations (tie cable) on the SPOT frame.

19.3 AT&T will maintain assignment records for the terminations of AT&T's equipment on the SPOT frame. AT&T will maintain the assignment records for those frame addresses involved in connecting AT&T's equipment to U S WEST unbundled Network Elements and the U S WEST unbundled Network Elements connected to other U S WEST unbundled Network Elements.

19.4 Charges

The two categories of charges for a SPOT frame are associated with the SPOT frame and tie pairs. Additional charges associated with the preparation of space may also apply.

19.4.1 SPOT Frame Charges

AT&T shall pay both non-recurring and recurring charges associated with the shared SPOT frame. Charges for the dedicated SPOT frame will be developed on an Individual Case Basis, in response to the specific SPOT frame capacity and options requested by AT&T, such as dedicated SPOT frame security door(s).

19.4.2 Tie Cable Charges

AT&T shall pay both non-recurring and recurring charges associated with the tie cable arrangements ordered by AT&T.

19.4.2.1 SPOT Frame Terminations

This element includes the tie cables, associated cable racking and terminating blocks placed between AT&T's collocated equipment and the vertical side of the SPOT Frame.

19.4.2.2 EICT

This element includes the tie cables, associated racking and terminating blocks placed between horizontal side of the SPOT Frame and U S WEST Unbundled Network Elements.

19.4.2.3 Regeneration charges shall apply when the tie cable connections are of such a distance as to require a form of conditioning or regeneration to maintain the required signal level.

19.4.2.4 Dedicated tie cables shall be billed as construction charges. These tie cables are dedicated for AT&T's sole use from the SPOT Frame to the point where the U S WEST UNE may be accessed, such as the COSMIC Frame or the DSX.

19.4.3 To the extent that AT&T's use of the SPOT frame results in U S WEST incurring building or frame additions other than the SPOT frame, construction charges will apply

as detailed in Section 3 of Attachment 1, Construction and Implementation Costs.

19.5 AT&T will be required to make the jumper wire connection between frame addresses on the SPOT frame to complete AT&T's circuit.

19.6 Ordering

19.6.1 SPOT frames shall be ordered in accordance with Section 40.5.1 of Part A of this Agreement.

19.6.2 As part of the ordering process, AT&T will provide at a minimum a one-year forecast for each wire center in which it intends to utilize the SPOT frame. Included in this forecast will be the termination type (DS0, DS1, DS3, optical) and the quantity of each termination required, and the quantity of each type of unbundled Network Elements (e.g., unbundled loops, unbundled line-side ports, unbundled trunk-side ports) that will be terminated on the SPOT frame. SPOT frame terminations must be ordered in multiples of the following quantities based upon a per U S WEST frame basis:

100 DS0 terminations
28 DS1 terminations (2-23 pair cables)
1 DS3 termination (2 coax cables)
1 Optical termination (fiber pair)

19.6.3 Upon AT&T's request for a dedicated SPOT frame, AT&T and U S WEST shall hold a joint planning meeting at which AT&T will identify the quantity of tie pairs to each U S WEST central office frame to which AT&T requires dedicated tie cables.

19.6.4 AT&T shall order subsequent tie cable capacity in the same manner as the initial tie cable capacity.

19.6.5 The ordering of unbundled Network Elements shall be in accordance with Section 2 of Attachment 3 of this Agreement.

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INTERCONNECTION

1. Definitions

1.1 *For purposes of this Attachment 4, "Interconnection" is the linking of the U S WEST and AT&T networks for the mutual exchange of traffic. Interconnection does not include the transport and termination of traffic. Interconnection is provided by virtual or physical collocation, entrance facilities or meet point arrangements.*

2. General Description

2.1 **U S WEST will provide interconnection at any technically feasible point, subject to negotiations between the Parties; such points may include, but not be limited to, a Meet Point, the line side distribution frame of the local switch, the trunk side distribution frame of the local switch, trunk interconnection points of the tandem switch, central office cross-connect points, and Signaling Transfer Points necessary to exchange traffic and access call related databases.**[1]

2.2 **AT&T may select for itself those technically feasible points in U S WEST's network to which AT&T wishes to interconnect. U S WEST may not require AT&T to have one point of interconnection for exchange of local traffic within calling area.**[2] *AT&T will be responsible for engineering and maintaining its network on its side of the POI. If and when the Parties choose to interconnect at a mid-span meet, AT&T and U S WEST will jointly provision the fiber optic facilities that connect the two (2) networks and shall share the financial and other responsibilities for that facility.*

2.3 *Within ten (10) Business Days of AT&T's request for any POI, U S WEST shall provide any information in its possession or available to it regarding the environmental conditions of the interconnection route or location including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in U S WEST's possession, or in the possession of a current or former agent, contractor, employee, lessor, or tenant of U S WEST's.*

2.4 *U S WEST shall allow AT&T to perform any environmental site investigations, including, but not limited to, asbestos surveys, AT&T deems to be necessary in support of its collocation needs. AT&T shall advise U S WEST in writing of its intent to conduct any such investigations, and shall receive written approval from U S WEST to proceed with the investigation which approval shall not be unreasonably withheld. AT&T shall indemnify U S WEST in accordance with the provisions of Section 18 of Part A of this Agreement for any loss or claim for damage suffered by U S WEST as a result of AT&T's actions during any site inspection.*

2.5 *Notwithstanding any performance standard set forth in this Attachment, U S WEST will provide the services set forth in this Attachment to AT&T with the level of service quality set forth in Section 52, Part A of this Agreement.*

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[1] Per First Order at pages 6-7, Paragraph 37.

[2] Per First Order at page 7, Paragraph 38.

3. **Location of Interconnection**

3.1 *AT&T will be responsible for implementing and maintaining its network on its side of the POI. U S WEST will be responsible for implementing and maintaining its network on its side of the POI. If and when the Parties choose to interconnect at a Meet Point, AT&T and U S WEST will jointly provision the fiber optic facilities that connect the two networks and shall proportionately share the financial and other responsibilities for that facility based on the reasonably negotiated Meet Point percentage.*

3.2 *If interconnection is complicated by the presence of environmental contamination or hazardous materials, and an alternative route is available, U S WEST shall make such alternative route available for AT&T's consideration.*

4. **Collocation**

4.1 *Interconnection may be accomplished through either virtual or physical Collocation. The terms and conditions under which Collocation will be available are described in Part A of this Agreement.*

5. **Entrance Facility**

5.1 *Interconnection may be accomplished using an entrance facility without the need for collocation. An entrance facility extends from the Point of Interface to a point within a U S WEST central office.*

6. **Quality of Interconnection**

6.1 *U S WEST will not, for the purpose of Interconnection, provide to AT&T less favorable terms and conditions than it provides itself or any other Person or in a manner less efficient than it would impose on itself or any other party. Interconnection will be at least equal in quality to that which U S WEST provides to itself.*

7. **Points of Interconnection**

7.1 *Upon a request for specific point to point routing, U S WEST will make available to AT&T information indicating the location and technical characteristics of U S WEST's network facilities. The following alternatives include (a) a DS-1, DS-3 or SONET rates, and other negotiated alternatives that are available (where facilities are not available and U S WEST builds in accordance with the Construction section of Attachment 1, Section 3, special construction and development costs may apply, if any); (b) virtual collocation; (c) physical collocation; and (d) negotiated Meet Point facilities. Each Party is responsible for providing its own facilities up to the Meet Point. The Parties will negotiate the facilities arrangement between their networks.*

8. **Trunking Requirements**

8.1 *U S WEST agrees to provide designated interconnection facilities that meet the same industry standards for technical criteria and service standards, such as the probability of blocking in peak hours and transmission standards.*

8.2 *The Parties shall initially reciprocally terminate local exchange traffic and intraLATA/interLATA toll calls originating on each other's networks as follows:*

8.2.1 There shall be no restrictions on traffic types carried.

8.2.1.1 Until the access structure is revised, to accommodate non-segregated traffic, pursuant to rules promulgated by the FCC or the Commission, separate trunk groups will be established wherever practical. Exceptions to this provision will not be based on technical infeasibility, but will be based on billing, signaling and network requirements. For example, exceptions include: (a) billing requirements - switched access vs. local traffic, (b) signaling requirements - MF vs. SS7, (c) network requirements - Directory Assistance traffic to TOPS tandems, and (d) one-way trunks for 911/E911. The following is the current list of traffic types that require separate trunk groups, unless otherwise specifically stated in this Agreement:

(a) intraLATA toll and interLATA switched access trunks
(b) EAS/local trunks
(c) Directory Assistance trunks
(d) 911/E911 trunks
(e) Operator Services trunks
(f) Non-U S WEST toll (transit toll to other providers)
(g) Non-U S WEST local (transit local to other providers)
(h) Commercial Mobile Radio Service/Wireless Traffic

8.2.2 If AT&T desires to combine Local Traffic and Toll Traffic on the same trunk group, U S WEST and AT&T shall submit such issue to arbitration pursuant to the dispute resolutions provisions of Section 27 of Part A of this Agreement.

8.3 Separate trunk groups will be established connecting AT&T's switch or AT&T's Operator Service Center to U S WEST's Operator Service Center for operator assisted busy line interrupt/verify. For traffic from the U S WEST network to AT&T for Operator Services, U S WEST will provide one trunk group per LATA served by the local U S WEST switch.

8.4 Trunk Servicing

8.4.1 Orders between the Parties to establish, add, change or disconnect trunks shall be processed by use of an Access Service Request ("ASR") or another industry standard for local service ordering.

8.4.2 As further described in this Agreement, both Parties will jointly manage the capacity of Local Interconnection trunk groups. U S WEST's trunk servicing group will send a Trunk Group Service Request ("TGSR"), or another industry standard eventually adopted to replace the TGSR, to AT&T to trigger changes U S WEST desires to the Local Interconnection trunk groups based on U S WEST's capacity assessment. AT&T will issue an ASR or other industry ordering standard to U S WEST:

(a) within ten (10) Business Days after receipt of the TGSR, upon review of and in response to U S WEST's TGSR, or

(b) at any time, as a result of AT&T's own capacity management assessment, to begin the provisioning process. The interval used by the

provisioning of Local Interconnection trunk groups shall be no longer than the standard interval for the provisioning of U S WEST's Switched Access service and shall be consistent with U S WEST's actual provisioning intervals for its own Switched Access customers.

8.4.3 U S WEST will attempt to meet AT&T requested due dates for the provision of Local Interconnect trunk groups. Where the installation of Local Interconnection trunk groups is required within a time that is shorter than the standard interval, the Parties will make all reasonable efforts and cooperate in good faith to ensure that the mutually agreed upon due date is met.

8.4.4 Orders that comprise a major project may be submitted at the same time, in which case their implementation shall be jointly planned and coordinated. Major projects are those that require the coordination and execution of multiple orders or related activities between and among U S WEST and AT&T work groups, including, but not limited to, the initial establishment of Local Interconnection or Meet Point trunk groups and service in an area, NXX code moves, re-homes, facility grooming, or network rearrangements.

8.5 Trunking Requirements

8.5.1 Trunk group connections will be made at a DS-1 or multiple DS-1 level for exchange of EAS/local, intraLATA toll, wireless/Commercial Mobile Radio Service, and Switched Access Traffic. Ancillary Service trunk groups will be made below a DS-1 level, as agreed to by the Parties.

8.5.2 Where CCS is not available, in-band multi-frequency (MF) wink start signaling will be provided. This MF arrangement will require a separate local trunk circuit between AT&T's switch and U S WEST's tandems. Reference Technical Pub. TR-314 and TR394.

9. Service Interruptions

9.1 Upon request by either Party, standards and procedures for notification of trunk disconnects will be jointly developed by the Parties. . Neither Party shall be expected to maintain active status for a trunk disconnected by the other Party for an extended or indefinite period of time.

9.2 The characteristics and methods of operation of any circuits, facilities or equipment of either Party connected with the services, facilities or equipment of the other Party pursuant to this Agreement shall not: (a) interfere with or impair service over any facilities of the other Party, its Affiliates, or its connecting and concurring carriers involved in its services; (b) cause damage to their plant; (c) violate any applicable law or regulation regarding the invasion of privacy of any communications carried over the Party's facilities; or (d) create hazards to the employees of either Party or to the public.

9.3 Each Party shall be solely responsible, and bear the expense, for the overall design of its services. Each Party shall also be responsible for any redesign or rearrangement of its services that may be required because of changes in facilities, operations or procedures, minimum network protection criteria, and operating or maintenance characteristics of the facilities. If one Party creates a circumstance causing additional costs to the other Party, the other Party may collect construction charges from the first Party.

9.4 To facilitate trouble reporting and to coordinate the repair of the service provided by each Party to the other under this Agreement, each Party shall designate and define a trouble reporting control office ("TRCO") for such service. Each Party shall furnish a trouble reporting telephone number for the designated TRCO. This number shall have access to the location where facility records are normally located and where current status reports on any trouble reports are readily available. Current and historical trouble reports will be made available, if necessary. Alternative out-of-hours procedures shall be established to ensure access to a location that is staffed and has the authority to initiate corrective action.

9.5 Where new facilities, services and arrangements are installed to rectify the service interruption, the TRCO shall ensure that continuity exists and take appropriate transmission measurements before advising the other Party that the new circuit is ready for service.

9.6 The Parties shall cooperate in isolating trouble conditions. Before either Party reports a trouble condition, it shall use reasonable efforts to isolate the trouble.

9.7 In cases where a trouble condition affects a significant portion of the other Party's service, the Parties shall assign the same priority provided to other interconnecting carriers.

10. Forecasting

10.1 The Parties agree that during the first year of Interconnection, joint forecasting and planning meetings will take place no less frequently than once per quarter.

10.2 The Parties shall establish joint forecasting responsibilities for traffic utilization over trunk groups. Intercompany forecast information must be provided by the Parties to each other four (4) times a year. The quarterly forecasts shall include forecasted requirements for each trunk group identified in Paragraph 8.2.1 of this Attachment. In addition, for tandem-switched traffic, the forecast shall include the quantity of tandem-switched traffic forecasted for each subtending end office. The Parties recognize that, to the extent historical traffic data can be shared between the Parties, the accuracy of the forecasts will improve. Forecasts shall be for a minimum of three (3) current and plus-1 and plus-2 years and shall include:

10.2.1 the use of Common Language Location Identifier (CLLI-MSG), which is described in Bellcore documents BR 795-100-100 and BR 795-400-100; and

10.2.2 a description of major network projects anticipated for the following six (6) months that could affect the other Party. Major network projects include trunking or network rearrangements, shifts in anticipated traffic patterns, or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecasting period. This planning will include the issues of network capacity, forecasting and compensation calculation, where appropriate.

10.2.3 If forecasts vary significantly, the Parties shall meet to review and reconcile such forecasts.

10.2.3.1 If the Parties are unable to reach such a reconciliation, the Local Interconnection trunk groups shall be provisioned to the higher forecast. At the end of three (3) months, the utilization of the Local

Interconnection trunk groups will be reviewed and if the average CCS utilization for the third month is under seventy five percent (75%) of capacity, either Party may issue an order to resize the trunk group, which shall be left with not less than twenty five percent (25%) excess capacity.

10.2.3.2 If the Parties agree on the original forecast and then it is determined that a trunk group is under seventy five percent (75%) of CCS capacity on a monthly-average basis for each month of any three-month period, either Party may issue an order to resize the trunk group, which shall be left with not less than twenty five percent (25%) excess capacity. In all cases, grade of service objectives identified in this Agreement shall be maintained.

10.3 Each Party shall provide a specified point of contact for planning, forecasting and trunk servicing purposes.

10.4 Trunking can be established to tandems or end offices or a combination of both via either one-way or two-way trunks. Trunking will be at the DS-0 level, DS-1 level, DS-3 level, or any other technically feasible level, subject to network disclosure requirements of the FCC. Initial trunking will be established between AT&T's switching centers and U S WEST's access tandem(s). The Parties will utilize direct end office trunking under the following conditions:

10.4.1 Tandem exhaust - If a tandem through which the Parties are interconnected is unable to, or is forecasted to be unable to, support additional traffic loads for any period of time, the Parties will mutually agree on an end office trunking plan that will alleviate the tandem capacity shortage and ensure completion of traffic between AT&T and U S WEST subscribers.

10.4.2 Traffic volume - The Parties shall install and retain direct end office trunking sufficient to handle actual or reasonably forecasted traffic volumes, whichever is greater, between an AT&T switching center and a U S WEST end office where the local traffic exceeds or is forecasted to exceed 512 CCS at the busy hour.

10.4.3 Mutual agreement - The Parties may install direct end office trunking upon mutual agreement in the absence of conditions (1) or (2) above and such agreement will not unreasonably be withheld.

11. Signaling

11.1 Signaling protocol. The Parties will interconnect their networks using SS7 signaling as defined in GR-317 and GR-394, including ISDN User Part ("ISUP") for trunk signaling and Transaction Capabilities Application Part ("TCAP") for CCS-based features in the interconnection of their networks. All appropriate industry standards for signaling interoperability will be followed.

11.2 The Parties will provide CCS to each other in conjunction with all trunk groups supporting Local, Transit, and Toll Traffic. The Parties will cooperate on the exchange of TCAP messages to facilitate full interoperability of CCS-based features between their respective networks, including all CLASS features and functions. All CCS signaling parameters will be provided, including automatic number identification (ANI), originating line information

(OLI), calling party category, charge number, etc. For terminating Feature Group D, the Parties will pass CPN if it receives CPN from Feature Group D carriers. All privacy indicators will be honored. Where available, network signaling information such as Transit Network Selection ("TNS") parameter (CCS platform) and CIC/OZZ information (non-CCS environment) will be provided by the Parties wherever such information is needed for call routing or billing. The Parties will follow all appropriate industry standards pertaining to TNS and CIC/OZZ codes.

11.3 Standard Interconnection facilities shall be Extended Superframe (ESF) with B8ZS line code. Where ESF/B8ZS is not available, AT&T will agree to using other interconnection protocols on an interim basis until the standard ESF/B8ZS is available. U S WEST will provide anticipated dates of availability for those areas not currently ESF/B8ZS compatible.

11.4 Where AT&T is unwilling to utilize an alternate interconnection protocol, AT&T will provide U S WEST an initial forecast of 64 Kbps Clear Channel Capability ("64K CCC") trunk quantities consistent with the forecasting agreements between the Parties. Upon receipt of this forecast, the Parties will begin joint planning for the engineering, procurement, and installation of the designated 64K CCC Local Interconnection trunk groups and the associated B8ZS Extended Super Frame facilities, for the purpose of transmitting 64K CCC data calls between AT&T and U S WEST. Where additional equipment is required, such equipment will be obtained, engineered, and installed on the same basis and with the same intervals as any similar growth job for an IXC, AT&T or U S WEST internal customer demand for 64K CCC trunks. Where technically feasible, these trunks will be established as two-way.

12. Ordering

12.1 AT&T shall, on each order for Local Interconnection trunks, specify the AT&T NXXs that are assigned to the trunks.

13. Network Management

13.1 Protective Protocols

Either Party may use protective network traffic management controls such as 7-digit and 10-digit code gaps on traffic toward each others network when required to protect the public switched network from congestion due to facility failures, switch congestion or failure or focused overload.

13.2 Rerouting Protocols

Where the capability exists, originating or terminating traffic reroutes may be implemented by either Party to temporarily relieve network congestion due to facility failures or abnormal calling patterns. Reroutes will not be used to circumvent normal trunk servicing. Rerouting controls will only be used when mutually agreed to by the Parties.

13.3 Mass Calling

AT&T and U S WEST shall cooperate and share pre-planning information, where available and in compliance with federal and state regulations, regarding cross-network call-ins expected to generate large or focused temporary increases in call volumes, to prevent or mitigate the impact of these events on the public switched network.

Furthermore, INP numbers may only be used consistent with network efficiency and integrity, i.e., inhibitions on mass calling events.

14. Usage Measurement

14.1 When applicable, each Party shall provide to the other:

14.1.1 Bellcore AMA formatted records to generate bills to the other Party;

14.1.2 measurement of minutes of use over Local Interconnection trunk groups in actual conversation seconds. The total conversation seconds over each individual Local Interconnection trunk group will be totaled for the entire monthly bill-round and then rounded to the next whole minute; and

14.1.3 Within twenty (20) calendar days after the end of each quarter (commencing with the first full quarter after the Effective Date of this Agreement), a usage report with the total traffic volume described in terms of minutes and messages and by call type local, toll, and other terminated to each other over SS7 Local Interconnection trunk groups.

15. Audiotext and Mass Announcement Services

The Parties agree that access to the audiotext, mass announcement and information services of each Party may be made available to the other Party upon execution of a separate agreement or an amendment to this Agreement.

16. Interconnection to Network Elements

16.1 Technical Requirements

16.1.1 When requested by AT&T, U S WEST shall provide interconnection between U S WEST Network Elements provided to AT&T and AT&T's network at available transmission rates designated by AT&T. If additional equipment beyond that which U S WEST currently has in place, or that U S WEST is planning to put in place, or is otherwise required to have in place is required to meet such transmission rates, the installation and/or acquisition of such equipment shall be accomplished pursuant to the ordering process set forth in this Agreement. The construction of additional equipment shall be subject to the provisions of Attachment 1, Section 3 of this Agreement.[3]

16.1.2 Traffic shall be combined and routed as follows:

16.1.2.1 At AT&T's request, U S WEST shall receive AT&T traffic destined to the U S WEST Operator Systems Network Element, on trunks from an AT&T end-office or an AT&T tandem.

16.1.2.2 At AT&T's request, U S WEST shall receive AT&T CAMA-ANI (Centralized Automatic Message Accounting - Automatic Number Identification) traffic destined to the 911 PSAPs or U S WEST E911 tandems, on trunks from an AT&T end-office.

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[3] The Parties agree to this last sentence pursuant to the Eighth Circuit decision.

16.1.2.3 At AT&T's request, U S WEST shall receive AT&T SS7 traffic destined to any U S WEST E911 tandem on trunks from an AT&T end-office, when SS7 E911 signaling is available in U S WEST's network.

16.1.3 When requested by AT&T and a third party carrier, U S WEST shall provide interconnections between AT&T's network, and the other carrier's network through the U S WEST network at transmission rates designated by AT&T, including, but not limited to, DS-1, DS-3, and STS-1, where available. U S WEST shall combine and route traffic to and from other local carriers and interLATA carriers through the U S WEST tandem network. Under separate contract, U S WEST may record and keep records of such traffic for AT&T billing purposes to the extent possible.

16.1.4 U S WEST shall provide two-way trunk groups for interconnection. At AT&T's request, and consistent with an efficient network architecture, U S WEST shall provide unidirectional traffic on such trunks, in either direction, effectively operating them as if they were one-way trunk groups.

16.1.5 All trunking provided by U S WEST shall adhere to the applicable performance requirements set forth in the "General Performance Requirements" section of this Agreement, pursuant to Sections 52.5.1 and 52.5.2 of Part A of this Agreement.

16.1.6 Intentionally left blank for numbering consistency.]

16.1.7 U S WEST and AT&T shall agree on the establishment of two-way trunk groups for the exchange of traffic for other IXCs. These trunk groups can be provided in a "meet point" arrangement.

16.1.8 Interconnection shall be made available upon AT&T's request at any technically feasible Point of Interface. All trunk interconnections shall be provided, including SS7, MF, DTMF, Dial Pulse, PRI-ISDN (where available), DID (Direct Inward Dialing), CAMA-ANI, and trunking necessary so that INP can be provided.

16.2 Trunk Interface Requirements

16.2.1 911/E911 Trunks

16.2.1.1 U S WEST shall allow AT&T to provide direct trunking to each U S WEST E911 end office or tandem, as is appropriate for the applicable serving area. These trunks are to be provided as one-way trunks from a given AT&T end office to the U S WEST E911 end office or tandem.

16.2.1.2 U S WEST shall provide for overflow E911 traffic in the same manner that U S WEST provides E911 overflow for itself.

16.2.2 S911 Trunks

If and when S911 tandems become available in the U S WEST network, U S WEST shall allow AT&T to provide direct trunking to each U S WEST S911 tandem. Such SS7 trunks are to be provided as one-way trunks from a given AT&T end-office to the U S WEST S911 tandem.

16.2.3 Local Switch and Access Tandem Trunks

16.2.3.1 U S WEST shall provide trunks groups provisioned exclusively to carry IntraLATA Toll Traffic, as designated by AT&T.

16.2.3.2 U S WEST shall provide trunk groups provisioned exclusively to carry interLATA traffic, as designated by AT&T.

16.2.3.3 U S WEST shall provide SS7 trunks which provide SS7 interconnection. At the Parties' agreement, MF trunks may be substituted for SS7 trunks where applicable.

16.2.3.4 U S WEST shall simultaneously route calls based on dialed digits (in accordance with the standard GR-317-CORE), and Carrier Identification Code (in accordance with the standard GR-394-CORE) over a single SS7 trunk group.

16.2.4 U S WEST Operator Services Trunk

U S WEST shall provide Operator Services trunks as one-way trunks from the U S WEST network to the AT&T network.

16.3 Network Interconnection between U S WEST and AT&T shall meet or exceed all of the requirements for network interconnection set forth in the following technical references:

16.3.1 GR-317-CORE, Switching System Generic Requirements for Call Control Using the Integrated Services Digital Network User Part (ISDNUP), Bellcore, February 1994;

16.3.2 GR-394-CORE, Switching System Generic Requirements for Interexchange Carrier Interconnection Using the Integrated Services Digital Network User Part (ISDNUP), Bellcore, February 1994;

16.3.3 FR-NWT-000271, OSSGR Operator Services Systems Generic Requirements, Bellcore, 1994 Edition; and

16.3.4 FR-NWT-000064, LATA Switching Systems Generic Requirements (LSSGR), Bellcore, 1994 Edition.

17. Reciprocal Traffic Exchange

17.1 Scope

Reciprocal traffic exchange addresses the exchange of traffic between AT&T end users and U S WEST end users. If such traffic is local, the provisions of this Agreement shall apply. Where either Party acts as an intraLATA toll provider or interLATA IXC or where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective tariffs or

contractual offerings for such third party terminations. Absent a separately negotiated agreement to the contrary, compensation for reciprocal traffic exchange solely applies to traffic exchanged directly between the Parties without the use of third party transit providers.

17.2 Responsibilities of The Parties

17.2.1 U S WEST and AT&T agree to treat each other fairly, nondiscriminatorily, and equally for all items included in this Agreement, or related to the support of items included in this Agreement.

17.2.2 AT&T and U S WEST agree to exchange such reports and/or data as provided in this Agreement to facilitate the proper billing of traffic.

17.2.3 [Intentionally left blank for numbering consistency]

17.2.4 AT&T and U S WEST shall share responsibility for all Control Office functions for Local Interconnection trunks and trunk groups, and both Parties shall share the overall coordination, installation, and maintenance responsibilities for these trunks and trunk groups.

17.2.5 The Party that performs the End Office function is responsible for all Control Office functions for the meet point trunking arrangement trunks and trunk groups, and shall be responsible for the overall coordination, installation, and maintenance responsibilities for these trunks and trunk groups.

17.2.6 AT&T and U S WEST shall:

17.2.6.1 Provide trained personnel with adequate and compatible test equipment to work with each other's technicians.

17.2.6.2 Notify each other when there is any change affecting the service requested, including the due date.

17.2.6.3 Coordinate and schedule testing activities of their own personnel, and others as applicable, to ensure its interconnection trunk/trunk groups are installed per the interconnection order, meet agreed upon acceptance test requirements, and are placed in service by the due date.

17.2.6.4 Perform sectionalization to determine if a trouble is located in its facility or its portion of the interconnection trunks prior to referring the trouble to each other.

17.2.6.5 Advise each other's Control Office if there is an equipment failure which may affect the interconnection trunks.

17.2.6.6 Provide each other with a trouble reporting/repair contact number that is readily accessible and available twenty-four (24) hours per day, seven (7) days per week. Any changes to this contact arrangement must be immediately provided to the other Party.

17.2.6.7 Provide to each other test-line numbers and access to test lines.

17.2.6.8 Cooperatively plan and implement coordinated repair procedures for the meet point and Local Interconnection Trunks and facilities to ensure trouble reports are resolved in a timely and appropriate manner.

17.3 Types of Traffic

17.3.1 The types of traffic to be exchanged or provided under this Agreement include, but are not limited to the following:

17.3.1.1 EAS/Local Traffic,

17.3.1.2 Transit Traffic,

17.3.1.3 Switched Access Traffic,

17.3.1.4 Ancillary traffic includes all traffic destined for ancillary services, or that may have special billing requirements, including, but not limited to the following:

(a) Directory Assistance
(b) 911/E911
(c) Operator call termination (busy line interrupt and verify)
(d) 800/888 database dip
(e) LIDB
(f) Information services requiring special billing.

17.3.1.5 Unless otherwise stated in this Agreement, ancillary traffic will be exchanged in accordance with whether the traffic is Local/EAS, intraLATA toll, or Switched Access.

17.4 Transport and Termination of Exchanged Traffic.

17.4.1 Termination of Local Traffic

Local Traffic will be terminated pursuant to the Reciprocal Compensation described in Attachment 1.

17.4.2 EAS/Local Traffic

As negotiated between the Parties, the exchange of local traffic between the Parties may occur in several ways:

17.4.2.1 While the Parties anticipate the use of two way trunks for the delivery of Local Traffic, either Party may elect to provision its own one-way trunks for delivery of Local Traffic to be terminated on the other Party's network at the "initial" point of interconnection.

17.4.2.2 The Parties may elect to purchase transport services from each other or from a third party. Such transport delivers the originating Party's Local Traffic to the terminating Party's end office or tandem for call

termination. Transport may be purchased as either tandem switched transport (which is included in the tandem call termination rate) or direct trunk transport.

17.4.2.3 To the extent that AT&T has established a Collocation arrangement at a U S WEST end office location, and has available capacity, the Parties agree that AT&T shall provide two-way direct trunk facilities, when required, from that end office to the AT&T switch. In all other cases, the direct facility may be provisioned by U S WEST or AT&T or a third party. If both AT&T and U S WEST desire to provision the facility and cannot otherwise agree, the Parties may agree to resolve the dispute through the submission of competitive bids.

17.4.3 Transit Traffic

17.4.3.1 U S WEST will accept traffic originated by AT&T and will terminate it at a point of interconnection with another CLEC, Exchange Carrier, IXC or Wireless Carrier. U S WEST will provide this transit service through Tandem Office Switches. AT&T may also provide U S WEST with Transit Service.

17.4.3.2 The Parties expect that all networks involved in transporting Transit Traffic will deliver calls to each involved network with CCS/SS7 protocol and the appropriate ISUP/TCAP message to facilitate full interoperability and billing functions. In all cases, the originating company is responsible to follow the EMR standard and to exchange records with both the transiting company and the terminating company, to facilitate the billing process to the originating network.

17.4.3.3 The Parties will use industry standards developed to handle the provision and billing of Switched Access by multiple providers (MECAB, MECOD and the Parties' FCC tariffs).

17.4.4 Toll Traffic

Toll Traffic routed to an access tandem, or directly routed to an end office, will be terminated as Switched Access Service.

17.5 Interface Code Availability And Optional Features

17.5.1 Interface Code Availability

Supervisory Signaling specifications, and the applicable network channel interface codes for Local Interconnection trunks, are the same as those used for Feature Group D Switched Access Service, as described in the Parties' applicable Switched Access tariffs.

17.5.2 Optional Features

17.5.2.1 Inband MF or SS7 Out of Band Signaling

Inband MF signaling and SS7 Out of Band Signaling are available for local trunks. MF signaling or SS7 out-of-band signaling must be requested on the order for the

new local trunks. Provisioning of the local trunks equipped with MF signaling or SS7 Out of Band Signaling is the same as that used for Feature Group D Switched Access. Common Channel Signaling Service, as described in this Agreement, must be ordered by AT&T when SS7 Out of Band signaling is requested on local trunks.

17.5.2.2 Clear Channel Capability

Clear channel capability permits 24 DS-0-64 kbit/s services or 1.536 Mbit/s of information on the 1.544 Mbit/s line rate. Clear channel capability is available for local trunks equipped with SS7 Out of Band signaling. Clear channel capability is only available on trunks to U S WEST's access tandem switch or U S WEST's end office switches (where available). Clear channel capability must be requested on the order for the new local trunks. The provisioning of the local trunks equipped with clear channel capability is the same as that used for Feature Group D Switched Access Service. U S WEST will provide AT&T with a listing of U S WEST end offices, local tandems and access tandems equipped with clear channel capability. (Clear channel capability is not available on trunks to U S WEST's local tandem switches or end offices where it is currently not deployed. AT&T agrees to use the Bona Fide Request process to request clear channel capability for such additional switches. In the event additional clear channel capability is required, costs and charges shall be assessed in accordance with Attachment 1, Section 3.

17.6 Measuring Local Interconnection Minutes

17.6.1 Measurement of terminating Local Interconnection minutes, as calculated per Attachment 5, begins when the terminating local entry switch receives answer supervision from the called end user's end office indicating the called end user has answered. The measurement of terminating call usage over local trunks ends when the terminating local entry switch receives disconnect supervision from either the called end user's end office, indicating the called end user has disconnected, or AT&T's Point of Interconnection, whichever is recognized first by the entry switch.

17.6.2 U S WEST and AT&T are required to provide each other the proper call information (e.g., originated call party number and destination call party number, etc.) to enable each Party to issue bills in a complete and timely fashion.

17.7 Testing

17.7.1 Acceptance Testing

At the time of installation of a local trunk group, and at no additional charge, the Parties will cooperatively test the same parameters tested for terminating Feature Group D Switched Access Service.

17.7.2 Testing Capabilities

17.7.2.1 Terminating Local Interconnection trunk testing is provided where equipment is available, with the following test lines: seven-digit access to balance (100 type), milliwatt (102 type), nonsynchronous or synchronous, automatic transmission measuring (105 type), data transmission (107

type), loop-around, short circuit, open circuit, and non-inverting digital loopback (108 type).

17.7.2.2 In addition to Local Interconnection trunk acceptance testing, other tests are available (e.g., additional cooperative acceptance testing, automatic scheduled testing, cooperative scheduled testing, manual scheduled testing, and non-scheduled testing) at the applicable tariff rates.

17.8 Mileage Measurement

Where required, the mileage measurement for Local Interconnection facilities and trunks is determined in the same manner as the mileage measurement for Feature Group D Switched Access Service.

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1. General Business Requirements

Notwithstanding any performance standard set forth in this Attachment, U S WEST will provide the services set forth in this Attachment to AT&T with the level of service quality set forth in Section 52, Part A of this Agreement.

1.1 Procedures

1.1.1 U S WEST Contact with Subscribers

1.1.1.1 AT&T at all times shall be the primary contact and account control for all interactions with its subscribers, except as specified by AT&T. AT&T subscribers include active Customers as well as those for whom service orders are pending.

1.1.1.2 U S WEST shall ensure that any U S WEST personnel who may receive customer inquiries, or otherwise have opportunity for subscriber contact: (i) provide appropriate referrals and telephone numbers to subscribers who inquire about AT&T services or products; (ii) do not in any way disparage AT&T or its products or services during such inquiry or subscriber contact; and (iii) do not provide information about U S WEST products or services during that same inquiry or subscriber contact.

1.1.1.3 AT&T shall ensure that any AT&T personnel who may receive customer inquiries, or otherwise have opportunity for subscriber contact: (i) provide appropriate referrals and telephone numbers to subscribers who inquire about U S WEST services or products; (ii) do not in any way disparage U S WEST, or its products or services during such inquiry or subscriber contact; and (iii) do not provide information about AT&T products or services during that same inquiry or subscriber contact.

1.1.1.4 U S WEST shall not use AT&T's request for subscriber information, order submission or any other aspect of AT&T's processes or services to aid U S WEST's marketing or sales efforts.

1.1.2 Expedite, Escalation and Disaster Procedures

1.1.2.1 Upon request by AT&T, the Parties shall develop mutually acceptable escalation and expedite procedures which may be invoked at any point in the Service Ordering, Provisioning, Maintenance and Subscriber Usage Data transfer processes to facilitate rapid and timely resolution of disputes. Within the said sixty (60) day period, U S WEST and AT&T will establish intercompany contact lists for purposes of handling subscriber and other matters which require attention/resolution outside of normal business procedures. To the extent possible, U S WEST shall notify AT&T of any changes to its escalation contact list at least one (1) week before such changes are effective.

1.1.2.2 Upon request by AT&T, the Parties shall jointly establish contingency and disaster recovery plans for those cases in which normal

Service Ordering, Provisioning, Maintenance, Billing and other procedures for U S WEST's unbundled Network Elements, features, functions and Retail Services are inoperable.

1.1.3 Operational and Technological Changes

1.1.3.1 U S WEST shall notify AT&T of any material operational or technological (e.g., network, systems interfaces) changes related to any services, interconnection methods, or Network Elements purchased by AT&T. At the time U S WEST decides to make such a change, U S WEST will notify AT&T in sufficient time to allow AT&T to make necessary adjustments to accommodate the change, but in no case with less than thirty (30) days' notice, unless otherwise agreed to by the Parties. Objections to the proposed change must be given in writing to U S WEST in a reasonable time. For the purposes of this Section, material changes shall be defined as those changes which will likely impact current interactions between AT&T (or its customers) and U S WEST.

1.1.3.2 U S WEST agrees to notify AT&T whenever an AT&T subscriber who is provided local service through services for resale, INP's, or unbundled Network Elements changes AT&T PIC status.

1.1.4 Customer of Record

1.1.4.1 Providing AT&T has obtained proper Customer Authorization, U S WEST shall recognize AT&T as the Customer of Record for all Network Elements or services for resale ordered by AT&T and shall send all notices, invoices, and information which pertain to such ordered services directly to AT&T. AT&T will provide U S WEST with addresses to which U S WEST shall send all such notices, invoices, and information.

1.1.5 Work Center Interface Procedures

1.1.5.1 Upon request by AT&T, the Parties shall develop and implement work center interface procedures for each functional business process necessary for fulfilling the terms of this Agreement.

1.2 Service Offerings

1.2.1 Changes in Retail Service Offerings

1.2.1.1 Pursuant to Section 23.2 of this Agreement, U S WEST shall provide summaries to AT&T describing the proposed change(s) of services which are available for resale pursuant to this Agreement.

1.2.1.2 [Intentionally left blank for numbering consistency.]

1.2.1.3 U S WEST shall provide AT&T with access to new services, features, and functions concurrent with U S WEST's notice to AT&T of such changes, so that AT&T may evaluate those services.

1.2.2 Essential Services

1.2.2.1 U S WEST shall designate trunks or lines as an Essential Service Line ("ESL") or Telecommunications Service Priority ("TSP"), whichever is applicable, upon AT&T's request, based on industry standards.

1.2.3 Blocking Services

1.2.3.1 Upon request from AT&T, U S WEST shall provide blocking in accordance with U S WEST standard intervals for 700, 900, and 976 services, or other services of similar type as may now exist or may be developed in the future according to industry standards, and shall provide Billed Number Screening ("BNS"), including required LIDB updates, or equivalent service for blocking completion of bill-to-third party and collect calls, on a line, trunk, or individual service basis.

1.2.4 Training Support

1.2.4.1 U S WEST will train its employees who may communicate with AT&T subscribers to treat AT&T in a nondiscriminatory manner. U S WEST will solicit and may take into account input from AT&T in the development of such training and will permit AT&T to review, but not approve, such training. Such training will comply with the branding requirements of this Agreement.

1.2.4.2 U S WEST or its agent shall train AT&T employees on U S WEST's systems and processes necessary to assure the accuracy of required information exchange between AT&T. Information materials provided to AT&T should include, at a minimum, operational and procedural information, and U S WEST-specific system access/interface instruction for performing similar functions.

1.2.5 Carrier Identification Codes

U S WEST shall provide to AT&T the access Carrier Identification Codes (CIC) for both Dial 1 and toll free (e.g., 800, 888) services for each of its access tandems pursuant to industry guidelines.

2. Pre-Ordering

2.1 General Business Requirements

2.1.1 Street Address Guide (SAG)

Upon request by AT&T, U S WEST shall provide to AT&T the SAG data, or its equivalent, in a mutually agreed to format. All changes to the SAG shall be provided to AT&T on a weekly basis.

2.1.2 CLASS and Custom Features

2.1.2.1 AT&T may order the entire set of CLASS and Custom features and functions, or a subset of any one or any combination of such features. In addition, U S WEST shall provide AT&T with a list of features and functions available on an end office by end office basis.

2.1.3 Customer Payment History

2.1.3.1 AT&T and U S WEST agree to make available to a mutually agreed upon third-party credit reporting agency, on a timely basis, such of the following Customer payment history information available for each person or entity that applies for local service or intraLATA toll Telecommunications Service(s) from either Party:

2.1.3.1.1 Applicant's name;
2.1.3.1.2 Applicant's address;
2.1.3.1.3 Applicant's previous phone number, if any;
2.1.3.1.4 Amount, if any, of unpaid balance in applicant's name;
2.1.3.1.5 Whether applicant is delinquent on payments;
2.1.3.1.6 Length of service with prior local or intraLATA toll provider;

2.1.3.1.7 Whether applicant had local or intraLATA toll service terminated or suspended within the last six (6) months with an explanation of the reason therefore; and,

2.1.3.1.8 Whether applicant was required by prior local or intraLATA toll provider to pay a deposit or provide another form of security including the amount of each.

2.1.3.2 Such information shall be provided on the condition that the credit reporting agency only make such information available to the carrier to which the person or entity in question has applied for Telecommunications Service.

2.1.4 Number Administration/Number Reservations

2.1.4.1 Until Number Administration functions are assumed by a neutral third party in accordance with FCC rules and regulations, U S WEST shall assign NXXs to AT&T on a non-discriminatory and equivalent basis following NANP guidelines. In addition, U S WEST shall provide testing and loading of AT&T's NXX on the same basis as U S WEST provides itself or its Affiliates. Further, in U S WEST's role as number administrator, it shall provide AT&T with access to abbreviated dialing codes, access arrangements for 555 line numbers, and the ability to obtain telephone numbers, including vanity numbers, while a customer is on the phone with AT&T. U S WEST shall provide the same range of number choices to AT&T, including choice of exchange number, as U S WEST provides its own customers. Reservation and aging of numbers shall remain U S WEST's responsibility.

2.1.4.2 AT&T may reserve blocks of U S WEST telephone numbers in accordance with U S WEST's tariffs, or in the same manner U S WEST reserves telephone numbers for its own use.

2.1.4.3 Where AT&T has obtained its own NXX, but has purchased U S WEST services for resale or Network Elements, U S WEST agrees to recognize the AT&T NXX in U S WEST's switch according to the local calling area defined by AT&T and approved by the Commission.

2.1.4.4 For resale and the unbundled switching element, U S WEST shall accept AT&T orders for vanity numbers and blocks of numbers for use with complex services including, but not limited to, DID, CENTREX, and hunting arrangements, as requested by AT&T on a non-discriminatory, equivalent basis following NANP guidelines.

2.1.4.5 For simple services, U S WEST shall provide real-time electronic interfaces to AT&T to obtain telephone number confirmation while the customer is on the line. When real time electronic interfaces are not available for simple services number reservations, U S WEST shall provide alternative means for confirmation of the number reservation while the customer is on the line. For number reservations associated with complex services, U S WEST shall provide confirmation of the number reservation within forty-eight (48) hours of AT&T's request or within such time as U S WEST may provide to itself or Affiliates, whichever is less.

2.1.4.6 Number Resources Arrangements

2.1.4.6.1 Nothing in this Agreement shall be construed in any manner to limit or otherwise adversely impact either Party's right to the request and assignment of any NANP number resources including, but not limited to, central office (NXX) codes pursuant to the Central Office Code Assignment Guidelines (last published by the Industry Numbering Committee ("INC") as INC 95-0407-008, Revision 4/19/96, formerly ICCF 93-0729-010).

2.1.4.6.2 To the extent U S WEST serves as Central Office Code Administrator for a given region, U S WEST will support all AT&T requests related to central office code (NXX) administration and assignments in the manner required and consistent with the Central Office Code Assignment Guidelines.

2.1.4.6.3 [Intentionally left blank for numbering consistency]

2.1.4.6.4 The Parties will comply with (NXX) administration requirements as prescribed by the FCC, the Commission, and accepted industry guidelines.

2.1.4.6.5 It shall be the responsibility of each Party to program and update its own switches and network systems pursuant to the Local Exchange Routing Guide ("LERG") guidelines to recognize and route traffic to the other Party's assigned NXX codes at all times. Neither Party shall impose any fees or charges whatsoever on the other Party for such activities. The Parties will cooperate to establish procedures to ensure the timely activation of NXX assignments in their respective networks.

2.1.4.6.6 Each Party shall be responsible for notifying its customers of any changes in numbering or dialing arrangements to include changes such as the introduction of new NPAs or new NXX codes.

2.1.4.6.7 Until an impartial entity is appointed to administer

telecommunications numbering, U S WEST will assign NXX codes to AT&T in accordance with national guidelines at no charge and on a nondiscriminatory basis.

2.1.4.6.8 Each Party is responsible for administering NXX codes assigned to it. Each Party is responsible for obtaining Local Exchange Routing Guide (LERG) listings of CLLI codes assigned to its switches. Each Party shall use the LERG published by Bellcore or its successor for obtaining routing information and shall provide all required information to Bellcore for maintaining the LERG in a timely manner.

2.1.4.7 U S WEST shall provide provisioning support outside of scheduled work hours at the same level that U S WEST provides itself and as requested by AT&T. Such support may be subject to a minimum labor charge.

2.1.4.8 Service Assurance Warranties and Incentives: U S WEST shall provide to AT&T service assurance warranties and incentives as U S WEST provides such service warranties and incentives to its own end users or any other Person or as otherwise provided by the Commission.

2.1.4.9 Availability of Network Capacity: Consistent with AT&T's forecasts, U S WEST shall deploy and keep deployed network facilities for AT&T services in a non-discriminatory manner and in the same manner as U S WEST makes such facilities available to itself for its services.

2.1.4.10 Workcenter Interface Methods and Procedures: U S WEST and AT&T shall finalize interface methods and procedures between their respective work centers detailing systems and processes for ordering and provisioning. Such methods and procedures shall be completed within one hundred twenty (120) days after a written request of either Party. The lack of workcenter interface methods and procedures shall not inhibit the provision of services under this Agreement.

2.2 Service Order Process Requirements

2.2.1 [Intentionally left blank for numbering consistency.]

2.2.2 Specific Unbundling Requirements

2.2.2.1 When ordering Network Elements, AT&T shall have the option of ordering all features, functions and capabilities of such Network Elements.

2.2.2.2 When AT&T orders Network Elements, U S WEST shall provision all features, functions, and capabilities appropriate to the Network Elements which may include, but are not limited to:

2.2.2.2.1 the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to U S WEST's Customers, such as telephone number, white page listing, and dial tone; and

2.2.2.2.2 all other features the switch has activated, including, but not limited to, custom calling, custom local area signaling service features and Centrex, as well as any technically feasible[1] customized routing functions provided by the switch.

2.3 Systems Interfaces and Information Exchanges

2.3.1 General Requirements

[Intentionally left blank for numbering consistency.]

2.3.2 Pre-Ordering and Provisioning for Resale Services and Unbundled Network Elements

2.3.2.1 U S WEST shall provide to AT&T a list of all intraLATA and interLATA carriers available for Customer selection on a central office level.

2.3.2.2 [Intentionally left blank for numbering consistency]

2.3.2.3 U S WEST shall provide AT&T with access to Customer Profile Information ("CPI") without requiring AT&T to produce a signed Letter of Authorization ("LOA") subject to proof of authorization requirements described elsewhere in this Agreement, based on AT&T's blanket representation that the Customer has authorized AT&T to obtain such CPI.

2.3.2.3.1 CPI shall be in the standard U S WEST format at the line and/or trunk level. U S WEST shall provide to AT&T a real-time electronic interface to U S WEST Customer information systems which will allow AT&T to obtain the Customer profile, which may include, but not be limited to, Customer name, service addresses, billed telephone number(s), and identification of features and services provided by U S WEST on the Customer accounts, and to obtain information on all features and services available in the end office where Customer's services are currently provisioned. The preceding information may not include services deemed not to be Telecommunications Services by the Commission.

2.3.2.3.1.1 Until access is available via a real-time electronic interface for CPI, U S WEST agrees that AT&T can obtain CPI in an interim mutually agreed to manner and in accordance with Section 3.2 of this Attachment to facilitate the service order process.

2.3.2.5 U S WEST shall provide to AT&T, via the ICON database or other mutually agreed upon means, a list of all current features and functions technically available from each switch by switch CLLI. Planned services

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[1] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "technically feasible"

shall be provided to AT&T through network disclosure process and/or Commission Notification as appropriate.

2.3.2.6 [Intentionally left blank for numerical consistency]

2.3.2.7 Pending or Held Orders: U S WEST shall provide, when available, the AT&T information regarding a subscriber's previous pending or held orders. If the subscriber has a pending or held order, the status of the order shall not be negatively impacted as a result of the subscriber changing local service providers (i.e. due date for pending service changed to later date).

2.3.2.8 Special Construction: When U S WEST determines that special construction is required, U S WEST shall notify AT&T on a timely basis of special construction requirements and changes, and obtain AT&T authorization before beginning such construction.

2.3.3 Pre-Ordering and Provisioning for Unbundling

2.3.3. U S WEST shall provide to AT&T, upon reasonable request, sufficient engineering design and layout information for Network Elements for specific applications.

2.3.3.2 U S WEST shall provide to AT&T, upon request, advance information of the details and requirements for planning and implementing NPA splits in accordance with NANP Guidelines.

2.3.3.3 U S WEST shall make engineering support available to AT&T as is normal and customary in the provision of Telecommunications Services, Network Elements, Combinations or Ancillary Functions as described in this Agreement. AT&T may request additional engineering support.

2.4 Pre-ordering Functions

For internal purposes, the term "Service Order" as used in this Attachment 5 will be internally referred to as a Local Service Request.

"Pre-Ordering" and "Ordering" encompasses the preliminary set of activities whereby a service representative dialogues with the customer in order to obtain the information required to write a service order and consists of the following functions: verify an address, check service availability, reserve a telephone number, check for appointment availability, reserve an appointment and return customer service information. These functions are described as follows:

2.4.1 Address Verification - Provides AT&T with the ability to query for and receive the customer service location, serving central office, and facility indicators. The facilities indicator will indicate the availability of facilities for one access line at the address, if the cable pair is available or working. If the cable pair is working, an indication of a pending disconnect order and the due date will be provided. This function does not reserve cable pairs.

2.4.2 Telephone Number Reservation - Provides AT&T with the capability to identify if one or more telephone numbers are available and reserve them if available. This

includes the ability to reserve one or more specific numbers (vanity numbers), a block of sequential or random block of numbers by serving central office and/or NXX. If a work order is not received within a negotiated amount of time, the reservation will automatically expire.

2.4.3 Appointment Availability and Reservation - Provides AT&T with the capability to determine the next available due date, the availability of a specific date, an indication if the date is available or a selection of the next available date any closed dates beyond that date, and reservation of an available appointment.

2.4.4 Service Availability - Allows AT&T to determine the availability of services and facilities to a specific end-users' location(s). This capability indicates is the service is available, that tariff rates apply, the amounts of any additional recurring and non-recurring costs, and the interval to be used when ordering the service.

2.4.5 Customer Service Information Request - Gives AT&T the ability to request a listing of existing services, features, directory listing and equipment for a customer account.

2.4.6 Circuit Identification Request - Provides AT&T with the capability to identify and obtain circuit identifications. If a work order for a Circuit Identification Request is not received within a negotiated amount of time, the request will automatically expire.

3. Ordering and Provisioning

3.1 General Business Requirements

3.1.1 Ordering and Provisioning Parity

U S WEST shall provide AT&T with the same level of ordering and provisioning support as U S WEST provides itself in accordance with standards and performance measurements that U S WEST uses and/or which are required by law, regulatory agency, or by U S WEST's own internal procedures, whichever are the most rigorous. These standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as U S WEST may deploy) that U S WEST provides to AT&T under this Agreement.

3.1.2 Interconnection Service Center (ISC)/Single Point of Contact (SPOC)

3.1.2.1 U S WEST shall provide a Systems Interface Help Desk or equivalent which shall serve for all activities involved in the electronic interface for ordering and provisioning of U S WEST's unbundled Network Elements, features, functions, and Resale Services. The Systems Interface Help Desk or equivalent shall be available twenty-four (24) hours a day, seven (7) days a week.

3.1.2.2 U S WEST shall provide a Single Point of Contact ("SPOC") and shall provide to AT&T toll-free nationwide telephone numbers (available during U S WEST's scheduled work hours) answered by competent, knowledgeable personnel, trained to answer questions and resolve problems in connection with the ordering and provisioning of unbundled Network Elements, features, functions, capabilities, and Resale Services.

U S WEST will provide sufficient resources to provide equivalent, or as otherwise agreed to by the Parties, service to AT&T.

3.1.2.3 In addition to the electronic interfaces provided for elsewhere in this Agreement, U S WEST shall provide, as requested by AT&T through the SPOC, provisioning and dispatch in the form of coordinated scheduling, status, and dispatch capabilities equivalent to that which U S WEST provides itself or as otherwise agreed to by the Parties.

3.1.3 Carrier Selection

3.1.3.1 For Services for Resale or unbundled Network Elements, U S WEST shall provide to AT&T, no later than January 1, 1997, the capability to order local service, intraLATA, and interLATA, toll services by entering AT&T subscriber's choice of carrier on a single order. U S WEST will offer other carrier selection choices as they become available. U S WEST shall provide AT&T with the capability to order separate interLATA and intraLATA carriers on a line or trunk basis where 1+ presubscription is available.

3.1.3.2 Where intraLATA 1+ presubscription is not available, or if the subscriber does not select an intraLATA toll carrier, U S WEST agrees to provide intraLATA toll services for resale to AT&T and to recognize the end user as the customer of AT&T for intraLATA toll. AT&T shall designate the default carrier for all other toll calls if the subscriber does not select a carrier. In all cases, U S WEST will route toll calls to the appropriate carrier as designated by AT&T.

3.1.4 Notification to Long Distance Carrier

3.1.4.1 U S WEST will not accept PIC change requests through the CARE process for AT&T local service customers. AT&T's long distance operations may obtain such CARE transactions for AT&T long distance customers from the customer's local service provider. U S WEST agrees to notify IXCs using OBF approved CARE transactions, whenever an IXC Customer who is provided local service through Services for Resale, INP/NP, or unbundled Network Elements changes PIC status.

3.1.4.2 U S WEST shall implement new Transaction Code Status Indicators ("TCSIs") 2033, 2233, 3147, and 3148. The new local service provider identification ("LSPID") will be included on these transactions if the new local resale provider agrees U S WEST should provide the information to a long distance provider as defined by the OBF in support of Local Resale. U S WEST shall implement TCSIs used in conjunction with the new local service provider ("LSP") identification code for handling account maintenance, customer service, and trouble administration issues. These TCSIs include 4001/02/05, 4201-4205, 4301, 2033, 2233, 3147, 3148, 3149, and others as the OBF may define.

3.1.4.2.1 In addition, U S WEST shall implement TCSIs, when available, used in conjunction with the new Ported Telephone Number field to link "shadow" and ported telephone numbers in support of Interim Number Portability. These TCSIs include 2231, 3150, 3151, and others as the OBF may define.

3.1.5 Ordering Interconnection

The Parties agree to utilize the OBF-ASR process for ordering interconnection trunks, which is the same process used to order Access Services. When the ordering Party requests facilities, routing, or optional features different than those determined to be available, the Parties will work cooperatively in determining an acceptable configuration based on available facilities, equipment and routing plans.

3.2 Service Order Process Requirements

3.2.1 OBF Compliance

3.2.1.1 U S WEST and AT&T shall generally follow the OBF-developed ordering and provisioning process guidelines. These processes include, but are not limited to, pre-order service inquiry, pre-order service inquiry response, firm order, acknowledgment/ rejection, firm order confirmation, delay notification, and completion notification. U S WEST agrees to work cooperatively to generally comply with future OBF developed guidelines.

3.2.2 Service Migrations and New Customer Additions

3.2.2.1 For Resale Services, U S WEST shall not require a disconnect order from a Customer, another local service provider, or any other entity, to process an AT&T order to establish AT&T Local Service and/or migrate a Customer to AT&T Local Service.

3.2.2.2 For Resale Services, U S WEST shall not disconnect any Customer service or existing features available under this Agreement at any time during the migration of that Customer to AT&T service without AT&T prior agreement.

3.2.2.3 For services provided through unbundled Network Elements, U S WEST shall recognize AT&T as an agent for the Customer in coordinating the disconnection of services provided by another CLEC or U S WEST.

3.2.2.4 Unless otherwise directed by AT&T, when AT&T orders Resale Services or Network Elements, All trunk or telephone numbers currently associated with existing services shall be retained without loss of feature capability and without loss of associated ancillary services including, but not limited to, Directory Assistance and 911/E911 capability for those services or features which U S WEST controls and which are available under this Agreement.

3.2.2.5 For Customer conversions requiring coordinated cut over activities, U S WEST and AT&T will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. Unless expedited, U S WEST and AT&T shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for AT&T the duration of any service interruption that the cut-over might cause. The cut-over time will be defined as a thirty (30) minute window within which both the AT&T

and U S WEST personnel will make telephone contact to complete the cut-over.

3.2.2.5.1 U S WEST will coordinate activities of all U S WEST work groups involved with the conversion. This coordination will include, but not be limited to, work centers charged with manual cross-connects, electronic cross-connect mapping, and switch translations (including, but not limited to, implementation of Interim Number Portability translations).

3.2.2.5.2 As soon as possible, but in no event later than one (1) hour after completion, U S WEST will notify AT&T when coordinated cut-over is complete.

3.2.2.5.3 End user service interruption shall not exceed twenty (20) minutes during any cut-over. The average interruption caused by the cut-over of AT&T Customers shall not exceed ten (10) minutes. However, if any service interruption is to exceed twenty (20) minutes, U S WEST will immediately notify AT&T of such delay

3.2.2.5.4 Within the appointed thirty (30) minute cut-over time, the U S WEST personnel will call the AT&T personnel designated to perform cross-connection work and when the U S WEST personnel is reached in that interval such work will be promptly performed. If the AT&T personnel is not ready within the appointed interval, and if AT&T had not called to reschedule the work at least two (2) hours prior to the start of the interval, U S WEST and AT&T will reschedule the work order and AT&T will pay the non-recurring installation charge for the unbundled loops scheduled for the missed appointment. In addition, non-recurring installation charges for the rescheduled appointment will apply. If the U S WEST personnel is not available or not ready at any time during the thirty (30) minute interval, AT&T and U S WEST will reschedule and U S WEST will waive the non-recurring charge for the unbundled loops scheduled for that interval. If unusual or unexpected circumstances prolong or extend the time required to accomplish the coordinated cut-over, the Party responsible for such circumstances is responsible for the reasonable labor charges of the other Party. Delays caused by the customer are the responsibility of AT&T. In addition, if AT&T has ordered INP as a part of the unbundled loop installation, U S WEST will coordinate implementation of INP with the unbundled loop installation.

Issue 5-1 Parked

[U S WEST proposes the following]

3.2.2.6 Service Order: U S WEST shall provide AT&T the capability to issue a service order for unbundled Network Elements, [combinations] consistent with Attachment 3, Section 19 and Resale Services.

3.2.2.7 U S WEST shall provide AT&T the capability to transfer a customer with no feature changes to AT&T through a streamlined process.

3.2.2.8 Status: U S WEST shall provide the AT&T status on a service order when the status of the order changes.

3.2.2.9 Modifies: U S WEST shall provide AT&T the capability to modify the service order any time after it has been issued, however, U S WEST may require the issuance of a supplemental or change order.

3.2.2.10 Cancel: U S WEST shall provide AT&T the capability to cancel the service order any time after it has been issued.

3.2.2.11 Coordinated Service Request: U S WEST shall provide AT&T the capability to relate coordinated services requests, and identify those service requests that require coordination with AT&T, or subscriber, or subscriber's vendor. When so identified, U S WEST will follow any specific instructions indicated on the service request so that the subscriber's service is not negatively affected by the service turn-up activity.

3.2.2.12 Expedite Process: U S WEST and AT&T shall mutually develop expedite procedures to be followed when AT&T determines an expedite is required to meet subscriber service needs.

3.2.2.13 Expedites: U S WEST shall provide AT&T the capability to expedite a service request. Within two (2) business hours after a request from AT&T for an expedited request, U S WEST shall notify AT&T of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

3.2.3 Intercept Treatment and Transfer of Service Announcements

3.2.3.1 U S WEST shall provide unbranded intercept treatment and transfer of service announcements to AT&T Customers. U S WEST shall provide such treatment and transfer of service announcement for all service disconnects, suspensions, or transfers, in the same manner as that which U S WEST provides its own end users. U S WEST's current standard time periods for providing such announcements is three (3) months for residential service and twelve (12) months for business service. AT&T may request extensions at parity with that which U S WEST provides its end-users.

3.2.3.2 Pursuant to this Agreement, AT&T shall provide unbranded intercept treatment and transfer of service announcements to U S WEST Customers. AT&T shall provide such treatment and transfer of service announcement for all service disconnects, suspensions, or transfers, at parity with what AT&T provides its own end users. AT&T standard time periods for providing such announcements is three (3) months for residential service and twelve (12) months for business service. U S WEST may request extensions at parity with that which AT&T provides its end-users.

3.2.4 Due Date

3.2.4.1 U S WEST and AT&T shall mutually agree on what services and circumstances are subject to the standard interval process to determine the due date or the requested/committed due date process.

3.2.4.2 For those services and circumstances that U S WEST and AT&T agree shall be handled by the standard interval process, U S WEST shall supply AT&T with standard due date intervals on a nondiscriminatory basis to be used by AT&T personnel to determine service installation dates. Under those circumstances U S WEST shall complete the provisioning within the standard interval.

3.2.4.2.1 If AT&T requests a due date earlier than the standard due date interval, then expedite charges may apply.

3.2.4.3 For those services and circumstances that U S WEST and AT&T agree shall be handled by the requested/committed due date process, AT&T may request a due date on each service request. U S WEST will provide an offered due date on a nondiscriminatory basis. If AT&T accepts the offered due date then such date shall become the committed due date. U S WEST will complete the order on the committed due date unless otherwise authorized by AT&T.

3.2.4.3.1 If AT&T requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the AT&T required due date then that required due date becomes the committed due date and expedite charges may apply.

3.2.4.4 Subsequent to an initial order submission, AT&T may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.

3.2.4.5 Any special or preferred scheduling options available, internally or externally, to U S WEST for ordering and provisioning services shall also be available to AT&T.

3.2.5 Customer Premises Inspections and Installations

3.2.5.1 AT&T shall perform or contract for all needs assessments, including equipment and installation requirements, at the Customer premises.

3.2.5.2 U S WEST shall provide AT&T with the ability to schedule dispatches for work under this Agreement.

3.2.5.3 U S WEST shall provide, at AT&T's request, extended demarcation beyond the NID using intrabuilding riser and lateral beyond the NID. This provision shall not require U S WEST to provide inside wire.

3.2.6 Firm Order Confirmation (FOC)

Issue 5-2 Parked

[U S WEST proposes the following]

3.2.6.1 U S WEST shall provide to AT&T, via an electronic interface, a Firm Order Confirmation ("FOC") for each AT&T order. The FOC shall contain on a per line and/or trunk basis an enumeration of AT&T ordered unbundled Network Elements (and the specific U S WEST naming convention applied to those Network Elements), features, functions, Resale Services, options, physical interconnection, quantity, and U S WEST committed due date for order completion.

[AT&T proposes the following]

3.2.6.1 U S WEST shall provide to AT&T, via an electronic interface, a Firm Order Confirmation ("FOC") for each AT&T order. The FOC shall contain on a per line and/or trunk basis an enumeration of AT&T ordered unbundled Network Elements (and the specific U S WEST naming convention applied to those Network Elements or Combinations), features, functions, Resale Services, options, physical interconnection, quantity, and U S WEST committed due date for order completion.

3.2.6.2 For a revised FOC, U S WEST shall provide order detail on a per line or per trunk level as well as the order detail from the prior FOC.

3.2.7 Order Rejections

3.2.7.1 U S WEST shall reject and return to AT&T any order that U S WEST cannot provision, due to technical reasons, missing information, or jeopardy conditions in accordance with performance measurements as defined herein. When an order is rejected, U S WEST shall, in its rejection notification, specifically describe all of the reasons for which the order was rejected. U S WEST shall not reject any orders on account of the requested due date.

3.2.7.2 On an exception basis, to the extent that errors cannot be corrected pursuant to electronic interface processes, U S WEST agrees to accept verbal order corrections from AT&T. U S WEST shall timely inform AT&T by telephone of any minor issues which can be handled over the phone. As required AT&T will provide a supplemental service request reflecting changes to the original service request.

3.2.8 Service Order Changes

3.2.8.1 If an installation or other AT&T-ordered work request requires a change from the original AT&T service request in any manner, U S WEST shall call AT&T in advance of performing the installation or other work to obtain authorization. U S WEST shall then provide AT&T an estimate of additional labor hours and/or materials. After all installation or other work is completed, U S WEST shall notify AT&T of actual labor hours and/or materials used in accordance with regular service order completion

schedules.

3.2.8.1.1 If additional work is completed on a service order, as approved by AT&T, the cost of the additional work must be reported to AT&T in accordance with regular service order completion schedules.

3.2.8.1.2 If a service order is partially completed, notification must identify the work that was done and the work remaining to be completed.

3.2.8.2 If an AT&T Customer requests a service change at the time of installation or other work being performed by U S WEST on behalf of AT&T, U S WEST, while at the Customer premises, shall direct the AT&T Customer to contact AT&T so as to avoid unnecessary delays in service activation should the U S WEST representative leave Customer premises prior to completing the installation.

3.2.9 Jeopardy Situations

To the extent jeopardy information is available, U S WEST shall provide to AT&T notification of any jeopardy situations prior to the committed due date, missed appointments and any other delay or problem in completing work specified on AT&T service order as detailed on the FOC, in accordance with the Performance Measurements as defined herein.

3.2.10 Cooperative Testing

3.2.10.1 Network Testing

3.2.10.1.1 To the extent that U S WEST provides testing for services offered to its end users and to the extent U S WEST provides testing for itself, U S WEST shall perform all pre-service testing prior to the completion of the AT&T order, including testing on local service facilities and switch translations, including, but not limited to, verification of features, functions, and services ordered by AT&T.

3.2.10.1.2 The Parties agree to cooperate in testing that is required to complete service orders.

3.2.10.2 Systems and Process Testing

3.2.10.2.1 Upon AT&T's request, U S WEST shall cooperate with AT&T to ensure that all operational interfaces and processes are in place and functioning properly and efficiently. Testing shall simulate actual operational procedures and systems interfaces to the greatest extent possible. AT&T may request cooperative testing to ensure service performance, reliability, and Customer service ability.

3.2.11 Service Suspensions/Restorations

3.2.11.1 For services other than non-switched, upon AT&T's request through

a Suspend/Restore Request, U S WEST shall suspend or restore the functionality of any Network Element, feature, function, or Resale Service. U S WEST shall provide restoration priority on a per Network Element basis in a manner that conforms with AT&T requested priorities and any applicable regulatory rules and regulations or government requirements.

3.2.12 Disconnects

3.2.12.1 U S WEST shall provide to AT&T daily information, in a mutually agreed upon format, notifying AT&T of any services disconnected from AT&T. This report will itemize a change in local service provider or outward line movement on service order activity.

3.2.13 Order Completion Notification

3.2.13.1 Upon completion of a service order by U S WEST in its system(s), U S WEST shall submit to AT&T an order completion which details the work performed (including a list of features and functions installed), the date completed, charges associated with the order, and verification of accurate service completion. Notification shall be provided in accordance with mutually agreed upon intervals.

3.2.14 [Intentionally left blank for numbering consistency]

3.2.15 Specific Unbundling Requirements

Issue 5-3 Parked

[AT&T proposes the following]

3.2.15.1 AT&T may order and U S WEST shall provision unbundled Network Elements either individually or in any combination on a single order. Network Elements ordered as combined shall be provisioned as combined.[2]

[U S WEST proposes the following]

3.2.15.1 AT&T may order Elements in a manner that permits AT&T to combine individual elements themselves subject to AT&T unbundling provisions of Attachment 3, Section 19.

3.2.15.2 Prior to providing service in a specific geographic area or when AT&T requires a change of network configuration, AT&T may elect to place an order with U S WEST requiring U S WEST to prepare Network Elements and switch translations in advance of orders for additional Network Elements from AT&T.

Issue 5-4 Parked

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2 Per First Order at page 12, Paragraph 63.

[U S WEST proposes deleting the following two provisions]

3.2.15.3 When AT&T orders combinations of currently connected Network Elements, U S WEST shall ensure that such Network Elements remain connected and functional without any disconnection or disruption.

3.2.15.4 Order combinations of contiguous Network Elements shall be available to be ordered (a) on a case-by-case basis for those Network Elements that are Customer-specific; or (b) on a common-use (non-end user specific) basis for those Network Elements that are shared by multiple Customers.

3.2.15.5 Individual Network Elements shall be identified and ordered by AT&T so that they can be provisioned together in accordance with the rebundling provisions of Attachment 3, Section 19.

3.2.15.6 U S WEST shall provide technical assistance to AT&T with respect to unbundled Network Elements pursuant to Section 2.3.3.3 of this Attachment.

3.2.15.7 Each order for Network Elements will contain administrative, bill, contact, and Customer information, as defined by the OBF.

3.2.15.8 When ordering unbundled switch ports, AT&T is required to specify the desired signaling (e.g. loop start, ground start or loop reverse battery) options.

3.2.15.8.1 To the extent AT&T requires an Unbundled Loop to provide ISDN, HDSL, ADSL, DS1 service or other channel performance options, such requirements will be identified on the order for unbundled loop service.

3.2.15.8.2 The actual loop facilities provided may utilize various technologies or combinations of technologies. Unless otherwise specified, loops provide an analog facility to AT&T.

3.2.16 Interim Interfaces

3.2.16.1 U S WEST will offer interim interfaces via Interconnect Mediated Access as documented in Document Number T-12.99-115472-00-32, current as of the Effective Date of this Agreement, or as mutually agreed to by the Parties.

3.2.16.2 Until the electronic interface described in Section 3.2.16.1 is available for the required services, U S WEST agrees that the Interconnect Service Center (ISC) or similar function will accept AT&T orders. Orders will be transmitted to the ISC via mutually agreed procedures.

3.2.16.3 Until industry standards are completed and implemented pursuant to Section 3.3.2 of this Attachment, U S WEST and AT&T agree to use

interim interfaces as described in Section 3.2.16.1 above.

3.2.17 Ordering and Maintenance

Issue 5-5 Parked

[U S WEST proposes the following]]

3.2.17.1 For the purpose of ordering unbundled Network Elements[3] [or Combinations] as provided in Attachment 3, Section 12, AT&T shall provide a blanket letter of authorization to U S WEST indicating that it shall be duly authorized by its customer to process such service orders.

Issue 5-6 Parked

[U S WEST proposes the following]]

3.2.17.2 If there is a conflict between an end user (and/or its respective agent) and AT&T regarding the disconnection or provision of unbundled Network Elements [or combinations] pursuant to the rebundling provisions of Attachment 3, Section 12, U S WEST will honor the latest dated proof of authorization designating an agent by the end user or its respective agent. Compensation for unauthorized disconnections or transfers shall be in accordance with § 258 of the Act or by Commission rule.

3.2.17.3 AT&T has primary responsibility for its own end user base and will have the responsibility for resolution of any service trouble report(s) from its customers. U S WEST will work cooperatively with AT&T to resolve trouble reports when the trouble condition has been isolated and found to be within a portion of U S WEST's network. Where available, AT&T must provide to U S WEST switch based test results when testing its customer's trouble prior to U S WEST performing any repair functions. The Parties will cooperate in developing mutually acceptable test reports.

Issue 5-7 Parked

[U S WEST proposes the following]

3.2.17.4 In the event of a transfer of the end user's service for unbundled Network Elements from one provider to AT&T, AT&T shall issue a request for transfer of service to U S WEST and the provider from whom the service is being transferred. In the event of a transfer of the end user's service for unbundled Network Elements from AT&T to another provider, AT&T shall submit to U S WEST a disconnect order for such unbundled Network Elements [or Combinations] to facilitate the cessation of billing by U S WEST. The Parties agree to develop procedures to handle the transfer of an end user service from one provider to another.

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[3] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "or combinations"

3.2.17.5 [Intentionally left blank for numbering consistency.]

3.2.17.6 When ordering Unbundled Loops, AT&T is responsible for obtaining or providing facilities and equipment that are compatible with the loop.

3.2.17.7 To the extent a U S WEST provided unbundled loop is provisioned without U S WEST provided unbundled switching, AT&T will have responsibility for testing the unbundled loop. If, at AT&T's request, U S WEST must dispatch to perform tests on an Unbundled Loop, and the fault is not in U S WEST facilities, a charge may apply.

3.2.17.8 To the extent a U S WEST provided unbundled loop is provisioned without unbundled U S WEST provided unbundled switching, AT&T will be responsible for providing the AT&T switch interface, if applicable, on the U S WEST MDF interface to facilitate plant test.

3.3 Systems Interfaces and Information Exchanges

3.3.1 Operational Systems Interfaces - Interface Implementation Timetable

3.3.1.1 U S WEST's initial operational systems interfaces deployment in January 1997 will support Pre-ordering, Ordering, Provisioning and Repair capabilities for POTS (non-design) services and billing capabilities for most U S WEST product offerings. Subsequent phases of the plan incorporate the capabilities to support designed services for Pre-ordering, Ordering, Provisioning, and Maintenance and Repair. Time frames for delivery of the operational support systems for designed services are estimated to be in November 1997.

3.3.1.2 U S WEST will develop long term mediated access.

3.3.2 Permanent Access to Systems Interfaces

3.3.2.1 U S WEST shall provide to AT&T a real-time electronic interface(s) for transferring and receiving information and executing Service Pre-Ordering, Ordering, Provisioning, Maintenance and Repair transactions for unbundled Network Elements and Resale Services, and any other database access required by FCC rules and regulations. In addition U S WEST shall also provide the electronic interfaces specified in this Agreement which support business processes or database access. The interface(s) shall be capable of supporting all of the steps in the OBF developed ordering and provisioning process. These steps include pre-order service inquiry, pre-order service inquiry response, firm order acknowledgment/rejection, firm order confirmation, and completion notification.

3.3.2.1.1 The Parties will jointly review each OBF standard upon completion. The review shall be completed within thirty (30) days, unless otherwise agreed to by the Parties. The review shall result in a mutual agreement on whether the new standard will be deployed. Within thirty (30) days of agreement to deploy the new standard, the Parties shall agree on a schedule for such deployment.

3.3.2.2 U S WEST shall provide AT&T a common electronic interface that will permit the transmittal of business and residential transactions.

3.3.3 Ordering and Provisioning for Resale Services

U S WEST shall provide a real time electronic interface with at least the following specifications:

3.3.3.1 U S WEST shall provide to AT&T an electronic interface to U S WEST information systems to allow AT&T to assign telephone number(s) (if the Customer does not already have a telephone number or requests a change of telephone number).

3.3.3.2 For Resale Services not subject to standard intervals, U S WEST shall provide to AT&T a real-time, electronic interface to schedule dispatch and installation appointments.

3.3.3.3 U S WEST shall inform AT&T whether a service call is required and shall provide AT&T the ability to schedule a service call.

3.3.3.4 [Intentionally left blank for numbering consistency.]

3.3.3.5 U S WEST shall provide to AT&T a real-time, electronic interface which transmits status information on service orders.

3.3.4 Ordering and Provisioning for Unbundling

3.3.4.1 For unbundled Network Elements not subject to standard intervals, U S WEST shall provide to AT&T, when available, a real-time, electronic interface which will allow AT&T to schedule appointments, and adjust pending order due dates in real-time.

3.3.4.2 U S WEST shall provide AT&T with results from mechanized loop tests.

3.3.4.3 U S WEST shall provide AT&T with confirmation of circuit assignments.

3.4 Standards

3.4.1 General Requirements

Issue 5-8 Parked - Combinations
[U S WEST proposes the following]

3.4.1.1 [The appropriate ordering] and provisioning codes will be used to ordering each Network Elements [or Combinations thereof]. These codes shall apply to all aspects of the unbundling of the [at] Network Elements [or Combination of Network Elements] and shall be known as data elements as defined by the Telecommunications Industry Forum Electronic Data Interchange Service Order Subcommittee (TCIF-EDI-SOSC), or as mutually agreed.

4. Connectivity Billing and Recording

This Section 4 describes the requirements for U S WEST to bill and record all charges AT&T incurs for purchasing services under this Agreement.

4.1 Procedures

4.1.1 The Parties recognize that deviations and discrepancies may occur from the various industry standards and other standards referenced in this Agreement. Subject to such discrepancies and deviations, U S WEST shall comply with these various standards. Discrepancies and deviations will be documented and reviewed.

4.1.1.1 Upon request by AT&T, the Parties will develop processes by which U S WEST will inform AT&T of deviations from standards for billing. The Parties agree that they will negotiate discrepancies and deviations in good faith. Further, the Parties agree that those documented deviations from such standards documented by U S WEST to AT&T shall supersede sections of technical standards applicable to such deviations referenced in this Agreement.

4.1.2 U S WEST shall record and bill in accordance with this Agreement those charges AT&T incurs as a result of AT&T purchasing from U S WEST services, as set forth in this Agreement (hereinafter "Connectivity Charges").

4.1.3 U S WEST shall format each bill for Connectivity Charges (hereinafter "Connectivity Bill") in accordance with the EDI, CABS or SECAB standard as appropriate to the services billed.

4.1.4 Each service purchased by AT&T shall be assigned a separate and unique billing code or identifier in the form agreed to by the Parties and such code or identifier shall be provided to AT&T on each Connectivity Bill in which charges for such services appear. Each such billing code or identifier shall enable AT&T to identify the service as purchased by AT&T.

4.1.5 Each Connectivity Bill shall set forth the quantity and description of each such service provided and billed to AT&T. All Connectivity Charges billed to AT&T shall indicate the state from which such charges were incurred.

4.1.6 U S WEST shall bill AT&T for each service supplied by U S WEST to AT&T pursuant to this Agreement at the rates set forth in Attachment 1 to this Agreement.

4.1.7 U S WEST shall bill AT&T for the Connectivity Charges incurred, provided, however, that, for those usage based Connectivity Charges where actual charge information is not determinable by U S WEST because the jurisdiction (i.e., interstate, interstate/interLATA, intrastate, intrastate/ intraLATA, local) of the traffic is unidentifiable, or for any other reason, the Parties shall jointly develop a process to determine the appropriate charges.

4.1.8 Measurement of usage-based Connectivity Charges shall be in actual conversation seconds. For local interconnection traffic provided under Attachments 3 and 4 of this Agreement, the total conversation time per

chargeable traffic types shall be totaled for the entire monthly bill cycle, rounded to the next whole minute and then billed at the contract rate. For Resale Services provided under Attachment 2 of this Agreement the total conversation time shall be measured in accordance with U S WEST's retail tariff and billed at the contract rate.

4.1.9 U S WEST shall provide to AT&T at no additional charge a Single Point of Contact for handling any Connectivity Billing questions or problems that may arise during the implementation and performance of the terms and conditions of this Agreement.

4.1.10 U S WEST shall provide Single Point of Contact for handling of any data exchange questions or problems that may arise during the implementation and performance of the terms and conditions of this Agreement.

4.1.11 Upon request by either Party, each Party shall provide the other Party written notice of which form of the monthly Connectivity Bill is to be deemed the official bill to assist the Parties in resolving any conflicts that may arise between the official bill and another form of bill received via a different media which purportedly contains the same charges as are on the official bill.

4.1.12 If either Party requests an additional copy(ies) of a bill, such Party shall pay the other Party a reasonable fee per additional bill copy, unless such copy was requested due to errors, omissions, or corrections or the failure of the transmission to comply with the specifications set forth in this Agreement.

4.1.13 When sending Connectivity Bills via electronic transmission, to avoid transmission failures or the receipt of Connectivity Billing information that cannot be processed, AT&T shall provide U S WEST process specifications. U S WEST shall comply with mutually agreed upon processing specifications when U S WEST transmits Connectivity Billing data to AT&T. AT&T shall provide to U S WEST notice if a Connectivity Billing transmission is not received that does not meet mutually agreed upon AT&T specifications. Faulty or failed transmissions shall be corrected and resubmitted to AT&T, at U S WEST's sole expense.

4.1.14 U S WEST shall deliver to a location specified by AT&T, billing information via Connect Direct, magnetic tape or paper, as agreed to by AT&T and U S WEST. In the event of an emergency, system failure or other such condition which prevents U S WEST from transmitting via Connect Direct, U S WEST shall notify AT&T of such difficulties within two (2) hours of detection. U S WEST shall deliver to a location specified by AT&T billing information via magnetic tape or paper, as agreed to by AT&T and U S WEST. The Parties acknowledge that all tapes transmitted to the other Party via U.S. Mail or overnight delivery service and which contain Connectivity Billing data shall not be returned to the sending party.

4.1.15 [Intentionally left blank for numbering consistency.]

4.1.16 Billed amounts which are being reasonably disputed or reasonably queried, or for which reasonable claims have been filed are not due for payment until such disputes, claims or queries have been fully resolved by both AT&T and U S WEST.

4.1.17 [Intentionally left blank for numbering consistency]

4.1.18 Bill Reconciliation

4.1.18.1 Each Party agrees to notify the other Party upon the discovery of a billing discrepancy ("Notice of Discrepancy").

4.1.18.2 In the event of such Notice of Discrepancy, the Parties shall endeavor to resolve the discrepancy within sixty (60) calendar days after the Notice of Discrepancy is issued using normal business procedures. If the discrepancy is disputed, resolution of such dispute is expected to occur at the first level of management resulting in a recommendation for settlement of the dispute and closure of a specific billing period.

4.1.18.3 Closure of a specific billing period shall occur by joint agreement of the Parties whereby the Parties agree that such billing period is closed to any further analysis and financial transactions, except those resulting from an Audit. Closure shall take place within nine (9) months of the Bill Date. The month being closed represents those Connectivity Charges that were billed or should have been billed by the applicable bill date.

4.1.18.4 If the dispute is not resolved within the allotted time frame, the following resolution procedure shall begin:

4.1.18.4.1 If the dispute is not resolved within sixty (60) days of the Notice of Discrepancy, the dispute shall be escalated to the second level of management for resolution.

4.1.18.4.2 If the dispute is not resolved within ninety (90) days of Notice of Discrepancy, the dispute shall be escalated to the third level of management for resolution.

4.1.18.4.3 If the dispute is not resolved within one hundred and twenty (120) days of the Notice of Discrepancy, upon the written request of either Party within such one hundred and twenty (120) day period, the dispute may be resolved pursuant to the dispute resolution provision set forth in Part A of this Agreement.

4.1.19 U S WEST shall reimburse AT&T for incorrect Connectivity Billing charges, including, without limitation: overcharges, services ordered or requested but not delivered, interrupted services, services of poor quality and installation problems, if such problems are caused by U S WEST. Such reimbursements shall be set forth in the appropriate section of the Connectivity Bill pursuant to appropriate standards.

4.1.20 The Parties agree to record call information in accordance with this Section 4.1. To the extent technically feasible, each Party shall record all call detail information associated with every call that one Party bills to the other Party. AT&T may request, through the BFR process the recording of call records and/or call detail information that is not currently recorded by U S WEST. These records shall be provided and retained pursuant to Section 5 of this Attachment.

4.1.21 When AT&T collocates with U S WEST in U S WEST's facility as described in this Agreement, capital expenditures (e.g., costs associated with building the

"cage"), shall not be included in the Connectivity Bill provided to AT&T pursuant to this Attachment 5. All such capital expenses shall be given a unique BAN and invoice number. All invoices for capital expenses shall be sent to the location specified by AT&T for payment. All other non-capital recurring collocation expenses shall be billed to AT&T in accordance with this Agreement. (The CABS/SECABS Billing Output Specifications (BOS) documents provide the guidelines on how to bill the Connectivity Charges associated with collocation.)

4.1.22 Local Number Portability

4.1.22.1 In accordance with the terms and conditions set forth in this Agreement, U S WEST shall record and provide to AT&T all detail information associated with an alternately billed call to an AT&T local exchange customer whose telephone number has been ported from U S WEST under INP as further described in this Agreement.

4.1.23 Meet Point Billing

4.1.23.1 AT&T and U S WEST will establish meet-point billing ("MPB") arrangements in accordance with the Meet Point Billing guidelines adopted by and contained in the OBF's MECAB and MECOD documents, except as otherwise mutually agreed to by the Parties. Both Parties will use their best reasonable efforts, individually and collectively, to maintain provisions in their respective federal and state access tariffs, and/or provisions within the National Exchange Carrier Association (NECA) Tariff No. 4, or any successor tariff to reflect the MPB arrangements identified in this Agreement, in MECAB and in MECOD.

4.1.23.2 The Parties will agree on a meet point percentage to enable the joint provisioning and billing of Switched Access Services to third parties in conformance with the Meet Point Billing guidelines adopted by and contained in the OBF's MECAB and MECOD documents and referenced in U S WEST's Switched Access Tariffs. The Parties understand and agree that MPB arrangements are available and functional only to/from IXCs who directly connect with the tandem(s) that AT&T sub-tends in each LATA.

4.1.23.3 The Parties will use reasonable efforts, individually and collectively, to maintain provisions in their respective federal and state access tariffs, and/or provisions within the National Exchange Carrier Association (NECA) Tariff No. 4, or any successor tariff, sufficient to reflect this MPB arrangement, including MPB percentages.

4.1.23.4 AT&T and U S WEST will implement the "Multiple Bill/Single Tariff" option in order to bill any interexchange carrier (IXC) for that portion of the network elements provided by AT&T and U S WEST. For all traffic carried over the MPB arrangement, AT&T and U S WEST shall bill IXCs all applicable elements at the rates specified in their respective tariffs.

4.1.23.5 U S WEST shall provide to AT&T the billing name, billing address, and carrier identification code (CIC) of the IXCs that may utilize any portion of AT&T network in an AT&T/U S WEST MPB arrangement in order to comply with the MPB notification process as outlined in the MECAB document. Such information shall be provided to AT&T in the format and via the medium that the Parties agree. If U S WEST does not have a CIC

for any IXC that will utilize a portion of AT&T network in an AT&T/U S WEST MPB arrangement, and for whom U S WEST must supply to AT&T MPB billing information, then until such carrier has obtained a CIC, U S WEST will submit the LEC's CIC on those MPB records provided to AT&T for MPB. U S WEST understands and agrees that it will be solely responsible for obtaining any reimbursements from such carriers who have utilized the jointly provided networks of U S WEST and AT&T.

4.1.23.6 U S WEST and AT&T agree that in an MPB arrangement where one Party provides local transport and the other Party provides the end office switching, the party who provides the end office switching is entitled to bill any residual interconnection charges (RIC) and common carrier line (CCL) charges associated with the traffic. The Parties further agree that in those MPB situations where one Party sub-tends the other Party's access tandem, the Party providing the access tandem in only entitled to bill the access tandem fee and any associated local transport charges. The Parties also agree that the Party who provides the end office switching is entitled to bill end office switching fees, local transport charges, RIC and CCL charges, as appropriate, and such other applicable charges.

4.1.23.7 U S WEST and AT&T will record and transmit MPB information in accordance with the standards and in the format set forth in this Attachment. U S WEST and AT&T will coordinate and exchange the billing account reference ("BAR") and billing account cross reference (BACR) numbers for the MPB arrangements described in this Agreement. Each Party will notify the other if the level of billing or other BAR/BACR elements change, resulting in a new BAR/BACR number.

4.1.23.8 If MPB data is not processed and delivered by either U S WEST or AT&T and sent to the other Party within ten (10) calendar days of the relevant recording period and in turn such Party is unable to bill the IXC for the appropriate charges, the Party who failed to deliver the data will be held liable for the amount of the unbillable charges.

4.1.23.9 If MPB data is not submitted within ten (10) calendar days of the relevant recording period or is not in the proper format as set forth in this Agreement, and, if, as a result, the other Party is delayed in billing the IXC for the appropriate charges it incurs, the delaying Party shall pay the other Party a late MPB data delivery charge which will be the total amount of the delayed charges times a monthly rate that shall not exceed 1.5% which may be levied by law for commercial transactions, compounded daily for the number of days from the date the MPB charges should have been received to and including the date the MPB charge information is actually received.

4.1.23.10 Errors in MPB data exchange by the Parties may be discovered by AT&T, U S WEST or the billable IXC. Both AT&T and U S WEST agree to provide the other Party with notification of any discovered errors within two (2) Business Days of the discovery. The other party shall correct that error within eight (8) Business Days of notification and resubmit the data. In the event the errors cannot be corrected within the time period specified above, the erroneous data shall be considered lost. If MPB data is lost due to uncorrectable errors or otherwise, the Parties shall follow the procedures

set forth in Section 5 of this Attachment of this Agreement and compensate the other for the lost MPB billing data.

Issue 5-9 - Parked

[U S WEST proposes the following]

4.1.23.11 In the event AT&T purchases from U S WEST Network Elements [or Combination thereof], *in a LATA other than the LATA to or from which the MPB services are homed and in which U S WEST operates an access tandem, U S WEST shall, except in instances of capacity limitations, permit and enable AT&T to sub-tend the U S WEST access tandem switch(es) nearest to the AT&T rating point(s) associated with the NPA-NXX(s) to/from which the MPB services are homed. In such event, AT&T shall be responsible for the transport facilities crossing LATA boundaries. In instances of capacity limitation at a given access tandem switch, AT&T shall be allowed to subtend the next nearest U S WEST access tandem switch in which sufficient capacity is available. The MPB percentages for each new rating point/access tandem pair shall be calculated in accordance with MECAB and MECOD.*

4.2 Information Exchange and Interfaces

4.2.1 U S WEST shall provide AT&T a monthly Connectivity Bill that includes all Connectivity Charges incurred by and credits and/or adjustments due to AT&T for those services ordered, established, utilized, discontinued or performed pursuant to this Agreement. For each account, U S WEST shall issue one bill per month and the billing cycle shall be on a calendar basis. Each Connectivity Bill provided by U S WEST to AT&T shall include:

4.2.1.1 all non-usage sensitive charges incurred for the current bill period.

4.2.1.2 any known unbilled non-usage sensitive charges for prior periods.

4.2.1.3 usage sensitive charges for the current relevant bill period, (from the last bill date and extending up to, and including, the current bill date);

4.2.1.4 any known unbilled usage sensitive charges for prior periods;

4.2.1.5 any known unbilled adjustments.

4.2.2 [Intentionally left blank for numbering consistency.]

4.2.3 The bill date must be present on each bill transmitted by U S WEST to AT&T, must be a valid calendar date, and not more than ninety (90) days old. Connectivity Bills shall not be rendered for any Connectivity Charges which are incurred under this Agreement on or before two hundred and seventy (270) days preceding the bill date, except as otherwise permitted by law.

4.2.4 On each bill where "Jurisdiction" is identified, local and local toll charges shall be identified as "Local" and not as interstate, interstate/interLATA, intrastate, or intrastate/intraLATA. U S WEST shall provide from and through dates for

charges rendered on all Connectivity Bills.

4.2.5 U S WEST shall separately identify business charges from residence charges, as appropriate.

4.2.6 U S WEST and AT&T shall issue all Connectivity Bills in accordance with the terms and conditions set forth in this Section 4. On Connectivity Bills U S WEST renders to AT&T, Billing Account Numbers (BANs) shall be thirteen (13) character alpha/numeric and there shall only be one (1) BAN per State unless otherwise agreed to by the Parties. The Bill Date shall be the same day month to month. Each Party shall provide the other Party at least thirty (30) calendar days written notice prior to changing, adding or deleting a BAN. The Parties shall provide one (1) Connectivity Billing invoice associated with each BAN. Each invoice must contain an invoice number (which will vary from month to month). On each bill associated with a BAN, the appropriate invoice number and the charges contained on such invoice must be reflected. All Connectivity Bills must be received by the other Party no later than ten (10) calendar days from bill date and at least twenty (20) calendar days prior to the payment due date (as described in Part A of this Agreement), whichever is earlier. Any Connectivity Bill received on a Saturday, Sunday or a day designated as a bank holiday will be deemed received the next business day. If either Party fails to receive Connectivity Billing data and information within the time period specified above, then the payment due date will be extended by the number of days receipt has been delayed.

4.2.7 U S WEST shall issue all Connectivity Bills containing such billing data and information in accordance with the most current version of EDI or CABS /SECABS published by Bellcore, or its successor, or such later versions as are adopted by Bellcore, or its successor as appropriate to the services being billed. To the extent that there are no CRIS, CABS, or SECAB standards governing the formatting of certain data, such data shall be issued in the format mutually agreed to by U S WEST and AT&T, and in accordance with Attachment 6 to this Agreement.

4.2.8 As detailed in the MECAB document, AT&T and U S WEST will exchange all information necessary to bill third parties for Switched Access Services traffic jointly handled by AT&T and U S WEST via the meet point arrangement in a timely fashion. Information shall be exchanged in Exchange Message Record ("EMR") format (Bellcore Standard BR 010-200-010, as amended) on magnetic tape or via a mutually acceptable electronic file transfer protocol. The Parties will exchange records pursuant to this paragraph without additional compensation.

4.2.9 U S WEST and AT&T agree that each Party shall transmit Connectivity Billing information and data in the appropriate format as provided herein, electronically via Connect Direct to the other Party at the location specified by such Party. AT&T data centers will be responsible for originating the calls for data transmission. U S WEST shall transmit in accordance to the technical specifications mutually agreed upon by the Parties. AT&T will supply to U S WEST its RACF ID and password before the first transmission of data via Connect Direct. Any changes to either Party's Connect Direct Node ID must be sent to the other Party no later than thirty (30) calendar days before the changes take effect.

4.2.10 In emergency situations when tape transmittal has been used U S WEST shall

adhere to the tape packaging requirements set forth in this Agreement. Where magnetic tape shipping containers are transported in freight compartments, adequate magnetic field protection shall be provided by keeping a 6-inch distance from any magnetic field generating device (except a magnetron-tape device). U S WEST shall only use those shipping containers that contain internal insulation to prevent damage. U S WEST shall clearly mark on the outside of each shipping container its name, contact and return address. U S WEST shall not ship any Connectivity Billing tapes in unprotected tape canisters.

4.2.11 *All emergency billing data transmitted via tape must be provided on a cartridge (cassette) tape and must be of high quality, conform to the Parties' record and label standards, 9-track, odd parity, 6250 BPI group coded recording mode and extended binary-coded decimal interchange code (EBCDIC). Each reel of tape must be 100% tested at 20% or better "clipping" level with full width certification and permanent error free at final inspection. AT&T reserves the right to destroy a tape that has been determined to have unrecoverable errors. AT&T also reserves the right to replace a tape with one of equal or better quality.*

4.2.12 *The header record will be formatted in accordance with the appropriate IBM, CABS or EDI standards as mutually agreed upon by the Parties.*

4.2.13 *A single 6-digit serial number must appear on the external (flat) surface of the tape for visual identification. This number shall also appear in the "dataset serial number field" of the first header record of the IBM standard tape label. This serial number shall consist of the character "V" followed by the reporting location's four digit Originating Company Code and a numeric character chosen by the sending Party. The external and internal label shall be the same. The dataset name shall appear on the flat side of the reel and also in the "data set name field" on the first header record of the IBM standard tape label. U S WEST's name, address, and contact shall appear on the flat side of the cartridge or reel.*

4.2.14 *Tape labels shall conform to IBM OSVS Operating System Standards contained in the IBM Standard Labels Manual. IBM standard labels are 80-character records recorded in EBCDIC, odd parity.*

4.2.15 *U S WEST shall conform to the Standard Volume Label Format which will be mutually agreed upon by the Parties.*

4.2.16 *U S WEST shall use the IBM Standard Dataset Label Format which will be mutually agreed upon by the Parties.*

4.2.17 *U S WEST shall use test and production dataset format which will be mutually agreed upon for all Connectivity Bills.*

4.3 Standards

4.3.1 *At least thirty (30) calendar days prior to U S WEST sending AT&T a mechanized bill for the first time via electronic transmission, U S WEST shall send to AT&T Connectivity Bill data in the appropriate mechanized format (e.g., EDI, CABS or SECAB) for testing to ensure that bills can be processed and that bills comply with the requirements of this Attachment. After receipt of the test data from U S WEST AT&T will notify U S WEST if the connectivity billing transmission meets AT&T testing specifications. If the transmission fails to meet the mutually*

agreed upon test and production dataset format, then, U S WEST shall make the necessary corrections within a mutually agreeable time frame. At least three (3) sets of testing data must meet AT&T testing specifications prior to U S WEST sending AT&T a mechanized production connectivity bill for the first time via electronic transmission or tape. Thereafter, U S WEST may begin sending AT&T production connectivity bills via electronic transfer on the next bill date, or within ten (10) calendar days, whichever is later.

4.3.2 U S WEST shall also provide to AT&T designated point of contact, U S WEST's applicable operating company number ("OCN") at least thirty (30) days prior to testing and at least thirty (30) days prior to a change of OCN.

4.3.3 At least ninety (90) days prior to any change in existing formats or change to a different format, U S WEST shall send to AT&T Connectivity Bill data in the appropriate mechanized format for testing to ensure that the bills can be processed and that the bills comply with the requirements of this Attachment. U S WEST agrees that it shall not send to AT&T bill data in the new mechanized format until such bill data has met the testing specifications as set forth in this Subsection.

4.3.4 During the testing period, in addition to CONNECT DIRECT, U S WEST shall also transmit to AT&T Connectivity Billing data and information via paper or tape as specified by AT&T. Test tapes shall be sent to an AT&T specified location.

4.3.5 For Connectivity Bills issued in CABS or SECAB format, U S WEST agrees that if it transmits data to AT&T in a mechanized format, U S WEST shall also comply with the following specifications which are not contained in CABS or SECAB guidelines but which are necessary for AT&T to process Connectivity Billing information and data:

4.3.5.1 The bill date shall not contain spaces or non-numeric values.

4.3.5.2 Each Connectivity Bill must contain at least one (1) detail record.

4.3.5.3 Any "from" date should be less than or equal to the associated "thru" date and neither date can contain spaces.

4.3.5.4 The invoice number must not have embedded spaces or low values.

4.3.6 U S WEST agrees that in order to ensure the proper performance and integrity of the entire Connectivity Billing process, U S WEST shall be responsible and accountable for transmitting to AT&T an accurate and current bill. U S WEST agrees to implement control mechanisms and procedures to render a bill that accurately reflects the services ordered and used by AT&T.

5. Provision Of Customer Usage Data

This Section 5 sets forth the terms and conditions for U S WEST's provision of Recorded Usage Data (as defined in this Attachment 5) to AT&T and for information exchange regarding long distance billing.

5.1 Procedures

5.1.1 General

5.1.1.1 U S WEST shall comply with various industry, OBF, and other standards referred to throughout this Agreement. To satisfy these requirements, the Parties agree to a mutual interpretation of all standards referred to in this Section.

5.1.1.2 The Parties shall mutually agree to OBF standards and the additional standards outlined in this Agreement when recording and transmitting Usage Data.

5.1.1.3 As new standards are developed and adopted by industry, U S WEST and AT&T will negotiate mutually agreeable implementation of those standards.

5.1.1.4 U S WEST shall record all usage to be billed to AT&T originating from, terminating to or billed to AT&T Customers using U S WEST services ordered by AT&T. Recorded Usage Data includes, but is not limited to, the following categories of information:

Call Attempts
Completed Calls
Use of CLASS/LASS/Custom Features
Calls To Information Providers Reached Via U S WEST Facilities And Contracted By U S WEST
Calls To Directory Assistance Where U S WEST Provides Such Service To An AT&T Customer
Calls Completed Via U S WEST-Provided Operator Services Where U S WEST Provides Such Service To AT&T Local Resale Customer
For U S WEST-Provided Centrex Service, Station Level Detail Records Shall Include Complete Call Detail And Complete Timing Information

5.1.1.5 Retention of Records: U S WEST shall maintain a machine readable back-up copy of the message detail provided to AT&T for a minimum of forty-five (45) calendar days. U S WEST shall provide any data back-up to AT&T upon the request of AT&T.

5.1.1.6 U S WEST shall provide to AT&T Recorded Usage Data for AT&T Customers only. U S WEST shall not submit other carrier local usage data as part of the AT&T recorded usage data.

5.1.1.7 U S WEST shall not bill to AT&T Customers any recurring or non-recurring charges for service provided by U S WEST to AT&T except where explicitly permitted to do so within a written agreement between U S WEST and AT&T.

5.1.1.8 The Parties shall record and rate all calls to information service providers (e.g., 976 service calls) and shall bill such calls directly to the calling party's local service provider. In the event a Party's end-user disputes such a call, that Party may recourse consistent with the recourse arrangement the billing Party has with its information service provider.

5.1.1.9 U S WEST shall provide Recorded Usage Data to AT&T billing locations as designated by AT&T.

5.1.1.10 U S WEST shall establish an Interconnect Service Center (ISC) or similar function to serve as AT&T single point of contact to respond to AT&T call usage, data error, and record transmission inquiries.

5.1.1.10.1 U S WEST shall provide AT&T with a single point of contact and Remote Identifiers for each sending location.

5.1.1.11 AT&T shall provide a single point of contact responsible for receiving usage transmitted by U S WEST and receiving usage tapes from a courier service in the event of a facility outage.

5.1.1.12 U S WEST shall bill and AT&T shall pay the charges for Recorded Usage Data. Billing and payment shall be in accordance with the applicable terms and conditions set forth in Connectivity Billing and Recording Section of this Attachment 5.

5.1.1.13 Without waiver of, and in addition to the Audit and Examination rights set forth in Part A of this Agreement, upon reasonable notice and at reasonable times, a Party or its authorized representatives may examine the recording Party's AMA records which relate to perceived problems with the recordings of the usage data relating to the billed Party under this Attachment.

5.1.2 Charges

5.1.2.1 The Parties may charge fees for recording, rating or transmitting usage data. For the six (6) months following the initial recording, rating or transmitting of non-test usage data, the Parties shall not charge each other.

5.1.2.2 No charges shall be assessed for incomplete call attempts

5.1.3 Central Clearinghouse & Settlement

5.1.3.1 U S WEST shall support and participate with AT&T to develop an in and out-collect process developed for intra-region alternately billed messages.

5.1.3.2 U S WEST shall settle with AT&T for both intra-region and inter-region billing exchanges of calling card, bill-to-third party, and collect calls, including settlement through the CMDS CATS system for inter-region billing.

5.1.4 Lost Data

5.1.4.1 Loss of Recorded Usage Data - AT&T recorded usage data determined to have been lost, damaged or destroyed as a result of an error or omission by U S WEST in its performance of the recording function shall, upon AT&T request, be recovered by U S WEST at no charge to AT&T. In the event the data cannot be recovered by U S WEST, U S WEST shall estimate the messages and associated revenue, with assistance from AT&T, based upon the method described below. This method shall be applied on a consistent basis, subject to modifications agreed to by

U S WEST and AT&T. This estimate shall be used to adjust amounts AT&T owes U S WEST for services U S WEST provides in conjunction with the provision of recorded usage data.

5.1.4.2 Partial Loss - U S WEST shall review its daily controls to determine if data has been lost. When there has been a partial loss, actual message and minute volumes shall be reported, if possible. Where actual data are not available, a full day shall be estimated for the recording entity, as outlined in the following paragraphs. The amount of the partial loss is then determined by subtracting the data actually recorded for such day from the estimated total for such day.

5.1.4.3 Complete Loss - Estimated message and minute volumes for each loss consisting of an entire AMA tape or entire data volume due to its loss prior to or during processing, loss after receipt, degaussed before processing, receipt of a blank or unreadable tape, or lost for other causes, shall be reported.

5.1.4.4 Estimated Volumes - From message and minute volume reports for the entity experiencing the loss, U S WEST shall secure message/minute counts for the four (4) corresponding days of the weeks preceding that in which the loss occurred and compute an average of these volumes. U S WEST shall apply the appropriate average revenue per message ("ARPM") mutually agreed upon to the estimated message volume to arrive at the estimated lost revenue.

5.1.4.5 If the day of loss is not a holiday but one (1) (or more) of the preceding corresponding days is a holiday, U S WEST shall use additional preceding weeks in order to procure volumes for two (2) non-holidays in the previous two (2) weeks that correspond to the day of the week that is the day of the loss

5.1.4.6 If the loss occurs on a weekday that is a holiday (except Christmas and Mother's Day), U S WEST shall use volumes from the two (2) preceding Sundays.

5.1.4.7 If the loss occurs on Mother's Day or Christmas, U S WEST shall use volumes from that day in the preceding year multiplied by a growth rate mutually agreed upon by the Parties.

5.1.4.8 AT&T may also request data be provided that has previously been successfully provided by U S WEST to AT&T. U S WEST shall re-provide such data, if available, at a charge mutually agreed to by the Parties.

5.1.5 Testing, Changes and Controls

5.1.5.1 The Recorded Usage Data, EMR format, content, and transmission process shall be tested as mutually agreed to by the Parties.

5.1.5.2 Interface Testing: The purpose of this test is to ensure that the usage records can be sent by U S WEST to AT&T and can be accepted and processed by AT&T. U S WEST shall provide a test file to AT&T designated Regional Processing Center (RPC) in the format that shall be

used for live day-to-day processing. The file's test content and volume shall be mutually agreed to by the Parties. AT&T shall review the file and verify that it conforms to its data center requirements. AT&T shall notify U S WEST in writing whether the format is acceptable. AT&T shall also provide U S WEST with the agreed-upon control reports as part of this test.

5.1.5.3 Operational Test: The purpose of this test is to ensure that volumes of usage in consecutive sequence can be extracted, distributed and processed by U S WEST and AT&T.

5.1.5.4 For testing purposes U S WEST shall provide AT&T with U S WEST recorded usage for a minimum of five (5) consecutive days. AT&T shall provide U S WEST with the message validation reports associated with test usage.

5.1.5.5 Test File: Test data should be transported via CONNECT DIRECT whenever possible. In the event that courier service must be used to transport test media, the physical tape characteristics to be used are described in this Attachment.

5.1.5.6 Periodic Review: Control procedures for all usage transferred between U S WEST and AT&T shall require periodic review. This review may be included as part of an annual audit of U S WEST by AT&T or as part of the normal production interface management function. Breakdowns which impact the flow of usage between U S WEST and AT&T must be identified and jointly resolved as they occur. The resolution may include changes to control procedures, as similar problems would be avoided in the future. Any changes to control procedures shall be mutually agreed upon by AT&T and U S WEST.

5.1.5.7 U S WEST Software Changes:

5.1.5.7.1 When U S WEST plans to introduce any software changes which impact the format or content structure of the usage data feed to AT&T, designated U S WEST personnel shall notify AT&T no less than one hundred twenty (120) calendar days before such changes are implemented.

5.1.5.7.2 U S WEST shall communicate the projected changes to the appropriate groups in AT&T so that potential impacts on AT&T processing can be determined.

5.1.5.7.3 AT&T personnel shall review the impact of the change on the entire control structure and the post conversion test plan. Where AT&T shall negotiate any perceived problems with U S WEST and shall arrange to have the data tested using the modified software.

5.1.5.7.4 If it is necessary for U S WEST to request changes in the schedule, content or format of usage data transmitted to AT&T, U S WEST shall notify AT&T.

5.1.5.8 AT&T Requested Changes:

5.1.5.8.1 AT&T may request changes in the schedule, content, format of the usage data transmitted from U S WEST, as deemed necessary by AT&T.

5.1.5.8.2 When the negotiated changes are to be implemented, AT&T and/or U S WEST shall arrange for testing of the modified data in a Post Conversion Test Plan designed to encompass all types of changes to the usage data transferred by U S WEST to AT&T and the methods of transmission for that data.

5.1.5.9 U S WEST System Change Description:

5.1.5.9.1 For a U S WEST system change, U S WEST shall provide AT&T with an overall description of the change, stating the objective and a brief explanation of the reasons for the change.

5.1.5.9.2 During the initial negotiations regarding the change, U S WEST shall provide a list of the specific records and/or systems impacted by the change to designated AT&T personnel.

5.1.5.9.3 U S WEST shall also provide AT&T a detailed description of the changes to be implemented. It shall include sufficient detail for designated AT&T personnel to analyze and estimate the effects of the changes and to design tests to verify the accuracy of the implementation.

5.1.5.10 Change Negotiations:

5.1.5.10.1 AT&T shall be notified in writing of all proposed change negotiations initiated by U S WEST in writing. In turn, AT&T shall notify U S WEST in writing of proposed change negotiations initiated by AT&T.

5.1.5.10.2 After formal notification of planned changes, whether originated by U S WEST or AT&T, designated AT&T personnel shall schedule negotiation meetings as required with designated U S WEST personnel. The first meeting should produce the overall change description (if not previously furnished) and the list of records and/or systems affected.

5.1.5.10.3 In subsequent meetings, U S WEST shall provide the detailed description of changes to be implemented. After reviewing the described changes, designated AT&T personnel shall negotiate a detailed test procedure with U S WEST.

5.1.5.11 Changes to controls: AT&T may request changes to the control structure. The Parties shall mutually agree on the requested changes.

5.1.5.12 Verification Of Changes:

5.1.5.12.1 Based on the detailed description of changes furnished by U S WEST, AT&T and U S WEST personnel shall:

Determine the type of change(s) to be implemented;
Develop a comprehensive test plan;
Negotiate scheduling and transfer of modified data with U S WEST;
Negotiate testing of modified data with the appropriate AT&T RPC;
Negotiate processing of verified data through the AT&T billing system with the RPC;
Arrange for review and verification of testing with appropriate AT&T groups;
Arrange for review of modified controls, if applicable.

5.1.5.13 Introduction of Changes:

5.1.5.13.1 When all the testing requirements have been met and the results reviewed and accepted, designated AT&T and U S WEST personnel shall:

Negotiate an implementation schedule; and

Verify the existence of a contingency plan with the appropriate AT&T personnel; and

Arrange for the follow-up review of changes with appropriate AT&T personnel; and

Arrange for appropriate changes in control program, if applicable; and

Arrange for long-term functional review of impact of changes on the AT&T billing system, i.e., accuracy, timeliness, and completeness.

5.2 Information Exchange and Interfaces

5.2.1 Core Billing Information

5.2.1.1 Recorded Usage Data includes all intraLATA toll and local usage U S WEST shall provide AT&T with unrated EMR records associated with all intraLATA toll and local usage which it records on AT&T's behalf. Any category, group and/or record types approved in the future for U S WEST shall be included if they fall within the definition of Local Resale. AT&T shall be given notification thirty (30) days prior to implementation of a new type, category and/or record.

5.2.1.2 U S WEST shall provide rated EMR records only when explicit consent for sending such records has been obtained from AT&T.

5.2.1.3 All messages recorded by a Party and billed to the other Party are to be transmitted to the billed Party. Recorded usage includes all usage billable to the other Party.

5.2.1.4 Data Delivery Schedules: Data shall be delivered to AT&T by U S WEST daily (Monday through Friday except holidays) unless otherwise negotiated. AT&T and/or U S WEST Data Center holidays are excluded.

U S WEST and AT&T shall exchange schedules of designated Data Center holidays.

5.2.2 Local Account Maintenance

5.2.2.1 When AT&T purchases local service from U S WEST, and, as appropriate, when AT&T purchases certain unbundled Network Elements, U S WEST shall provide AT&T with local account maintenance as described herein.

5.2.2.2 When notified by a CLEC that an AT&T customer has switched to CLEC's service, U S WEST shall provision the change and notify AT&T via Connect:Direct within twenty-four (24) hours of the provisioning that the customer has changed to another service provider ("OutPLOC").

5.2.2.3 When notified by AT&T that a customer has changed its PIC only from one interexchange carrier to another U S WEST shall provision the PIC only change.

5.2.2.4 If notified by an IXC using a '01' PIC order record that an AT&T customer has changed its PIC only, U S WEST shall reject the order and notify that IXC using industry standard record formats, that a '01' CARE PIC record should be sent to AT&T for processing.

5.2.3 Product/Service Specific

5.2.3.1 Subject to conditions specified in Section 5.1.1(c) of this Attachment, U S WEST shall provide a Specialized Service/Service Provider Charge record to support the Special Features Star Services if these features are part of U S WEST's offering. Such record shall be an EMR 10-01-18 record or industry standard record as may subsequently be mutually agreed to by the Parties. Such record shall be a 10-01-18 record or Bellcore assigned record as may be subsequently agreed to by the Parties.

5.2.4 Emergency Information

5.2.4.1 U S WEST shall provide the transport facility for transmitting usage and billing data between U S WEST location and the AT&T location. U S WEST shall transmit via CONNECT DIRECT whenever possible. In the event usage transfer cannot be accommodated by CONNECT DIRECT because of extended (one (1) Business Day or longer) facility outages, U S WEST shall contract for a courier service to transport the data via tape.

5.2.4.2 The Parties shall mutually agree to the following standards when emergency data is transported to AT&T on tape or cartridge via a courier. The data shall be in fixed or variable block format as mutually agreed to by the Parties:

Tape: 9-track, 6250 (or 1600) BPI (Bytes per inch)
Cartridge: 38,000 BPI (Bytes per inch)

LRECL:2,472 Bytes
Parity: Odd
Character Set: Extended Binary Coded Decimal Interchange Code (EBCDIC)
External labels: Exchange Carrier Name, Dataset Name (DSN) and volume serial number
Internal labels: IBM industry OS labels shall be used. They consist of a single volume label and two sets of header and trailer labels.

5.2.4.3 To the extent the above standards are changed or revised, the Parties may agree to negotiate the incorporation of such new standards.

5.2.5 Rejected Recorded Usage Data

5.2.5.1 At the discretion of AT&T, consistent with industry practice, any messages that cannot be rated and/or billed by AT&T may be returned to U S WEST via CONNECT DIRECT. Returned messages shall be sent directly to U S WEST in EMR format. Standard EMR return codes shall be utilized.

5.2.6 Interfaces

5.2.6.1 The Parties shall transmit formatted Recorded Usage Data via Connect Direct.

5.2.6.2 AT&T shall notify U S WEST of resend requirements if a pack or entire dataset must be replaced due to pack rejection, damage in transit, dataset name failure, etc.

5.2.6.3 Critical edit failure on the pack header or pack trailer records shall result in pack rejection (e.g., detail record count not equal to grand total included in the pack trailer). Notification of pack rejection shall be made by AT&T within one (1) Business Day of processing. Rejected packs shall be corrected by U S WEST and retransmitted to AT&T within twenty-four (24) hours or within an alternate time frame negotiated on a case by case basis.

5.2.6.4 A pack shall contain a minimum of one message record or a maximum of 9,999 message records plus a pack header record and a pack trailer record. A file transmission contains a maximum of 99 packs. A dataset shall contain a maximum of one pack. U S WEST shall provide AT&T one dataset per sending location, with the agreed upon RAO/OCN populated in the header and trailer records.

5.2.7 Formats & Characteristics

5.2.7.1 Rated in collect messages should be transmitted via the CONNECT DIRECT and can be intermingled with the unrated messages. No special packing is needed.

5.2.7.2 EMR: U S WEST shall provide Recorded Usage Data in the EMR format and by category, group and record type, and shall be transmitted, via a

direct feed, to AT&T. The types of EMR records that AT&T can expect to receive from U S WEST, includes, but is not limited to the following:

Header Record	20-21-01, 20-20-01 or 20-24-01
Trailer Record	20-21-02, 20-20-02 or 20-24-02
Detail Records *	01-01-01, 06, 08, 14, 17, 18, 31, 32, 35, 37, 80, 81, 82, 10-01-01, 06, 08, 14, 17, 18, 31, 32, 35, 37
Credit Records	03-01-01, 06, 08, 14, 17, 18, 31, 32, 35, 37, 80, 81, 82,
Rated Credits	41-01-01, 06, 08, 14, 17, 18, 31, 32, 35, 37, 80, 81, 82,
Cancel Records	51-01-01, 06, 08, 09, 14, 17, 18, 31, 32, 35, 37, 80, 81, 82,
Correction Records	71-01-01, 06, 08, 14, 17, 18, 31, 32, 35, 37, 80, 81, 82

* Category 01 is utilized for rated messages; Category 10 is utilized for unrated messages. Category 10 records are to have indicator 13 populated with a value of 5

5.2.7.2.1 To the extent the above standards are changed or revised, the Parties may agree to incorporate such new standards.

5.2.7.3 U S WEST shall comply with the most current version of Bellcore standard practice guidelines for formatting EMR records.

5.2.7.4 The interfacing Bell RAO, OCN, and remote identifiers shall be used by AT&T to control invoice sequencing and each shall have its own invoice controls. The OCN shall also be used to determine where the message returns file, containing any misdirected and unguidable usage, shall be sent.

5.2.7.5 The file's Record Format (RECFM) shall be Variable Block or fixed as negotiated. Size and the Logical Record Length (LRECL) shall be as mutually agreed to by the Parties.

5.2.7.6 [Intentionally left blank for numbering consistency]

5.2.7.7 U S WEST shall transmit the usage to AT&T using dataset naming conventions mutually agreed upon.

5.2.8 Controls

5.2.8.1 AT&T shall test and certify the CONNECT DIRECT interface to ensure the accurate receipt of Recorded Usage Data.

5.2.8.2 Header and trailer records shall be populated in positions 13-27 with the following information:

Position	
13-14	Invoice numbers (1-99)
15-16	Bell Co. ID number
17-19	Interfacing Bell RAO Code
20-23	AT&T OCN - value 7229
24-27	Reseller OCN

The trailer grand total record count shall be populated with total records in pack (excluding header & trailer)

5.2.8.3 Control Reports: AT&T accepts input data provided by U S WEST in EMR format in accordance with the requirements and specifications detailed in this Attachment 5. In order to ensure the overall integrity of the usage being transmitted from U S WEST to AT&T, data transfer control reports shall be required. These reports shall be provided by AT&T to U S WEST on a daily or otherwise negotiated basis and reflect the results of the processing for each pack transmitted by U S WEST.

5.2.8.4 Control Reports - Distribution: Since U S WEST is not receiving control reports, dataset names shall be established during detailed negotiations.

5.2.8.5 Message Validation Reports: AT&T shall provide the following once(1) per day (or as otherwise negotiated) Message Validation reports to the designated U S WEST System Control Coordinator once a day (or as otherwise agreed to by the Parties). These reports shall be produced for all data received within U S WEST Local Resale feed and shall be transmitted Monday through Friday.

5.2.8.6 Incollect Pack Processing: This report provides vital statistics and control totals for packs rejected and accepted and dropped messages. The information is provided in the following report formats and control levels:

U S WEST name; and
Reseller total messages processed in a pack; and
Packs processed shall reflect the number of messages initially erred and accepted within a pack; and
Reseller total packs processed.

5.3 Standards

5.3.1 When requested for security purposes and on an exception basis when a reasonable need is demonstrated, a Party shall provide the other Party with Recorded Usage Data within two (2) hours of the call completion or within the same period that the recording Party would have that data for itself under similar circumstances. If not available in EMR format, the Recorded Usage Data may be provided in AMA format.

5.3.2 U S WEST shall include the Working Telephone Number (WTN) of the call originator on each EMR call record.

5.3.3 End user Customer usage records and station level detail records shall be in packs in accordance with EMR standards or applicable industry standards as defined in Section 5.3.1 of this Attachment.

5.3.4 U S WEST shall provide Recorded Usage Data once a day to AT&T on a schedule to be determined by the Parties, Monday through Friday excluding holidays. The Parties shall work together to reach agreement on an acceptable holiday schedule. U S WEST shall provide to AT&T the Recorded Usage Data

not more than one business day after termination of the call for which usage data is to be provided.

5.3.5 U S WEST shall segregate and organize the Recorded Usage Data in accordance with 5.2.7 of this Section.

5.4 Standards for Transmitting and Recording Usage Data

To be developed pursuant to Section 52 of Part A of this Agreement.

5.5 Reporting

5.5.1 Upon request by AT&T, the Parties shall jointly develop reporting procedures for the standards for transmitting and recording usage data described in Section 5.4 above.

6. Maintenance

6.1 [Intentionally left blank for numbering consistency]

6.2 General Requirements

Issue 5-10 - Parked

[U S WEST proposes the following]

6.2.1 U S WEST shall provide repair, maintenance, testing, and surveillance on all Telecommunications Services and unbundled Network Elements [and Combinations] in accordance with the terms and conditions of this Agreement.

6.2.1.1 U S WEST shall provide AT&T with the same level of maintenance support as U S WEST provides itself in accordance with standards and performance measurements that U S WEST uses and/or which are required by law, regulatory agency, or by U S WEST's own internal procedures, whichever are the most rigorous. These standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as U S WEST may deploy) that U S WEST provides to AT&T under this Agreement.

6.2.1.2 U S WEST shall provide a SPOC (Single Point of Contact) for Residence, and a SPOC for Business for AT&T to report via toll free telephone numbers maintenance issues and trouble reports twenty four (24) hours a day and seven (7) days a week. The SPOC Residence 800 number, and SPOC Business 800 number, will be the numbers for all of U S WEST's 14 states.

6.2.1.3 U S WEST shall provide AT&T maintenance dispatch personnel on the same schedule that it provides its own Customers.

6.2.2 AT&T shall handle all interaction with AT&T Customers including all calls regarding service problems, scheduling of technician visits, and notifying the Customer of trouble status and resolution. When a U S WEST technician is on site, the customer will be statused in accordance with standard U S WEST

procedures.

6.2.3 AT&T and U S WEST will provide their respective customers with the correct telephone numbers to call for access to their respective repair bureaus.

6.2.4 Customers of AT&T shall be instructed to report all cases of trouble to AT&T as appropriate. Customers of U S WEST shall be instructed to report all cases of trouble to U S WEST as appropriate. AT&T and U S WEST will provide their respective repair contact numbers to one another on a reciprocal basis.

Issue 5-11 - Parked

[U S WEST proposes the following]

6.2.5 U S WEST shall cooperate with AT&T to meet maintenance standards for all Telecommunications Services, unbundled Network Elements [and Combinations] ordered under this Agreement. Such maintenance standards shall include, without limitation, standards for testing, network management, call gapping, and notification of upgrades as they become available.

6.2.6 All U S WEST employees or contractors who perform repair service for AT&T Customers shall follow mutually agreed to procedures in all their communications with AT&T Customers. At a minimum, these procedures and processes shall ensure that: (1) U S WEST employees or contractors will perform repair service that is at least equal in quality to that provided to U S WEST Customers; (2) trouble calls from AT&T Customers shall receive response time priority that is at least equal to that of U S WEST Customers, regardless of whether the Customer is an AT&T Customer or a U S WEST Customer.

6.2.7 In responding to repair calls, neither Party shall make disparaging remarks about each other, nor shall they use repair calls as the basis for internal referrals or to solicit customers to market services. Either Party may respond with accurate information in answering customer questions.

Issue 5-12 - Parked

[U S WEST proposes the following]

6.2.8 U S WEST shall perform scheduled maintenance, including without limitation, required and recommended maintenance intervals and procedures, for all Telecommunications Services, Network Elements [and Combinations] provided to AT&T under this Agreement equal in quality to that currently provided by U S WEST in the maintenance of its own network.

6.2.8.1 U S WEST shall exercise its best efforts to provide the designated AT&T SPOC at least sixty (60) days' advance notice of any scheduled activity which will likely impact AT&T customers.

6.2.8.2 Plans for significant service affecting activities shall include, at a minimum, the following information: location and type of facilities, specific work to be performed, date and time work is scheduled to commence, work schedule to be followed, date and time work is scheduled to be completed, and estimated number of work hours for completion. Examples of such activities include, but are not limited to, office

conversions, cable facility rolls, and tandem re-homes.

6.2.9 U S WEST shall exercise its best efforts to notify AT&T of all non-scheduled activities to be performed by U S WEST on any Network Element, including without limitation, any hardware, equipment, software, or system, providing service functionality which will likely impact AT&T Customers.

6.2.9.1 U S WEST shall provide to the designated SPOC maximum advance notice of such non-scheduled activities in the same time and manner that it provides to its operation service centers.

6.2.9.2 U S WEST shall perform emergency maintenance as promptly as possible to maintain or restore service and shall promptly advise the AT&T designated SPOC of any such actions it takes.

Issue 5-13 - Parked

[U S WEST proposes the following]

6.2.10 U S WEST shall provide AT&T a detailed description of any and all emergency restoration plans and disaster recovery plans which are in place during the term of this Agreement. Such plans shall include, at a minimum, the following: (a) provisions for immediate notification to AT&T of the existence, location, and source of any emergency network outage potentially affecting an AT&T Customer; (b) establishment of a SPOC responsible for initiating and coordinating the restoration of all local services and Network Elements[4] for connections between Network Elements for which U S WEST is responsible; (c) methods and procedures to provide AT&T with access to information relating to the status of restoration efforts and problem resolution comparable to that access that U S WEST provides itself during the restoration process; (d) an inventory and description of mobile restoration equipment, by location and by event; (e) methods and procedures for reprovisioning of all Telecommunications Services and Network Elements [or Combinations] after initial restoration; (f) equal priority, as between AT&T Customers and U S WEST Customers, for restoration efforts, consistent with FCC Service Restoration guidelines, including without limitation, deployment of repair personnel, and access to spare parts and components; and (g) a mutually agreeable process for escalation of maintenance problems, including a complete, up-to-date list of responsible contacts, each available twenty-four (24) hours per day, seven (7) days per week.

6.2.10.1 For purposes of this Subsection 6.1, an emergency network outage is defined as 5,000 or more blocked call attempts in a ten (10) minute period for all Customers in a single exchange.

6.2.10.2 AT&T and U S WEST will work cooperatively to assess up chain (end office to tandem calls), down chain (tandem to end office calls), and overall customer impact. U S WEST categorizes, reports and reacts to network outages using FCC reporting criteria and U S WEST Abnormal Condition Report Criteria.

6.2.11 U S WEST and AT&T shall establish mutually acceptable methods and

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[4] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and Combinations"

procedures for the immediate handling of misdirected calls from AT&T customers to U S WEST requesting repair. The Customer shall be informed that AT&T is its local service provider (LSP), and the U S WEST representative will provide the AT&T customer with the appropriate telephone number of the AT&T repair center. If the LSP screen indicator is not available, the U S WEST representative will ask the AT&T customer it knows the name of its LSP. The U S WEST representative will provide the AT&T customer with the appropriate number of the AT&T repair center. These calls are limited to repair information only, and are not to be used for marketing purposes.

6.2.12 When electronic interface is available, U S WEST shall inform AT&T of repair completion and trouble reason within ten (10) minutes upon completion. If no electronic interface is available, AT&T will provide a SPOC for U S WEST to call as soon as possible after repair completion. U S WEST shall notify AT&T that the trouble has been cleared. This is done on a real-time basis. Therefore the technician will notify AT&T in a similar manner, for both dispatched-in and dispatched-out troubles. The report shall not be considered closed until such notification is made. AT&T will contact its Customer to determine if repairs were completed and confirm the trouble no longer exists.

6.2.13 U S WEST and AT&T shall mutually develop escalation procedures to be followed if, in AT&T judgment, any performance standard defined in this Agreement is not met for any individual trouble report. The escalation procedures to be provided shall include names and telephone numbers of U S WEST management personnel who are responsible for maintenance issues and who will be contacted when a trouble condition is escalated.

6.2.14 In the event U S WEST shall fail to materially conform to any specified performance and service quality standards, identified elsewhere in this Agreement), U S WEST shall perform and deliver to AT&T, a standard root cause analysis of the reasons for U S WEST's failure to conform, and, where the failure to conform is due to U S WEST, U S WEST shall correct said cause as soon as possible, at its own expense.

6.2.15 Dispatching of U S WEST technicians to AT&T Customer premises shall be accomplished by U S WEST pursuant to a request received from AT&T. AT&T shall be able to schedule maintenance appointments on intervals at parity with U S WEST upon opening of trouble report.

6.2.16 [Intentionally left blank for numbering consistency]

6.2.17 U S WEST shall supply AT&T with a unique number to identify each AT&T initial trouble report opened.

6.2.17.1 U S WEST and AT&T agree to a trouble priority and severity coding format for all trouble reports handled between the two companies. Troubles are prioritized according to appointment schedules.

6.2.17.1.1 Priority 1 = Out of Service
6.2.17.1.2 Priority 2 = Affecting Service
6.2.17.1.3 Priority 3 = Feature Trouble

6.2.17.2 Customer has the ability to escalate.

6.2.18 U S WEST shall provide for resale any maintenance/protection plans for services offered under this Agreement to AT&T that it offers U S WEST's own Customers.

6.2.19 U S WEST's current trouble reporting system does not provide the capability to reopen a closed trouble report. Therefore, U S WEST shall allow AT&T to designate that a trouble report is associated with the initial trouble report which was closed in the past twenty-four (24) hours without repairs being performed to the Customer's satisfaction. U S WEST shall measure the frequency of these types of repeated reports and will demonstrate non-discriminatory treatment to AT&T.

6.2.20 Additional Unbundling Requirements

6.2.20.1 When trouble is reported by a Customer served through unbundled Network Elements, AT&T will test its network to identify any problems. If no problems are identified with the AT&T network, AT&T will open a trouble report with U S WEST and provide switch-based test results to the U S WEST technician. U S WEST shall then test its portion of the network and perform repairs as required in the time frames set forth below in this Attachment.

6.2.20.1.1 If U S WEST tests the unbundled loop and no trouble found ("NTF"), the same shall be reported back to AT&T. If, upon testing the unbundled loop, the trouble is isolated to the Customer side of the NID (inside wire, CPE, etc.), AT&T shall be billed a trouble isolation charge ("TIC"). If, after AT&T has opened a trouble ticket, it cancels the trouble ticket before a U S WEST technician has been dispatched on the trouble, no charges will apply. If the U S WEST technician has been dispatched on the reported trouble before the trouble ticket is canceled by AT&T, a TIC will be applied.

6.2.20.1.2 AT&T will coordinate combined testing or repair activities until trouble is resolved. U S WEST shall provide repair updates to AT&T. For trouble isolation both Parties will cooperatively test to isolate the trouble as required.

6.3 Systems Interfaces and Information Exchanges

6.3.1 The Parties will cooperate to provide, as appropriate, a real-time, electronic interface to U S WEST's maintenance systems and databases equal in quality to that which U S WEST provides to itself.

6.3.1.1 An electronic bond will be a system to system connection with immediate update capability. In no way shall this interface cause AT&T personnel to use U S WEST systems via remote hook up or any other means of access.

6.3.1.2 This interface shall allow AT&T personnel to perform the following functions for AT&T Customers: (a) enter trouble reports in the U S WEST maintenance systems for an AT&T Customer, (b) retrieve and track

current status on all AT&T Customer trouble report; (c) receive "estimated time to repair" (ETTR) on a real-time basis; (d) receive immediate notification in the event a repair person is unable to be present for, or anticipates missing, a scheduled repair appointment; (e) retrieve all time and material charges that apply to AT&T at the time of ticket closure (itemized by time spent, price of materials used, procedures employed, amounts incurred in each such category, and total by Customer, per event and (f) receive automated notification of case closure.

6.3.1.3 Automated interfaces must be provided into a centralized operations support systems data base for real time network monitoring to proactively identify potential service degradation. Such systems must monitor and report on the integrity of the U S WEST network, isolate trouble and where applicable (e.g., when an unbundled loop is connected to an unbundled port or when an unbundled loop includes such equipment as DCS, DA etc.), initiate repair operations, test individual unbundled loops and generate maintenance and repair notices that impact any end user's ability to complete calls. Ongoing maintenance practices on such unbundled loops must be equal to or exceed the practices employed by U S WEST for facilities used to provide Services for Resale.

6.3.1.4 U S WEST agrees to develop and implement, as soon as possible, with a target date of November 1, 1997 the electronic interfaces described above.

6.3.2 U S WEST agrees that AT&T may report troubles directly to a single U S WEST Repair/Maintenance Center for both residential and business Customers. The Repair Center will have two separate numbers, one for residence and one for business. CLEC's will be treated in the same manner as U S WEST Customers.

6.3.3 U S WEST shall perform all testing for Resale Services. U S WEST shall provide the capability for AT&T to receive MLT test results while AT&T customer is on line during the initial trouble report when available[5] in the U S WEST network.

6.3.3.1 U S WEST shall provide test results to AT&T, if appropriate, for trouble clearance. In all instances, U S WEST will provide AT&T with the disposition of the trouble.

6.3.4 U S WEST shall provide to AT&T the ability to obtain the status on open maintenance trouble reports via telephone or by another interface as agreed to by the Parties. U S WEST agrees to provide the status of residence and small business trouble reports upon AT&T request.

6.3.5 U S WEST agrees to provide to AT&T the status for open maintenance trouble reports for large business Customers anytime the status of the trouble report changes or at AT&T request.

6.3.6 U S WEST agrees that AT&T may call U S WEST to verify central office features and functions as they relate to an open trouble report. U S WEST agrees to work with AT&T on the initial trouble report to isolate the cause of the trouble and,

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5 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "electronic".

where possible, resolve the feature/function related trouble at that time.

6.3.7 U S WEST agrees to proactively advise AT&T of any central office failure that is known at the time of any inquiry or trouble report. U S WEST agrees to continue to work with AT&T toward implementing a process to meet AT&T requirements for notification of switch failures as soon as possible.

6.3.8 U S WEST agrees to provide an Estimated Time To Repair (ETTR) on all residence and small business trouble reports.

6.3.9 U S WEST agrees to develop, with AT&T's cooperation, mutually acceptable workcenter interface agreements to document methods and procedures for interim and final interfaces for each service upon a request by AT&T.

6.3.9.1 After the initial deployment of the workcenter processes, U S WEST agrees to continue working with the AT&T to further develop, improve and refine the operational process described in this Agreement.

6.3.10 U S WEST agrees to provide AT&T repair history of previous trouble reports on customer service of open trouble report.

6.3.11 U S WEST shall provide AT&T the capability to cancel a trouble report.

6.3.12 U S WEST shall provide AT&T with the capability to modify a trouble report.

6.4 Standards

6.4.1 Maintenance charges for premises visits by U S WEST employees or contractors shall be billed by AT&T to its Customer.

6.4.1.1 U S WEST employees or contractors shall present the Customer with an AT&T provided, AT&T-branded form detailing the time spent, the materials used and an indication that the trouble has either been resolved, or that additional work will be necessary in accordance with the provisions of this Agreement.

6.4.1.2 If additional work is required, U S WEST employees or contractors shall call AT&T from Customer premises so that AT&T can schedule a new appointment with U S WEST and Customer at the same time.

6.4.2 U S WEST agrees to work with AT&T to support expeditious development of an industry standard trouble report entry format and agrees to implement such standard within sixty (60) days after final resolution by the Network Operation Forum (NOF).

6.5 Performance Measurements and Reporting

This subject to be addressed according to the procedures set forth in Section 52 of Part A of this Agreement.

7. Miscellaneous Services and Functions

This subject to be addressed according to the procedures set forth in Section 52 of Part A of this Agreement.

INTERFACE REQUIREMENTS FOR PRE-ORDERING, ORDERING, PROVISIONING, MAINTENANCE AND REPAIR, AND BILLING

1. Purpose

1.1 *This Attachment 6 sets forth the interface requirements for pre-ordering, ordering and provisioning, maintenance and repair, and billing, where AT&T provides service to its customers through its resale of U S WEST Local Services or through its use of Unbundled Network Elements or Combinations that AT&T combines.*

2. Use of Standards

2.1 *As described below, AT&T and U S WEST agree to implement each interface described below based upon existing and evolving industry standards or as mutually agreed upon. The Parties shall transition the electronic interfaces to industry standards within a timeframe mutually agreed to.*

3. Reimbursement

3.1 *Reimbursement for operational interfaces shall be as determined by the appropriate regulatory agency as set forth in this Interconnection Agreement.*

4. Scope

4.1 *This Attachment addresses the real-time transaction based protocols and transport networks that will be used to exchange information for:*

- *Preorder/Ordering/Provisioning for Service Resale (SR) and Customer Specific Unbundled Network Elements (UNEs)*
- *Maintenance/Repair for SR and UNEs*

It also addresses the batch protocols and transport networks that will be used to exchange information for:

- *Recorded Customer Usage for SR and UNE*
- *Wholesale Billing for SR and UNE*
- *Recorded Usage Receivables for UNE*
- *Local Account Maintenance for SR and UNE*
- *Directory Assistance Database*

The preceding list of information to be exchanged is intended to be exemplary and does not represent a comprehensive list of such information to be exchanged between the parties.

4.2 *AT&T and U S WEST will use at least one method of exchanging preorder information which will be real-time transaction based. AT&T and U S WEST may also assess and determine the arrangements and conditions to support Batch file transmittal for certain types of preorder information related to the Street Address Guide and Switch/Feature/Facility availability.*

5. System Interfaces

5.1 *For Pre-order, Order and Provisioning, an exchange protocol, such as that based upon a subset of Common Management Interface Protocol (CMIP) transactions referred to as*

Electronic Communications-Lite (EC-Lite), will be used to transport Electronic Data Interchange (EDI) formatted content. AT&T and U S WEST will use a TCP/IP based transport network for the exchange of EDI transactions. AT&T and U S WEST will translate ordering and provisioning requests from the Ordering and Billing Forum (OBF) forms into EDI transactions using mutually agreed to mappings. The Service Order SubCommittee (SOSC) of the Telecommunications Industry Forum/Electronic Data Interchange (TCIF/EDI) committee interpretations of the 850, 855, 860, 864, 865, 870, and 977 transactions, in accordance with the OBF forms, will be used to convey all the necessary data to connect, modify or disconnect local exchange services.

5.2 *For Maintenance and Repair, the CMIP transactions referred to as Electronic Bonding - Trouble Administration (EB-TA) will be used. AT&T and U S WEST will use an X.25 transport network which is the currently defined standard.*

5.3 *For Billing, AT&T and U S WEST will use EDI 811 and* OBF Billing Output Specification (BOS) *formats via CONNECT:Direct. Section 13 further defines the conditions when one or the other format will be used.*

5.4 *For Local Account Maintenance (LAM), AT&T and U S WEST agree to use CONNECT:Direct.*

5.5 *For Directory Assistance Database Information, AT&T and U S WEST agree to use a batch protocol and transport network that is yet to be determined and will be addressed in the Joint Implementation Agreement (JIA) described in Section 18 of this Attachment.*

5.6 *Modifications to OBF forms that are required due to the absence of, or existence of unnecessary data fields, contents, or formats will be addressed in the Joint Implementation Agreement described in Section 18 of this Attachment ("JIA").*

6. Real Time Performance

6.1 *The pre-order real time interface will support the AT&T customer contact as executed within AT&T's Sales and Service Centers. Gateway-to-gateway query-response cycle time performance requirements will be specified as part of the Joint Implementation Agreement described in Section 18 of this Attachment.*

6.2 *The transaction response time U S WEST provides to AT&T Sales and Service Center will be equal in quality with that which U S WEST provides to itself or other telecommunications carriers. For purposes of this Attachment, U S WEST agrees to provide AT&T benchmarking information for end-user performance based on transaction volumes (nominal - light volume, standard - typical volume, and worst case - heavy volume). AT&T may request an improvement in the transaction response time U S WEST provides to AT&T's Sales and Service Center above that which U S WEST provides to itself or other telecommunications carriers, through the Bona Fide Request Process, which is defined in Part A of this Agreement should cycle times not meet AT&T's business requirements.*

7. Compliance with Industry Standards

7.1 *AT&T and U S WEST agree to discuss the modification of these interfaces based upon evolving standards (e.g., data elements, protocols, transport networks, etc.) and guidelines issued by or referenced by relevant Alliance for Telecommunication Industry Solution (ATIS) committees. Upon request by either Party, establishment of new, or changes to industry standards and guidelines will be reviewed on no less than an annual basis. This review will consider standards and guidelines that have reached final closure as well as those published in final form. Both parties agree to evaluate evolving*

standards and mutually determine the relevant modification to be implemented based upon the latest approved version adopted or the latest version reflecting final closure by the relevant (ATIS) committee or subcommittee. The parties will use reasonable effort to reach closure upon the necessary changes within no more than three months of initiating each review and to implement the changes within nine months or earlier, if reasonably possible, unless there is mutual agreement to a different implementation schedule.

7.2 In the course of establishing operational ready system interfaces between U S WEST and AT&T to support Local Services delivery, AT&T and U S WEST may need to define and implement system interface specifications that are supplemental to existing standards. Where mutually agreed to, AT&T and U S WEST will submit such specifications to the appropriate standards committee and will work towards its acceptance as a standard.

8. Scheduled Availability

8.1 AT&T and U S WEST agree to an operational/production readiness as soon as possible with a target date of November 1, 1997 for the delivery of all systems interfaces described within this document, with the mutual understanding that (1) product delivery content is dependent on requirements definition and the time required to develop to these requirements and (2) operational readiness is dependent upon satisfactory test results for the transaction volumes projected by AT&T. AT&T and U S WEST agree to work to mutually identify, prioritize and track those functions which may need to be positioned in a subsequent systems interface delivery. These functions will be jointly reviewed to define the time frame for development of subsequent releases of the system interfaces and establish mutually agreeable delivery dates.

8.2 AT&T and U S WEST agree that project schedules, timelines, milestone deliverables, reporting processes, among others, will be specified in the Joint Implementation Agreement (Section 18). These schedules and deliverables will be reviewed and revised as needed as part of regularly scheduled meetings conducted throughout the development/implementation cycle.

9. Pre-Order

9.1 The Parties agree that the exchange of preordering information for resale services and for services provided using UNEs will be transmitted over the same interface.

9.2 AT&T and U S WEST will establish a transaction-based electronic communications interface based upon the most current (as of the Effective Date of this Interconnection Agreement) version of the Service Order Subcommittee (SOSC) implementation guideline for Electronic Data Interchange (EDI). An exchange protocol, such as Electronic Communications-Lite (EC-Lite) will be used to transport EDI formatted content necessary to perform inquiries including but not limited to: switch/feature/facility availability, address verification, telephone number assignment, appointment scheduling, and customer service record requests. Without limiting other restrictions which may apply, Customer service records are provided for the limited purpose of supporting the resale of U S WEST local exchange services by AT&T or the sale of unbundled elements on behalf of that Customer. The use of records in a manner not associated with the ordering process, is expressly forbidden, and is a violation of the terms of this Agreement.

10. Order and Provisioning

10.1 When AT&T is the customer of record for the resold local exchange service(s), the exchange of information relating to the ordering and provisioning of local exchange service will be based upon the American National Standards Institute (ANSI) Accredited Standards Committee (ASC) X12 Standards as documented by the SOSC of the

Telecommunications Industry Forum/Electronic Data Interchange (TCIF/EDI) committee. The Implementation Guidelines for Electronic Data Interchange EDI Guidelines Customer Services Issue 7 will be used as a baseline for implementation despite the fact that this document may not have reached final approval stage by the Effective Date of this Interconnection Agreement. An exchange protocol, such as EC-Lite will be used to transport EDI formatted content. The information exchange will be forms-based, using Local Service Request (LSR) Form, End User Information Form, and the Resale Service Form developed by the OBF as specified in the August 1996 version of the OBF forms in Bellcore SR STS-4710XX, and for Directory Listings, included with a local service request, as specified in SR STS-471102.

Issue 6-1 - Parked

[U S WEST proposes the following]

10.2 *The end-user specific UNE order will be based upon OBF LSR forms. The applicable SOSC implementation guidelines described previously also apply to the End-user Specific Provisioning UNE orders. U S WEST and AT&T agree that the information exchange will be forms-based using the Local Service Request Form, End User Information Form, Loop Service Form (which may ultimately be renamed the Loop Element form) and Port Form (which may ultimately be renamed the Switch Element Form) developed by the OBF. End-user-specific Network Elements,* [or Combinations thereof,] *to be supported in UNE orders shall be as permitted in this Agreement for unbundled Network Elements and subject to FCC and state regulatory requirements.*

10.3 *Subject to regulatory direction or mutual agreement relative to the requirement of providing combinations of UNE components, AT&T and U S WEST will establish a method to relate, track and process as a single entity the individual U S WEST provided End-user specific UNE components specified at the time of the initial order.*

10.4 *AT&T and U S WEST will use the same transaction based protocol, such as EC-Lite, and transport network specified for service resale for End-user specific UNE orders.*

10.5 *The ordering of common use (non-end user specific) UNEs, as may be permitted under this Agreement for unbundled elements and subject to FCC and state regulatory requirements, will be supported by a process separate from that described in the preceding paragraphs for end-user-specific UNEs, such system to be the same or similar to the mechanized process used for trunk service requests or another process or system as appropriate and determined by mutual agreement. Unless U S WEST is otherwise required by AT&T, this process will not employ the electronic interfaces specified in this Attachment, unless modified by separate agreement. U S WEST will support, if and to the extent required by law, this Interconnection Agreement or mutually agreed to, interconnection and operation of End-user specific UNEs used in combination with common use UNEs. The systems and ordering process as outlined herein is separate and apart from the Bona Fide Request Process agreed to by the parties. The Joint Implementation Agreement (Section 18 of this Attachment 6) will address the details related to defining a mechanism to correlate End-user-specific UNE orders placed via system interfaces with Common Use UNEs that may have been previously ordered.*

10.6 *U S WEST will accept an 860 transaction that contains the complete refresh of the previously provided order information (under the original 850 transaction) simultaneously with the delivery of supplemental (new/revised) information from AT&T, subject to mutually agreed upon business rules. This treatment with respect to the 850 transaction will be accepted by both parties until the SOSC explicitly clarifies the information exchanges associated with supplementing orders, or AT&T and U S WEST mutually agree to change the treatment.*

11. Maintenance and Repair

Issue 6-2 - Parked

[U S WEST proposes the following]

11.1 *The exchange of maintenance and repair information, for both U S WEST retail local exchange services to be resold by AT&T and for services AT&T provides using a U S WEST UNE* or U S WEST UNEs combined by AT&T, [or combinations of U S WEST UNEs], *will be transmitted over the same interface.*

11.2 *For the purpose of exchanging fault management information, AT&T and U S WEST will establish an electronic bonding interface, based upon ANSI standards T1.227-1995 and T1.228-1995, and Electronic Communication Implementation Committee (ECIC) Trouble Report Format Definition (TRFD) Number 1 as defined in ECIC document ECIC/TRA/95-003, and all standards referenced within those documents. The parties will use the functions currently implemented for reporting access circuit troubles. These functions include, but are not limited to: Enter Trouble, Request Trouble Report Status, Add Trouble Information, Modify Trouble Report Attributes, Trouble Report Attribute Value Change (AVC) Notification and Cancel Trouble Report, all of which are fully explained in ANSI T1.227/T1.228-1995. Additional functions not currently implemented by the parties or defined by the standards may be supported by mutual agreement (e.g. Test Access and Trouble History).*

11.3 *Modifications that are required due to the absence of, or existence of unnecessary data fields, contents, or formats will be addressed in the Joint Implementation Agreement (JIA) described in Section 18 of this Attachment.*

12. Recorded Customer Usage

12.1 *U S WEST will record the mutually agreed upon Customer usage data that AT&T requires for its retail local service Customers. The content of such data will be based upon a mutually agreeable interpretation of the BellCore Exchange Message Record (EMR) format to be documented within the JIA. U S WEST will provide electronic transmission of the recorded data using CONNECT:Direct daily on Monday through Friday on a schedule to be determined in the Joint Implementation Agreement (excluding holidays). This interface and format will be used to deliver recorded usage when AT&T is reselling retail local exchange services of U S WEST and when usage is associated with Customers served by AT&T through one or more UNEs provided by U S WEST. AT&T and U S WEST will mutually agree upon the conditions when customer usage data recording will be provided on behalf of AT&T.*

13. Billing Format for Service Resale (SR) and Unbundled Network Elements (UNE) Payables

13.1 *Billing information for unbundled loop and port elements that are flat rated will be provided in a single EDI 811 format across all U S WEST regions via Connect:Direct. Billing information for unbundled trunks/interoffice transport elements that are flat rated will be provided in a BOS format via Connect:Direct and will appear in the Customer Service Record of the facility bill. Billing information for SR products and services that are flat rated will be provided in a single EDI 811 format across all U S WEST regions via Connect:Direct. Exceptions include, but are not limited to, frame relay which will be provided in a BOS format via Connect:Direct. The display of rating codes and the associated charge will be mutually agreed upon in both formats. Charges associated with a specific loop will reflect the circuit ID format.*

13.2 *For usage-rated billing, U S WEST will issue bills to AT&T for SR/UNE in the formats described under the flat-rated SR/UNE billing section. Usage rated billing for SR/UNE will be uniquely identified and displayed in the Usage Sections of the bill. For products using BOS format, jurisdiction will be specified per BOS guidelines. Conversation time, by chargeable traffic type, will be displayed and billed per applicable tariffs. Delivery of usage rated SR/UNE bills will be provided as described under the flat-rated SR/UNE billing section.*

Issue 6-3 - Parked

[U S WEST proposes deleting the following] [AT&T opposes the deletion]

13.3 UNEs which U S WEST agrees to provide, under the terms and conditions of the Agreement, or to the extent required by law, that are recombined as a single service, will be grouped together by U S WEST and displayed together on the bill.

14. Recorded UNE Local or Access Usage Receivables

14.1 *U S WEST will record all agreed upon originating and terminating usage billed to and associated with a UNE provided by U S WEST to AT&T. The usage recorded will be in the same BellCore Exchange Message Record format discussed within Section 12 and will be subject to the same terms and conditions for modification and/or replacement of the format as discussed in Section IX.*

14.2 *AT&T and U S WEST will mutually agree upon the Local and Long Distance access customer usage data recording that U S WEST will provide to AT&T consistent with FCC and State regulatory guidelines and requirements, so that AT&T may bill other carriers for the local and exchange access usage charges to which AT&T is entitled, if any. AT&T and U S WEST will perform mutually agreeable systems testing, as documented in the Joint Implementation Agreement (Section 18), as soon as possible.*

14.3 *U S WEST will provide electronic transmission of the recorded usage using CONNECT:Direct daily on Monday through Friday on a schedule to be determined in the Joint Implementation Agreement (excluding holidays). The same or similar interface used for delivery of recorded customer usage, discussed in Section 12 of this Attachment 6, will be used for delivery of the recorded usage discussed in this section.*

15. Local Account Maintenance

15.1 *When acting as the switch provider for AT&T, where AT&T either is reselling retail services of U S WEST or employing UNEs to provide local service, U S WEST will notify AT&T whenever the local service Customer transfers service from AT&T to another local*

service provider. U S WEST will provide this notification via CONNECT:Direct using a mutually agreeable 4 digit Local Use Transaction Code Status Indicator (TCSI) that will be used to indicate that the retail customer is terminating local service with AT&T. This notice will be provided on the next processing day after implementing the transfer, where processing days are Monday through Friday (excluding holidays). The TCSI, sent by U S WEST, will be in the 960 byte industry standard CARE record format.

15.2 AT&T and U S WEST will process account changes that affect only the pre-subscribed intraLATA and/or interLATA toll provider (PIC) via a Change service order form using the same EC-Lite transaction based protocol and transport network employed for ordering resale service as specified in Section 10.

15.3 When appropriate regulatory guidelines exist, U S WEST will use the industry standard CARE message TCSI 3148 to reject an IXC initiated change of the Primary Interexchange Carrier (PIC), where U S WEST is the switch provider either for the retail local services of U S WEST that AT&T resells or UNEs of U S WEST that AT&T employs in providing service.

15.4 Agreement by U S WEST and AT&T to the Local Account Maintenance described above does not, in any way, set a precedence or remove any obligation for U S WEST and AT&T to work towards an industry solution for supporting customer movement between and among other ILECs and CLECs.

16. Directory Assistance Database

16.1 AT&T and U S WEST will use a batch protocol and transport network to exchange Directory Assistance Database information similar to existing U S WEST listings products (i.e., DA EUSL, DA EUSL Updates). The specific protocol and transport network to be used has not been determined or mutually agreed to and will be specified in the JIA.

16.2 Without limiting other restrictions which may apply, directory service listing products are provided for the limited purpose of supporting provision of services as outlined in this Interconnection Agreement. The use of listings in a manner not associated with this use, is expressly forbidden, and is a violation of the terms of this Agreement.

17. Testing and Acceptance

17.1 The Parties will test the interfaces developed under this Attachment. The intent of the end-to-end integrity testing is to establish, through the submission and processing of test cases, that transactions agreed to by AT&T and U S WEST will successfully process, in a timely and accurate manner, through both parties' supporting OSS as well as the interfaces. Irreconcilable differences regarding the interpretation of operational status of the interfaces will be handled through the Dispute Resolution Process as defined in Section 27 of Part A of this approved by the Commission.

17.2 An interoperability testing suite shall ensure the implementation of functions, capabilities, and acceptance criteria enumerated in the JIA, with both parties agreeing to resolve any material defects in the software.

17.3 The test process shall include a series of tests in which the transactions, representative of the predominant business transactions associated with local customer servicing, are performed side-by-side using the mediated access gateway interface to U S WEST Legacy systems and the Legacy system interface utilized by U S WEST service representatives and repair attendants. The purpose of this series of tests will be to verify that the performance and response times visible to a user of the mediated access

gateway for nominal and worst case scenarios with the same level of quality in accordance with the Act.

17.4 U S WEST does not warrant that its systems and access to those systems will be error-free.

17.5 Products and services already billed via the Integrated Access Billing System (IABS) will be included in the existing pre-bill certification process for general availability and a re-certification process conducted in accordance with current practices. For products and services billed outside of IABS, the parties will work towards establishing a mutually agreed upon pre-bill certification process.

17.6 AT&T and U S WEST agree that metrics are required in order to monitor the performance and assure the on-going delivery of non-discriminatory access to U S WEST systems for pre-order/ordering/provisioning, maintenance/repair, billing, and directory assistance databases. A performance measurement plan that addresses the definition, measurement, and review of quality, timeliness, accuracy and availability of each interface and associated transactions or files will be jointly developed and documented within the JIA for each interface.

17.7 AT&T and U S WEST agree to periodic status meetings to review the overall progress toward introducing fully operational interfaces capabilities as soon as possible, with a target date of November 1, 1997.

17.8 Results of testing shall be considered Confidential Information, except that such results may be provided pursuant to this Agreement and law.

18. Joint Implementation Agreement Development

18.1 AT&T and U S WEST recognize that the preceding provisions are not sufficient to resolve all, technical and operational details related to the interfaces described. Therefore, AT&T and U S WEST agree to document the additional, technical and operational details in the form of a Joint Implementation Agreement (JIA). The purpose of the JIA is to establish the working details of the systems interfaces between the two parties, and as such, they will not be submitted to the Commission for approval as amendments to this Agreement. These JIA may be modified, by mutual agreement, over the life of the Interconnection Agreement without subjecting the balance of this Agreement to renegotiation or modification.

18.2 Both parties further agree that any technical, operational or implementation issues directly associated with the systems interfaces, once identified at the working team level, may be escalated by the initiative of either party thirty (30) days after an issue is identified. The escalation will proceed first to the senior management of both companies who will seek to resolve the issue. Within fourteen (14) days of acceptance of this Agreement, AT&T and U S WEST will document the agreed upon escalation process including the names and contact information of responsible senior management. If an issue is not resolved within thirty (30) days following receipt of the issue by senior management, either party may submit the issue to the Alternative Dispute resolution process contained in Section 22 of Part A of this Agreement.

18.3 Upon request by either Party, AT&T and U S WEST will document an overall project implementation schedule. This schedule will be mutually binding and can be modified by mutual consent.

18.4 In addition, AT&T and U S WEST agree to document both a topical outline for the JIA, and establish a schedule for identifying, discussing, resolving and documenting resolution

of issues related to each aspect of the JIA topical outline for each interface discussed in this document. In no case will either end to end integrity testing or load testing begin without both parties mutually agreeing that each interface JIA documents the intended operation of the interface scheduled for testing. In the event the parties can not agree prior to one hundred and twenty (120) days of the operational/production readiness date for delivery of all system interfaces described within this Attachment, disputes over the sufficiency of documentation will be submitted to arbitration pursuant to the Alternative Dispute Resolution process contained in Section 27 of Part A of this Agreement.

18.5 *By mutual agreement, specific paragraphs or entire sections of this Agreement may be identified and documented to serve the purpose described for the Joint Implementation Agreement for specific interfaces. Any issues identified and subsequently resolved through either the end-to-end integrity or load testing processes will be incorporated into the impacted interface section of the JIA within thirty (30) days of issue resolution.*

18.6 *An illustrative outline for a JIA follows:*

- *Introduction*
- *Purpose of Joint Implementation Agreement*
- *Terms of Agreement*
- *"System" Interface*
  - *Business Process and Data Requirements*
  - *Overall Responsibilities*
  - *Identification & Definitions of Activities*
  - *Information To Be Provided Per Transaction*
  - *Process Information for Each Activity & Transaction*
- *Delivery Criteria*
  - *Data Standard*
  - *Message Protocol*
  - *Transmission Protocol*
  - *Destination*
  - *Frequency Of Data*
  - *Deviations to Generic Specification*
  - *Error Processing*
  - *Process for Notification of Late Transmittals*
  - *Escalation & Expedite Procedures*
  - *Transaction Response Times*
  - *File Format Specifications*
  - *Rules for the Physical Interface*
  - *File Structure*
  - *Data Format*
  - *Error Controls*
  - *Physical Tape Specifications*
  - *Site Information*
  - *Contact Person*
  - *Transmission Hours*
- *Testing*
  - *Cooperative Testing*
  - *Pairwise Testing*
  - *ETE Testing*
  - *Test Order ETE (Employees)*
  - *Future Testing Requirements*
- *Interface Metrics*

- *Data Timeliness*
- *Data Completeness*
- *Data Accuracy*

- *Contact Information*
  - *Contacts/Escalation Contacts*
  - *Schedules for Center Operations (days/hours of Operation)*
- *Data Requirements*
  - *Retention of Data*
  - *Back-up and Recovery Procedures*
  - *Disaster Recovery*
  - *System Change Notification*
  - *Guarding of Proprietary Data*
- *Reporting Information*
  - *Reports to be Generated*
  - *Frequency*
  - *Data Requirements*
  - *Transmission*
- *Change Control Process*
- *Issue Resolution Process*
- *Termination of interface Notification*

IMPLEMENTATION SCHEDULE

1. Local Service Resale

1.1 *Within ninety (90) days, after a request by AT&T, U S WEST shall provide for resale all services designated in this Agreement. Once service is initiated in an area, the ordering and provisioning intervals will be as specified in this Agreement and/or adopted by the Commission.*

2. Unbundled Network Platform (All Network Elements in Combination)

Issue 7-1 - Parked

[U S WEST proposes the following]

2.1 *Within one hundred and twenty (120) days after a request by AT&T, U S WEST shall offer all services* and *Network Elements* [and any Combinations thereof] *designated in this Agreement. Once service is initiated in an area, the ordering and provisioning intervals will be as specified in this Agreement and/or adopted by the Commission.*

3. Interconnection Trunking for Local Service

3.1 *Within thirty (30) days of the Effective Date of this Agreement or such other time period as the Parties may mutually agree, the AT&T shall provide U S WEST with its initial forecast of the quantity of interconnection trunks it requires, by location and type. The forecast shall address AT&T's requirements as set forth in the trunk forecasting provisions of Attachment 4. U S WEST shall cooperate with AT&T in the development of its forecast, as required.*

3.2 *Upon completion of the forecast, U S WEST and AT&T shall meet to review the forecast, and to determine the availability of trunks and interoffice facilities necessary to accommodate AT&T's forecast. Where the facilities are in place, U S WEST shall provide the initial installation of Interconnection trunk groups upon request by AT&T. In the event that facilities are not available, U S WEST shall so advise AT&T within five (5) Business Days, and jointly plan and develop an implementation schedule within the next thirty (30) day period. Subsequent to the thirty (30) days, Interconnection trunk orders shall be processed as specified in this Agreement and/or adopted by the Commission. .*

4. Ancillary Trunking

4.1 *Within ninety (90) days after* a request by AT&T, *U S WEST shall provide:*

- 4.1.1 *E-911 Trunking in cooperation with AT&T;*
- 4.1.2 *SS7 Interconnection and Certification in cooperation with AT&T; and*
- 4.1.3 *Directory Listings Arrangements and Directory Assistance Interconnection.*

5. Unbundled Loops

5.1 *Within sixty (60) days after Collocation has been provided pursuant to the terms of the Agreement, U S WEST shall provide unbundled loops at designated end offices. Subsequent unbundled loops should be made available pursuant to ordering intervals as specified in this Agreement and/or adopted by the Commission.*

6. Collocation

6.1 Collocation will be provided upon request pursuant to the terms and conditions of this Agreement.

7. Access To Poles, Ducts and Rights of Way

7.1 Access to Poles, Ducts and Rights of Way shall be provided upon request, pursuant to the terms and conditions of this Agreement.

8. Interim Number Portability

8.1 Interim Number Portability capabilities, as specified in this Agreement, shall be made available in specified locations, upon request by AT&T, and within appropriate service order windows thereafter. Interim Number Portability shall be capable of being ordered electronically as of the Effective Date of this Agreement.

9. Operational Support System

Issue 7-2 - Parked

[U S WEST proposes the following]

9.1 Operational Support Systems shall be available for preordering, ordering, provisioning, maintenance, repair and billing under the following target schedule:

9.1.1 Service Resale for POTS and Multiline Hunt Group up to 12 lines by 1/1/98
9.1.2 Complex Business services by 2/28/99
9.1.3 Interim Number Portability by 9/30/98
9.1.4 [Intentionally left blank for numbering consistency]
9.1.5 Other elements within the Agreement by 2/28/99 or as agreed to by the Parties.

AT&T proposes the following.

9.1 Operational Support Systems shall be available for preordering, ordering, provisioning, maintenance, repair and billing under the following target schedule:

9.1.1 Service Resale for POTS and Multiline Hunt Group up to 12 lines by ; 1/1/98
9.1.2 Complex Business services by ;2/28/99
9.1.3 Interim Number Portability by ;9/30/98
9.1.4 Unbundled Network Platform by ;2/28/99
9.1.5 Other elements within the Agreement by 2/28/99 or as agreed to by the Parties.

JOINT STATEMENT OF DISPUTED ISSUES
AT&T/U S WEST Interconnection Agreement for SOUTH DAKOTA

Issue	Provision	Subject	Action
	Part A - General Terms and Conditions		
A-1	§ Recitals, last ¶	Combinations	Parked
A-2	§ Definitions: Itself (see § 52.3.3)	Definition of Itself	Open
			Closed
A-3a	§ 5.1 - 5.3	Intellectual Property	Open. Previously briefed, awaiting Commission decision
			Closed
A-3b	§ 18.2	Indemnity/Intellectual Property	Open. Previously briefed, awaiting Commission decision
			Closed
			Closed
A-4	§ 40.1.11	Spot Frame	Parked
			Closed
			Closed
			Closed
			Closed
Part of A-2	§ 52.3.3	Service Standards - Non-discriminatory Standard	Open
			Closed
			Closed
	Attachment 1: Rates and Charges		
		Appendix A	Note: Need to verify rates with Order.
1-1	§ 2.11	Resale Discount	Parked
1-2	Appendix A	Spot Frame Rates	Parked
			Closed
			Closed
	Attachment 2: Resale		
			Closed
	Attachment 3: Unbundled Access/Elements		
3-1	§ 1.5.2	Combinations	Parked
			Closed
3-2	§ 2.4	Demarcation Point	Parked
			Closed

3-3	§ 5	Shared Transport	Parked
			Closed
			Closed
			Closed
			Closed
3-4 a	§ 7.2.7	SPOT Frame	Parked
			Closed
3-5	§ 10.1.1	Local Switching/SPOT Frame	Parked
3-6	§ 18.1.1	Cooperative Testing Definition	Parked
3-7	§ 18.1.2.1	Cooperative Testing/Combinations	Parked
			Closed
3-8	§ 19.1 - 19.6	SPOT Frame	Parked
	Attachment 4: Interconnection		
			Closed
			Closed
			Closed
			Closed
			Closed
			Closed
	Attachment 5 - Business Process Requirements		
			Closed
5-1	§ 3.2.2.6	Combinations	Parked
			Closed
5-2	§ 3.2.6.1	Firm Order Confirmation	Parked
5-3	§ 3.2.15.1	Combinations	Parked
5-4	§ 3.2.15.3 - 3.2.15.4	Combinations	Parked
5-5	§ 3.2.17.1	Combinations	Parked
5-6	§ 3.2.17.2	Combinations	Parked
5-7	§ 3.2.17.4	Combinations	Parked
			Closed
5-8	§ 3.4.1.1	Ordering/Provisioning Codes	Parked - Combinations
5-9	§ 4.1.23.11	Combinations	Parked
			Closed
			Closed
5-10	§ 6.2.1	Combinations	Parked
5-11	§ 6.2.5	Combinations	Parked
5-12	§ 6.2.8	Combinations	Parked
5-13	§ 6.2.10	Restoration Status/Combinations	Parked - Combinations
			Closed
			Closed

	Attachment 6 - Interface Requirement for Pre-Ordering, Ordering, Provisioning, Maintenance and Repair, and Billing		
6-1	§ 10.2	Combinations	Parked
6-2	§ 11.1	Combinations	Parked
6-3	§ 13.3	Combinations	Parked
	Attachment 7: Implementation Schedule		
7-1	§ 2.1	Combinations	Parked
7-2	§ 9.1	OSS Timeframes	Parked

EXHIBIT B

AT & T CORPORATION, et al., petitioners,
v.
IOWA UTILITIES BOARD, et al.
AT & T Corporation, et al., petitioners,
v.
California, et al.
MCI Telecommunications Corporation, petitioner,
v.
Iowa Utilities Board, et al.
MCI Telecommunications Corporation, petitioner,
v.
California, et al.
Association For Local Telecommunications Services, et al., petitioners,
v.
Iowa Utilities Board, et al.
Federal Communications Commission and United States, petitioners,
v.
Iowa Utilities Board, et al.
Federal Communications Commission and United States, petitioners,
v.
California, et al.
Ameritech Corporation, et al., petitioners,
v.
Federal Communications Commission, et al.
GTE Midwest, Incorporated, petitioner,
v.
Federal Communications Commission, et al.
US West, Inc., petitioner,
v.
Federal Communications Commission, et al.
Southern New England Telephone Company, et al., petitioners,
v.
Federal Communications Commission, et al.

Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141

Supreme Court of the United States

Argued October 13, 1998

Decided January 25, 1999 [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Syllabus [FN*]

FN*. Together with AT & T Corp. et al. v. California et al. (see this Court's Rule 12.4), No. 97-829, MCI Telecommunications Corp. v. Iowa Utilities Board et al., MCI Telecommunications Corp. v. California et al. (see this Court's Rule 12.4), No. 97-830, Association for Local Telecommunications Services et al. v. Iowa Utilities Board et al., No. 97-831, Federal Communications Commission et al. v. Iowa Utilities Board et al., Federal Communications Commission et al. v. California et al. (see this Court's Rule 12.4), No. 97-1075, Ameritech Corp. et al. v. Federal Communications Commission et al., No. 97-1087, GTE Midwest Inc. v. Federal Communications Commission et al., No. 97-1099, U S West, Inc. v. Federal Communications Commission et al., and No. 97-1141, Southern New England Telephone Co. et al. v. Federal Communications Commission et al., also on certiorari to the same court.

*1 The Telecommunications Act of 1996 (1996 Act) fundamentally restructures local telephone markets, ending the monopolies that States historically granted to local exchange carriers (LECs) and subjecting incumbent LECs to a host of duties intended to facilitate market entry, including the obligations under 47 U.S.C. § 251(c) to share their networks with competitors. A requesting carrier can obtain such shared access by purchasing local telephone services at wholesale rates for resale to end-users, by leasing elements of the incumbent's network "on an unbundled basis," and by interconnecting its own facilities with the incumbent's network. After the FCC issued regulations implementing the 1996 Act's local-competition provisions, incumbent LECs and state commissions filed numerous challenges, which were consolidated in the Eighth Circuit. Among other things, that court held that the FCC lacked jurisdiction to promulgate its rules regarding pricing, nesting, parity, exemptions for rural LECs, the proper procedure for resolving local-competition disputes, and state review of pre-1996 interconnection agreements; that, in specifying the network elements available to requesting carriers under Rule 319, the FCC reasonably implemented the Act's requirement that it consider whether access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service, see § 251(d)(2); that, in Rule 319, the FCC reasonably interpreted the statutory definition of "network element," see § 153(29); that the "all elements" rule, which effectively allows competitors to provide local phone service relying solely on the elements in an incumbent's network, is consistent with the 1996 Act; that Rule

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315(b), which forbids incumbents to separate already-combined network elements before leasing them to competitors, must be vacated because it requires access to those elements on a bundled rather than an unbundled, i.e., physically separated, basis; and that the FCC's "pick and choose" rule, which enables a carrier to demand access to any individual interconnection, service, or network element arrangement on the same terms and conditions the LEC has given anyone else in an approved § 252 agreement without having to accept the agreement's other provisions, must be vacated because it would deter the "voluntarily negotiated agreements" that the 1996 Act favors.

Held:

1. The FCC has general jurisdiction to implement the 1996 Act's local- competition provisions. Since Congress expressly directed that the Act be inserted into the Communications Act of 1934, and since the 1934 Act already provides that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," 47 U.S.C. § 201(b), the FCC's rulemaking authority extends to implementation of §§ 251 and 252. Section 152(b) of the Communications Act, which provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to ... intrastate communications service ... " does not change this conclusion because the 1996 Act clearly applies to intrastate matters. The Eighth Circuit erred in reaching respondents' challenge to the FCC's claim that § 208 gives it authority to review agreements approved by state commissions under the local-competition provisions, because that claim is not ripe. See Toilet Goods Assoc. v. Gardner, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697. Pp. 9-19.

*2 2. The FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the 1996 Act. Pp. 19-28.

(a) Given the breadth of § 153(29)'s "network element" definition—i.e., "features, functions, and capabilities ... provided by means of" a facility or equipment used in the provision of a telecommunications service—it is impossible to credit the incumbents' argument that a "network element" must be part of the physical facilities and equipment used to provide local phone service. It was therefore proper for Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided to competitors. Pp. 19-20.

(b) However, since the FCC did not adequately consider the § 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements, Rule 319 is vacated. The rule implicitly regards the "necessary" standard as having been met regardless of whether carriers can obtain requested proprietary elements from a source other than the incumbent, and regards the "impairment" standard as having been met if an incumbent's failure to provide access to a network element would decrease the quality, or increase the cost, of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network. The FCC cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. In addition, the FCC's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of these terms. Section 251(d)(2) requires the FCC to determine on a national basis which network elements must be made available, taking into account the 1996 Act's objectives and giving some substance to the "necessary" and "impair" requirements. Pp. 20-25.

(c) The FCC reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in § 251(c)(3) that incumbents provide access to "any" requesting carrier. P. 25.

(d) Rule 315(b), which forbids incumbents to separate already-combined network elements before leasing them to competitors, reasonably interprets § 251(c)(3), which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements. That section forbids incumbents to sabotage elements that are provided in discrete pieces, but it does not say, or even remotely imply, that elements must be provided in that fashion. Pp. 25-28.

*3 3. Because the "pick and choose" rule tracks the

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pertinent language in § 252(i) almost exactly, it is not only a reasonable interpretation of that section, it is the most readily apparent. Pp. 28-30.

Nos. 97-826 (first judgment), 97-829 (first judgment), 97-830, 97-831 (first judgment), 97-1075, 97-1087, 97-1099, and 97-1141, 120 F.3d 753, reversed in part, affirmed in part, and remanded; Nos. 97-826, 97-829, and 97-831 (second judgments), 124 F.3d 934, reversed in part and remanded.

SCALIA, J., delivered the opinion of the Court, Parts I, III-A, III-C, III-D, and IV of which were joined by REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., Part II of which was joined by STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., and Part III-B of which was joined by REHNQUIST, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ. SOUTER, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and BREYER, J., joined. BREYER, J., filed an opinion concurring in part and dissenting in part. O'CONNOR, J., took no part in the consideration or decision of these cases.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

For U.S. Supreme Court Briefs See:

1998 WL 267886 (Resp.Brief)

1998 WL 396941 (Pet.Brief)

1998 WL 396961 (Reply.Brief)

1998 WL 396977 (Reply.Brief)

1998 WL 401620 (Reply.Brief)

1998 WL 401622 (Reply.Brief)

1998 WL 404278 (Resp.Brief)

1998 WL 404296 (Resp.Brief)

1998 WL 404300 (Resp.Brief)

1998 WL 404302 (Reply.Brief)

1998 WL 703460 (Amicus.Brief)

For Transcript of Oral Argument See:

1998 WL 729541 (U.S.Oral.Arg.)

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we address whether the Federal Communications Commission has authority to implement certain pricing and nonpricing provisions of the Telecommunications Act of 1996, as well as whether the Commission's rules governing unbundled access and "pick and choose" negotiation are consistent with the statute.

I

Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loop (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances, however, have made competition among multiple providers of local service seem possible, and Congress recently ended the long-standing regime of state-sanctioned monopolies.

The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56, (1996 Act or Act) fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) (1994 ed., Supp. II) to share its network with competitors. Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect its own facilities with the incumbent's network. [FN1] When an entrant seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) [FN2] or (c). See § 252(a)(1). But if private negotiation fails, either party can petition the state commission that regulates local

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phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder.

FN1. 47 U.S.C. § 251(c) (1994 ed., Supp. II) provides as follows:
"Additional Obligations of Incumbent Local Exchange Carriers.
"In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:
"(1) Duty to Negotiate
"The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section, and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.
"(2) Interconnection
"The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--
"(A) for the transmission and routing of telephone exchange service and exchange access;
"(B) at any technically feasible point within the carrier's network;
"(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
"(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.
"(3) Unbundled Access
"The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.
"(4) Resale
"The duty--
"(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
"(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.
"(5) Notice of Changes
"The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.
"(6) Collocation
"The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

FN2. Section 251(b) imposes the following duties on incumbents:
"(1) Resale
"The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.
"(2) Number Portability
"The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.
"(3) Dialing Parity
"The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.
"(4) Access to Rights-of-Way "The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.
"(5) Reciprocal Compensation
"The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

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*4 Six months after the 1996 Act was passed, the FCC issued its First Report and Order implementing the local-competition provisions. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (First Report & Order). The numerous challenges to this rulemaking, filed across the country by incumbent LECs and state utility commissions, were consolidated in the United States Court of Appeals for the Eighth Circuit.

The basic attack was jurisdictional. The LECs and state commissions insisted that primary authority to implement the local-competition provisions belonged to the States rather than to the FCC. They thus argued that many of the local- competition rules were invalid, most notably the one requiring that prices for interconnection and unbundled access be based on "Total Element Long Run Incremental Cost" (TELRIC)—a forward-looking rather than historic measure. [FN3] See 47 CFR § § 51.503, 51.505 (1997). The Court of Appeals agreed, and vacated the pricing rules, and several other aspects of the Order, on reaching beyond the Commission's jurisdiction. Iowa Utilities Board v. FCC, 120 F.3d 753, 800, 804, 805-806 (1997). It held that the general rulemaking authority conferred upon the Commission by the Communications Act of 1934 extended only to interstate matters, and that the Commission therefore needed specific congressional authorization before implementing provisions of the 1996 Act addressing intrastate telecommunications. Id., at 795. It found no such authorization for the Commission's rules regarding pricing, dialing parity, [FN4] exemptions for rural LECs, the proper procedure for resolving local- competition disputes, and state review of pre-1996 interconnection agreements. Id., at 795-796, 802-806. Indeed, with respect to some of those matters, the Eighth Circuit said that the 1996 Act had affirmatively given exclusive authority to the state commissions. Id., at 795, 802, 805.

FN3. TELRIC pricing is based upon the cost of operating a hypothetical network built with the most efficient technology available. Incumbents argued below that this method was unreasonable because it ignored their historic costs and underestimated the actual costs of providing interconnection and unbundled access. The Eighth Circuit did not reach this issue, and the merits of TELRIC are not before us.

FN4. Dialing parity, which seeks to ensure that a new entrant's customers can make calls without having to dial an access code, was addressed in the Commission's Second Report and Order. See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 19392 (1996). In a separate opinion that is also before us today, the Eighth Circuit vacated this rule insofar as it went beyond the FCC's jurisdiction over interstate calls. People of California v. FCC, 124 F.3d 934, 943 (1997).

The Court of Appeals found support for its holdings in 47 U.S.C. § 152(b) (§ 2(b) of the Communications Act of 1934), which, it said, creates a presumption in favor of preserving state authority over intrastate communications. 120 F.3d, at 795. It found nothing in the 1996 Act clear enough to overcome this presumption, which it described as a fence that is "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." Id., at 800.

Incumbent LECs also made several challenges, only some of which are relevant here, to the rules implementing the 1996 Act's requirement of unbundled access. See 47 U.S.C. § 251(c)(3) (1994 ed., Supp. II). Rule 319, the primary unbundling rule, sets forth a minimum number of network elements that incumbents must make available to requesting carriers. See 47 CFR § 51.319 (1997). The LECs complained that, in compiling this list, the FCC had virtually ignored the 1996 Act's requirement that it consider whether access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service. See § 251(d)(2). In addition, the LECs thought that the list included items (like directory assistance and caller I.D.) that did not meet the statutory definition of "network elements." See § 153(29). The Eighth Circuit rebuffed both arguments, holding that the Commission's interpretations of the "necessary and impair" standard and the definition of "network element" were reasonable and hence lawful under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See 120 F.3d, at 809-810.

*5 When it promulgated its unbundling rules, the Commission explicitly declined to impose a requirement of facility ownership on carriers who sought to lease network elements. First Report & Order & para; & para;328-340. Because the list of elements that Rule 319 made available was so extensive, the effect of this omission was to allow competitors to provide local phone service relying

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solely on the elements in an incumbent's network. The LECs argued that this "all elements" rule undermined the 1996 Act's goal of encouraging entrants to develop their own facilities. The Court of Appeals, however, deferred to the FCC's approach. Nothing in the 1996 Act itself imposed a requirement of facility ownership, and the court was of the view that the language of § 251(c)(3) indicated that "a requesting carrier may achieve the capability to provide telecommunications service completely through access to the unbundled elements of an incumbent LEC's network." 120 F.3d, at 814.

Given the sweep of the "all elements" rule, however, the Eighth Circuit thought that the FCC went too far in its Rule 315(b), which forbids incumbents to separate network elements before leasing them to competitors. 47 CFR § 51.315(b) (1997). Taken together, the two rules allowed requesting carriers to lease the incumbent's entire, preassembled network. The Court of Appeals believed that this would render the resale provision of the statute a dead letter, because by leasing the entire network rather than purchasing and reselling service offerings, entrants could obtain the same product—finished service—at a cost-based, rather than wholesale, rate. 120 F.3d, at 813. Apparently reasoning that the word "unbundled" in § 251(c)(3) meant "physically separated," the court vacated Rule 315(b) for requiring access to the incumbent LEC's network elements "on a bundled rather than an unbundled basis." Ibid.

Finally, incumbent LECs objected to the Commission's "pick and choose" rule, which governs the terms of agreements between LECs and competing carriers. Under this rule, a carrier may demand that the LEC make available to it "any individual interconnection, service, or network element arrangement" on the same terms and conditions the LEC has given anyone else in an agreement approved under § 252—without its having to accept the other provisions of the agreement. 47 CFR § 51.809 (1997); First Report & Order & para; & para; 1309-1310. The Court of Appeals vacated the rule, reasoning that it would deter the "voluntarily negotiated agreements" that the 1996 Act favored, by making incumbent LECs reluctant to grant quids for quos, so to speak, for fear that they would have to grant others the same quids without receiving quos. 120 F.3d, at 801.

The Commission, MCI, and AT & T petitioned for review of the Eighth Circuit's holdings regarding jurisdiction, Rule 315(b), and the "pick and choose" rule; the incumbent LECs cross-petitioned for review of the Eighth Circuit's treatment of the other unbundling issues. We granted all the petitions. 521 U.S. — (1998).

II

*6 Section 201(b), a 1938 amendment to the Communications Act of 1934, provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 52 Stat. 588, 47 U.S.C. § 201(b). Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, 1996 Act, § 1(b), 110 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local- competition provisions. [FN5]

FN5. JUSTICE BREYER says, post, at 10, that "Congress enacted [the] language [of § 201(b)] in 1938," and that whether it confers "general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates." That is assuredly true. But we think that what the later statute contemplates is best determined, not by speculating about what the 1996 Act (and presumably every other amendment to the Communications Act since 1938) "foresaw," ibid., but by the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." JUSTICE BREYER cannot plausibly assert that the 1996 Congress was unaware of the general grant of rulemaking authority contained within the Communications Act, since § 251(i) specifically provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

Respondents argue, however, that § 201(b) rulemaking authority is limited to those provisions dealing with purely interstate and foreign matters, because the first sentence of § 201(a) makes it "the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ." It is impossible to understand how this use of the qualifier "interstate or foreign" in § 201(a), which limits the class of common carriers with the duty of providing communication service, reaches forward into the last sentence of § 201(b) to limit the class of provisions that the Commission has authority

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to implement. We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include § § 251 and 252, added by the Telecommunications Act of 1996. [FN6]

FN6. JUSTICE BREYER appeals to our cases which say that there is a " 'presumption against the pre-emption of state police power regulations,' " post, at 10, quoting from Capellone v. Liggett Group, Inc., 505 U.S. 504, 518, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), and that there must be " 'clear and manifest' showing of congressional intent to supplant traditional state police powers," post, at 10, quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). But the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new federal regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

The appeals by both JUSTICE THOMAS and JUSTICE BREYER to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts—but it is hard to spark a passionate "States' rights" debate over that detail.

Our view is unaffected by 47 U.S.C. § 152(b) (§ 2(b) of the 1934 enactment), which reads:

"Except as provided in sections 223 through 227 ..., inclusive, and section 332 ..., and subject to the provisions of section 301 of this title ..., nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service ... ."

The local-competition provisions are not identified in § 152(b)'s "except" clause. Seizing on this omission, respondents argue that the 1996 Act does nothing to displace the presumption that the States retain their traditional authority over local phone service.

Respondents' argument on this point is (necessarily) an extremely subtle one. They do not contend that the "nothing ... shall be construed" provision prevents all "appl[ication]" of the Communications Act, as amended in 1996, to intrastate service, or even precludes all "Commission jurisdiction with respect to" such service. Such an interpretation would utterly nullify the 1996 amendments, which clearly "apply" to intrastate service, and clearly confer "Commission jurisdiction" over some matters. Respondents argue, therefore, that the effect of the "nothing ... shall be construed" provision is to require an explicit "appl[ication]" to intrastate service, and in addition an explicit conferral of "Commission jurisdiction" over intrastate service, before Commission jurisdiction can be found to exist. Such explicit "appl[ication]," they acknowledge, was effected by the 1996 amendments, but "Commission jurisdiction" was explicitly conferred only as to a few matters.

*7 The fallacy in this reasoning is that it ignores the fact that § 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies. Respondents argue that avoiding this pari passu expansion of Commission jurisdiction with expansion of the substantive scope of the Act was the reason the "nothing shall be construed" provision was framed in the alternative: "nothing in this Act shall be construed to apply or to give the Commission jurisdiction " (emphasis added) with respect to the forbidden subjects. The italicized portion would have no operative effect, they assert, if every "application" of the Act automatically entailed Commission jurisdiction. The argument is an imaginative one, but ultimately fails. For even though "Commission jurisdiction" always follows where the Act "applies," Commission jurisdiction (so-called "ancillary" jurisdiction) could exist even where the Act does not "apply." The term "apply" limits the substantive reach of the statute (and the concomitant scope of primary FCC jurisdiction), and the phrase "or give the Commission jurisdiction" limits, in addition, the FCC's ancillary jurisdiction.

The need for both limitations is exemplified by Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), where the FCC claimed authority to issue rules governing depreciation methods applied by local telephone companies. [FN7] The Commission supported its claim with two arguments. First, that it could regulate intrastate because Congress had intended the

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depreciation provisions of the Communications Act to bind state commissions—i.e., that the depreciation provisions "applied" to intrastate ratemaking. Id., at 376-377. We observed that "[w]hile it is, no doubt, possible to find some support in the broad language of the section for respondents' position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b) ... " Id., at 377. But the Commission also argued that, even if the statute's depreciation provisions did not apply intrastate, regulation of state depreciation methods would enable it to effectuate the federal policy of encouraging competition in interstate telecommunications. Id., at 369. We rejected that argument because, even though the FCC's broad regulatory authority normally would have been enough to justify its regulation of intrastate depreciation methods that affected interstate commerce, see id., at 370; cf. Shreveport Rate Cases, 234 U.S. 342, 358, 34 S.Ct. 833, 58 L.Ed. 1341 (1914), § 152(b) prevented the Commission from taking intrastate action solely because it furthered an interstate goal. 476 U.S., at 374. [FN8]

FN7. We discuss the Louisiana case because of the light it sheds upon the meaning of § 152(b). We of course do not agree with JUSTICE BREYER's contention, post, at 11, that the case "raised a question almost identical to the one before us." That case involved the Commission's attempt to regulate services over which it had not explicitly been given rulemaking authority; this one involves its attempt to regulate services over which it has explicitly been given rulemaking authority.

FN8. Because this reasoning clearly gives separate meanings to the provisions "apply" and "give the Commission jurisdiction," we do not understand why JUSTICE THOMAS asserts, post, at 9-10, that we have not given effect to every word that Congress used. Nor do we agree with JUSTICE THOMAS that our interpretation renders § 152(b) a nullity. See post, at 9. After the 1996 Act, § 152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.
JUSTICE THOMAS admits, as he must, that the Commission has authority to implement at least some portions of the 1996 Act. See post, at 7. But his interpretation of § 152(b) confers such inflexibility upon that provision that he must strain to explain where the Commission gets this authority. A number of the provisions he relies on plainly read, not like conferrals of authority, but like references to the exercise of authority conferred elsewhere (we think, of course, in § 201(b)). See, e.g., § 251(b)(2) (assigning State commissions "[t]he duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."); § 251(d)(2) (setting forth factors for the Commission to consider "[i]n determining what network elements should be made available for purposes of subsection (c)(3)"); § 251(g) (requiring that any pre-existing "regulation, order, or policy of the Commission" governing exchange access and interconnection agreements remain in effect until it is "explicitly superseded by regulations prescribed by the Commission"). Moreover, his interpretation produces a most chopped-up statute, conferring Commission jurisdiction over such curious and isolated matters as "number portability, ... those network elements that the carrier must make available on an unbundled basis for purposes of § 251(c), ... numbering administration, ... exchange access and interconnection requirements in effect prior to the Act's effective date, ... and treatment of comparable carriers as incumbents ...." post, at 7, but denying Commission jurisdiction over much more significant matters. We think it most unlikely that Congress created such a strange hodgepodge. And, of course, Justice Thomas's recognition of any FCC jurisdiction over intrastate matters subjects his analysis to the same criticism he levels against us, post, at 10: Just as it is true that Congress did not explicitly amend § 152(b) to exempt the entire 1996 Act, neither did it explicitly amend § 152(b) to exempt the five provisions he relies upon.

*8 The parties have devoted some effort in this case to debating whether § 251(d) serves as a jurisdictional grant to the FCC. That section provides that "[w]ithin 6 months after [the date of enactment of the Telecommunications Act of 1996,] the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d) (1994 ed., Supp. II). The FCC relies on this section as an alternative source of jurisdiction, arguing that if it was necessary for Congress to include an express jurisdictional grant in the 1996 Act, § 251(d) does the job. Respondents counter that this provision functions only as a time constraint on the exercise of regulatory authority that the Commission has been given in the six subsections of § 251 that specifically mention the FCC. See §§ 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(e), 251(g), 251(h)(2). Our understanding of the Commission's general authority under § 201(b) renders this debate academic. [FN9]

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FN9. JUSTICE THOMAS says that the grants of authority to the Commission in § 251 would have been unnecessary "[i]f Congress believed ... that § 201(b) provided the FCC with plenary authority to promulgate regulations." Post, at 9. We have already explained that three of the five provisions on which JUSTICE THOMAS relies are not grants of authority at all. See n. 9, supra. And the remaining two do not support his argument because they are not redundant of § 201(b). Section 251(e), which provides that "[t]he Commission shall create or designate one or more impartial entities to administer telecommunications numbering," requires the Commission to exercise its rulemaking authority, as opposed to § 201(b), which merely authorizes the Commission to promulgate rules if it so chooses. Section 251(h)(2) says that the FCC "may, by rule, provide for the treatment of a local exchange carrier ... as an incumbent local exchange carrier for purposes of [§ 251]" if the carrier satisfies certain requirements. This provision gives the Commission authority beyond that conferred by § 201(b); without it, the FCC certainly could not have saddled a nonincumbent carrier with the burdens of incumbent status.

The jurisdictional objections we have addressed thus far pertain to an asserted lack of what might be called underlying FCC jurisdiction. The remaining jurisdictional argument is that certain individual provisions in the 1996 Act negate particular aspects of the Commission's implementing authority. With regard to pricing, the incumbent LECs and state commissions point to § 252(c), which provides:

"(c) Standards for Arbitration

"In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a state commission shall—

"(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

"(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

"(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement."

Respondents contend that the Commission's TELRIC rule is invalid because § 252(c)(2) entrusts the task of establishing rates to the state commissions. We think this attributes to that task a greater degree of autonomy than the phrase "establish any rates" necessarily implies. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.

Respondents emphasize the fact that § 252(c)(1), which requires state commissions to assure compliance with the provisions of § 251, adds "including the regulations prescribed by the Commission pursuant to section 251," whereas § 252(c)(2), which requires state commissions to assure compliance with the pricing standards in subsection (d), says nothing about Commission regulations applicable to subsection (d). There is undeniably a lack of parallelism here, but it seems to us adequately explained by the fact that § 251 specifically requires the Commission to promulgate regulations implementing that provision, whereas subsection (d) of § 252 does not. It seems to us not peculiar that the mandated regulations should be specifically referenced, whereas regulations permitted pursuant to the Commission's § 201(b) authority are not. In any event, the mere lack of parallelism is surely not enough to displace that explicit authority. We hold, therefore, that the Commission has jurisdiction to design a pricing methodology.

*9 For similar reasons, we reverse the Court of Appeals' determination that the Commission had no jurisdiction to promulgate rules regarding state review of pre-existing interconnection agreements between incumbent LECs and other carriers, regarding rural exemptions, and regarding dialing parity. See 47 CFR §§ 51.303, 51.405, and 51.205-51.215 (1997). None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority. While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, 47 U.S.C. § 252(e) (1994 ed., Supp. II), and granting exemptions to rural LECs, § 251(f), these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgments. And since the provision addressing dialing parity, § 251(b)(3), does not even mention the States, it is even clearer that the Commission's § 201(b) authority is not superseded. [FN10]

FN10. 10 JUSTICE THOMAS notes that it is well settled that state officers may interpret and apply federal law, see, e.g., United States v. Jones, 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015 (1883), which

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> leads him to conclude that there is no constitutional impediment to the interpretation that would give the States general authority, uncontrolled by the FCC's general rulemaking authority, over the matters specified in the particular sections we have just discussed. Post, at 12-13. But constitutional impediments aside, we are aware of no similar instances in which federal policymaking has been turned over to state administrative agencies. The arguments we have been addressing in the last three paragraphs of our text assume a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (rulemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which--within the broad range of lawful policymaking left open to administrative agencies--are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

Finally (as to jurisdiction), respondents challenge the claim in the Commission's First Report and Order that § 208, a provision giving the Commission general authority to hear complaints arising under the Communications Act of 1934, also gives it authority to review agreements approved by state commissions under the local-competition provisions. First Report & Order & para; & para;121-128. The Eighth Circuit held that the Commission's "perception of its authority ... is untenable ... in light of the language and structure of the Act and ... operation of section [152(b)]." 120 F.3d, at 803. The Court of Appeals erred in reaching this claim because it is not ripe. When, as is the case with this Commission statement, there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements. Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); see also Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

III

A

We turn next to the unbundling rules, and come first to the incumbent LECs' complaint that the FCC included within the features and services that must be provided to competitors under Rule 319 items that do not (as they must) meet the statutory definition of "network element"--namely, operator services and directory assistance, operational support systems (OSS), and vertical switching functions such as caller I. D., call forwarding, and call waiting. See 47 CFR § § 51.319(f)-(g) (1997); First Report & Order & para;413. The statute defines "network element" as

> "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29) (1994 ed., Supp II).

*10 Given the breadth of this definition, it is impossible to credit the incumbents' argument that a "network element" must be part of the physical facilities and equipment used to provide local phone service. Operator services and directory assistance, whether they involve live operators or automation, are "features, functions, and capabilities ... provided by means of" the network equipment. OSS, the incumbent's background software system, contains essential network information as well as programs to manage billing, repair ordering, and other functions. Section 153(29)'s reference to "databases ... and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" provides ample basis for treating this system as a "network element." And vertical switching features, such as caller I. D., are "functions ... provided by means of" the switch, and thus fall squarely within the statutory definition. We agree with the Eighth Circuit that the Commission's application of the "network element" definition is eminently reasonable. See Chevron v. NRDC, 467 U.S., at 866.

B

We are of the view, however, that the FCC did not adequately consider the "necessary and impair" standards when it gave blanket access to these network elements, and others, in Rule 319. That rule requires an incumbent to provide requesting carriers with access to a minimum of seven network elements: the local loop, the network interface device, switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance. 47 CFR § 51.319 (1997). If a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis. § 51.317.

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Section 251(d)(2) of the Act provides:

"In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

"(A) access to such network elements as are proprietary in nature is necessary; and

"(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

The incumbents argue that § 251(d)(2) codifies something akin to the "essential facilities" doctrine of antitrust theory, see generally 3A P. Areeda & H. Hovenkamp, Antitrust Law & para; & para;771-773 (1996), opening up only those "bottleneck" elements unavailable elsewhere in the marketplace. We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply that standard; it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind. But we do agree with the incumbents that the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do. In the general statement of its methodology set forth in the First Report and Order, the Commission announced that it would regard the "necessary" standard as having been met regardless of whether "requesting carriers can obtain the requested proprietary element from a source other than the incumbent," since "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." First Report & Order & para;283. And it announced that it would regard the "impairment" standard as having been met if "the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network," id., & para;285 (emphasis added)--which means that comparison with self-provision, or with purchasing from another provider, is excluded. Since any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an "impairment" under this standard. The Commission asserts that it deliberately limited its inquiry to the incumbent's own network because no rational entrant would seek access to network elements from an incumbent if it could get better service or prices elsewhere. That may be. But that judgment allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services. The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's rule to be set aside. In addition, however, the Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms. An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not ipso facto been "impair[ed] ... in its ability to provide the services it seeks to offer"; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is "necessary." [FN11] In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with "necessity" and "impairment" might be reasonable, but it has not established the existence of such an ideal world. We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

FN11. JUSTICE SOUTER points out that one can say his ability to replace a light bulb is "impaired" by the absence of a ladder, and that a ladder is "necessary" to replace the bulb, even though one "could stand instead on a chair, a milk crate, or eight volumes of Gibbon." True enough (and nicely put), but the proper analogy here, it seems to us, is not the absence of a ladder, but the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension. A ladder one-half inch taller is not, "within an ordinary and fair meaning of the word," post, at 4, "necessary," nor does its absence "impair" one's ability to do the job. We similarly disagree with JUSTICE SOUTER

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> that a business can be impaired in its ability to provide services—even impaired in that ability "in an ordinary, weak sense of impairment," ibid., at 4—when the business receives a handsome profit but is denied an even handsomer one.

*11 When the full record of these proceedings is examined, it appears that that is precisely what the Commission thought Congress had said. The FCC was content with its expansive methodology because of its misunderstanding of § 251(c)(3), which directs an incumbent to allow a requesting carrier access to its network elements "at any technically feasible point." The Commission interpreted this to "impos[e] on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access," and went on to "conclude that we have authority to establish regulations that are coextensive" with this duty, First Report & Order & para;278 (emphasis added). See also id., & para;286 ("[w]e conclude that the statute does not require us to interpret the 'impairment' standard in a way that would significantly diminish the obligation imposed by section 251(c)(3)"). As the Eighth Circuit held, that was undoubtedly wrong: Section 251(c)(3) indicates "where unbundled access must occur, not which [network] elements must be unbundled." 120 F.3d, at 810. The Commission does not seek review of the Eighth Circuit's holding on this point, and we bring it into our discussion only because the Commission's application of § 251(d)(2) was colored by this error. The Commission began with the premise that an incumbent was obliged to turn over as much of its network as was "technically feasible," and viewed (d)(2) as merely permitting it to soften that obligation by regulatory grace:

> "To give effect to both sections 251(c)(3) and 251(d)(2), we conclude that the proprietary and impairment standards in section 251(d)(2) grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis." First Report & Order & para;279.

The Commission's premise was wrong. Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements. The latter is not achieved by disregarding entirely the availability of elements outside the network, and by regarding any "increased cost or decreased service quality" as establishing a "necessity" and an "impair[ment]" of the ability to "provide ... services."

The Commission generally applied the above described methodology as it considered the various network elements seriatim. See id., & para; & para; 388-393, 419-420, 447, 481-482, 490-491, 497-499, 521-522, 539-540. Though some of these sections contain statements suggesting that the Commission's action might be supported by a higher standard, see, e.g., & para; & para;521-522, no other standard is consistently applied and we must assume that the Commission's expansive methodology governed throughout. Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate 47 CFR § 51.319 (1997).

C

*12 The incumbent LECs also renew their challenge to the "all elements" rule, which allows competitors to provide local phone service relying solely on the elements in an incumbent's network. See First Report & Order & para; & para;338-340. This issue may be largely academic in light of our disposition of Rule 319. If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an earrier will no longer be able to lease every component of the network. But whether a requesting carrier can access the incumbent's network in whole or in part, we think that the Commission reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in § 251(c)(3) that incumbents provide access to "any" requesting carrier. We agree with the Court of Appeals that the Commission's refusal to impose a facilities-ownership requirement was proper.

D

Rule 315(b) forbids an incumbent to separate already-combined network elements before leasing them to a competitor. As they did in the Court of Appeals, the incumbents object to the effect of this rule when it is combined with others before us today. TELRIC allows an entrant to lease network elements based on forward-looking costs. Rule 319 subjects virtually all network elements to the unbundling requirement, and the all-elements rule allows requesting carriers to rely only on the incumbent's network in providing service. When Rule 315(b) is added to these, a competitor can lease a complete, preassembled network at (allegedly

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very low) cost-based rates.

The incumbents argue that this result is totally inconsistent with the 1996 Act. They say that it not only eviscerates the distinction between resale and unbundled access, but that it also amounts to Government-sanctioned regulatory arbitrage. Currently, state laws require local phone rates to include a "universal service" subsidy. Business customers, for whom the cost of service is relatively low, are charged significantly above cost to subsidize service to rural and residential customers, for whom the cost of service is relatively high. Because this universal-service subsidy is built into retail rates, it is passed on to carriers who enter the market through the resale provision. Carriers who purchase network elements at cost, however, avoid the subsidy altogether and can lure business customers away from incumbents by offering rates closer to cost. This, of course, would leave the incumbents holding the bag for universal service.

As was the case for the all-elements rule, our remand of Rule 319 may render the incumbents' concern on this score academic. Moreover, § 254 requires that universal-service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary. In any event, we cannot say that Rule 315(b) unreasonably interprets the statute.

Section 251(c)(3) establishes:

*13 "The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 .... An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Because this provision requires elements to be provided in a manner that "allows requesting carriers to combine" them, incumbents say that it contemplates the leasing of network elements in discrete pieces. It was entirely reasonable for the Commission to find that the text does not command this conclusion. It forbids incumbents to sabotage network elements that are provided in discrete pieces, and thus assuredly contemplates that elements may be requested and provided in this form (which the Commission's rules do not prohibit). But it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form. Nor are we persuaded by the incumbents' insistence that the phrase "on an unbundled basis" in § 251(c)(3) means "physically separated." The dictionary definition of "unbundled" (and the only definition given, we might add) matches the FCC's interpretation of the word: "to give separate prices for equipment and supporting services." Webster's Ninth New Collegiate Dictionary 1283 (1985).

The reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners 23. It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

IV

The FCC's "pick and choose" rule provides, in relevant part:

"An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement." 47 CFR § 51.809 (1997).

*14 Respondents argue that this rule threatens the give-and-take of negotiations, because every concession as to an "interconnection, service, or network element arrangement" made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant into the market. A carrier who wants one term from an existing agreement, they say, should be required to accept all the terms in the agreement.

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Although the latter proposition seems eminently fair, it is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language almost exactly. Section 252(i) provides:

"A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

The FCC's interpretation is not only reasonable, it is the most readily apparent. Moreover, in some respects the rule is more generous to incumbent LECs than § 252(i) itself. It exempts incumbents who can prove to the state commission that providing a particular interconnection service or network element to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible. 47 CFR § 51.809(b) (1997). And it limits the amount of time during which negotiated agreements are open to requests under this section. § 51.809(c). The Commission has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove are "legitimately related" to the desired term. First Report & Order & para;1315. Section 252(i) certainly demands no more than that. And whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken. We reverse the Eighth Circuit and reinstate the rule.

* * *

It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis- & agrave;-vis the state commissions and to competing carriers vis- & agrave;-vis the incumbents--and the Commission has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see Chevron v. NRDC, 467 U.S., at 842-843. We can only enforce the clear limits that the 1996 Act contains, which in the present case invalidate only Rule 319.

*15 For the reasons stated, the July 18, 1997 judgment of the Court of Appeals, 120 F.3d 753, is reversed in part and affirmed in part; the August 22, 1997 judgment of the Court of Appeals, 124 F.3d 934, is reversed in part; and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE SOUTER, concurring in part and dissenting in part.

I agree with the Court's holding that the Federal Communications Commission has authority to implement and interpret the disputed provisions of the Telecommunications Act of 1996, and that deference is due to the Commission's reasonable interpretation under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). I disagree with the Court's holding that the Commission was unreasonable in its interpretation of 47 U.S.C. § 251(d)(2) (1994 ed., Supp. II), which requires it to consider whether competitors' access to network elements owned by Local Exchange Companies (LECs) is "necessary" and whether failure to provide access to such elements would "impair" competitors' ability to provide services. Ante, at 17. Because I think that, under Chevron, the Commission reasonably interpreted its duty to consider necessity and impairment, I respectfully dissent from Part III-B of the Court's opinion.

The statutory provision in question specifies that in determining what network elements should be made available on an unbundled basis to potential competitors of the LECs, the Commission "shall consider" whether "access to such network elements as are proprietary in nature is necessary," § 251(d)(2)(A), and whether "the failure to provide access" to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer," § 251(d)(2)(B). The Commission interpreted "necessary" to mean "prerequisite for competition," in the sense that without access to certain proprietary network elements, competitors' "ability to compete would be significantly impaired or thwarted," as an implementation of the Local Competition Provisions

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in the Telecommunications Act of 1996, & para;282, 11 FCC Rcd 15,499, 15641-15642 (1996) (First Report & Order). On this basis, it decided to require access to such elements unless the incumbent LEC could prove both that the requested network element was proprietary and that the requesting competitor could offer the same service through the use of another, nonproprietary element offered by the incumbent LEC. Id., & para;283, at 15642.

The Commission interpreted "impair" to mean "diminished in value," and explained that a potential competitor's ability to offer services would diminish in value when the quality of those services would decline or their price rise, absent the element in question. Id., & para;285, at 15643. The Commission chose to apply this standard "by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network," ibid., and decided that whenever it would be more expensive for a competitor to offer a service using other available network elements, or whenever the service offered using those other elements would be of lower quality, the LEC must offer the desired element to the competitor, ibid.

*16 In practice, as the Court observes, ante, at 18, the Commission's interpretation will probably allow a competitor to obtain access to any network element that it wants; a competitor is unlikely in fact to want an element that would be economically unjustifiable, and a weak economic justification will do. Under Chevron, the only question before us is whether the Commission's interpretation, obviously favorable to potential competitors, falls outside the bounds of reasonableness.

As a matter of textual justification, certainly, the Commission is not to be faulted. The words "necessary" and "impair" are ambiguous in being susceptible to a fairly wide range of meanings, and doubtless can carry the meanings the Commission identified. If I want to replace a light bulb, I would be within an ordinary and fair meaning of the word "necessary" to say that a stepladder is "necessary" to install the bulb, even though I could stand instead on a chair, a milk can, or eight volumes of Gibbon. I could just as easily say that the want of a ladder would "impair" my ability to install the bulb under the same circumstances. These examples use the concepts of necessity and impairment in what might be called their weak senses, but these are unquestionably still ordinary uses of the words.

Accordingly, the Court goes too far when it says that under "the ordinary and fair meaning" of "necessary" and "impair," ante, at 18, "[a]n entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment ... has not ipso facto been 'impair[ed] ... in its ability to provide the services it seeks to offer'; and it cannot realistically be said that the network element enabling it to raise profits to 100% is 'necessary,' " ante, at 18-19. A service is surely "necessary" to my business in an ordinary, weak sense of necessity when that service would allow me to realize more profits, and a business can be said to be "impaired" in delivery of services in an ordinary, weak sense of impairment when something stops the business from getting the profit it wants for those services.

Not every choice of meaning that falls within the bounds of textual ambiguity is necessarily reasonable, to be sure, but the Court's appeal to broader statutory policy comes up short in my judgment. The Court says, with some intuitive plausibility, that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do." Ante, at 17. In the Court's eyes, the trouble with the Commission's interpretation is that it "allows entrants, rather than the Commission, to determine" necessity and impairment, ante, at 18, and so the Court concludes that "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all." Ante, at 19.

*17 The Court thus judges the reasonableness of the Commission's rule for implementing § 251(d)(2) by asking how likely it is that Congress would have legislated at all if its point in adopting the criteria of necessity and impairment was to do no more than require economic rationality, and the Court answers that the Commission's notion of the congressional objective in using the ambiguous language is just too modest to be reasonable. The persuasiveness of the Court's answer to its question, however, rests on overlooking the very different question that the Commission was obviously answering when it adopted Rule 319. As the Court itself notes, ante, at 17-18, the Commission explicitly addressed the consequences that would follow from requiring an entrant to satisfy the necessity and impairment criteria by showing that alternative facilities were unavailable at reasonable cost from anyone except the incumbent LEC. First Report & Order & para;283, 11 FCC Rcd, at 15642.

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To require that kind of a showing, the Commission said, would encourage duplication of facilities and personnel, with obvious systemic costs. Ibid. The Commission, in other words, was approaching the task of giving reasonable interpretations to "necessary" and "impair" by asking whether Congress would have mandated economic inefficiency as a limit on the objective of encouraging competition through ease of market entry. The Commission concluded, without any apparent implausibility, that the answer was no, and proceeded to implement the necessity and impairment provisions in accordance with that answer.

Before we conclude that the Commission's reading of the statute was unreasonable, therefore, we have to do more than simply ask whether Congress would probably have legislated the necessity and impairment criteria in their weak sense. We have to ask whether the Commission's further question is an irrelevant one, and (if it is not), whether the Commission's answer is reasonably defensible. If the question is sensible and the answer fair, Chevron deference surely requires us to respect the Commission's conclusion. This is so regardless of whether the answer to the Commission's question points in a different direction from the answer to the Court's question; there is no apparent reason why deference to the agency should not extend to the agency's choice in responding to mutually ill-fitting clues to congressional meaning. This, indeed, is surely a classic case for such deference, the statute here being infected not only with "ambiguity" but even "self-contradiction." Ante, at 25. I would accordingly respect the Commission's choice to give primacy to the question it chose.

JUSTICE THOMAS, with whom the CHIEF JUSTICE and JUSTICE BREYER join, concurring in part and dissenting in part.

Since Alexander Graham Bell invented the telephone in 1876, the States have been, for all practical purposes, exclusively responsible for regulating intrastate telephone service. Although the Telecommunications Act of 1996 altered that more than century-old tradition, the majority takes the Act too far in transferring the States' regulatory authority wholesale to the Federal Communications Commission. In my view, the Act does not unambiguously indicate that Congress intended for such a transfer to occur. Indeed, it specifically reserves for the States the primary responsibility to conduct mediations and arbitrations and to approve agreements between carriers. See 47 U.S.C. §§ 252(e); (e) (1994 ed., Supp. II). I therefore respectfully dissent from Part II of the majority's opinion. [FN1]

FN1. I agree with the majority's analysis of the unbundling and pick-and-choose rules, which were not challenged as jurisdictional grounds.

I

*18 From the time that the commercial offering of telephone service began in 1877 until the expiration of key patents in 1893 and 1894, Alexander Graham Bell's telephone company—which came to be known as the American Telephone and Telegraph Company—enjoyed a monopoly. J. Brooks, Telephone: The First Hundred Years 59, 67, 71-72 (1976). In the decades that followed, thousands of independent phone companies emerged to fill in the gaps left by the telephone giant and, in most larger markets, to build rival networks in direct competition with it. Id., at 102-111. As competition developed, many municipalities began to adopt ordinances regulating telephone service. See, e.g., E. Laperche, The Bell System and Regional Business 177-186 (1989).

During the 1900's, state legislatures came under increasing pressure to centralize the regulation of telephone service. See, e.g., id., at 185-207. Although the quasi-competitive system had significant drawbacks from the consumers' standpoint—principally the refusal of competing systems to interconnect—perhaps the strongest advocate of state regulation was AT & T itself. Ibid. The company's arguments that telephone service was naturally monopolistic and that competition was resulting in wasteful duplication of facilities appealed to Progressive-era legislatures. Cohen, The Telephone Problem and the Road to Telephone Regulation in the United States, 31 Policy Hist. 42, 55-57 (1991); see generally, Laperche, supra, at 185-207. By 1915, most States had established public utility commissions and charged them with regulating telephone service. Brooks, supra, at 144. Over time, the Bell Companies' policy of buying out independent providers coupled with the state commissions' practice of prohibiting competitive entry led back to the monopoly provisions of local telephone service. See R. Garnet, The Telephone Enterprise: The Evolution of the Bell System's Horizontal Structure, 1876-1909, 146-153 (1985).

Early federal telecommunications regulation, which began with the Mann-Elkins Act of 1910, did not

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displace the States' fledgling efforts to regulate intrastate telephone service. To the contrary, the Mann-Elkins Act extended the jurisdiction of the Interstate Commerce Commission (ICC) to cover only interstate and international telecommunications services. [FN2] As a result, state and federal agencies were required to meticulously separate the intrastate and interstate aspects of telephone services. Accordingly, in Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1931), this Court invalidated an Illinois Commerce Commission order establishing rates for the city of Chicago because it failed to distinguish between the intrastate and interstate property and business of the telephone company. In so doing, the Court emphasized that "[t]he separation of the intrastate and interstate property, revenues and expenses of the Company is ... essential to the appropriate recognition of the competent governmental authority in each field of regulation." Id., at 148.

> FN2. The Mann-Elkins Act provided, in relevant part, that "the provisions of this Act shall apply to ... telegraph, telephone, and cable companies ... engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act." Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544-545.

*19 In the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq., Congress transferred authority over interstate communications from the ICC to the newly created Federal Communications Commission (FCC or Commission). As in the Mann-Elkins Act, Congress chose not to displace the States' authority over intrastate communications. Indeed, Congress took care to preserve it explicitly in § 2(b), which provides, in relevant part, that "nothing in this chapter shall be construed to apply to or give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). We have carefully guarded the historical jurisdictional division codified in § 2(b). See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). In Louisiana, we held that § 2(b) precluded the FCC from pre-empting state depreciation regulations. In so doing, we rejected the FCC's argument that § 220 of the Communications Act of 1934 provided it with authority to displace state regulations that were inconsistent with federal depreciation standards. We instead concluded that § 2(b) "fences off from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service," id., at 370, and we further indicated that the FCC could breach § 2(b)'s jurisdictional "fence" only when Congress used "unambiguous or straightforward" language to give it jurisdiction over intrastate communications. Id., at 377.

Congress enacted the Telecommunications Act of 1996(Act), Pub.L. 104-104, 110 Stat. 56, against this backdrop. To be sure, the 1996 Act marked a significant change in federal telecommunications policy. Most important, Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies. See 47 U.S.C. § 253(a) (1994 ed., Supp. II). It also required incumbent local exchange carriers to allow their competitors to access their facilities in three different ways. As the majority describes more completely, ante, at 3, n. 1, incumbents must: interconnect their networks with requesting carriers' facilities and equipment, § 251(c)(2); provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, § 251(c)(3); and offer to resell at wholesale rates any telecommunications service that they provide to subscribers who are not telecommunications carriers, § 251(c)(4). The Act sets forth additional obligations applicable to all telecommunications carriers, § 251(a), and all local exchange carriers, § 251(b). To facilitate rapid transition from monopoly to competitive provision of local telephone service, Congress set forth a process to ensure that the incumbent and competing carriers fulfill these obligations in § 252.

*20 Section 252 sets up a preference for negotiated interconnection agreements. § 252(a). To the extent that the incumbent and competing carriers cannot agree, the Act gives the state commissions primary responsibility for mediating and arbitrating agreements. Specifically, Congress directed the state commissions to mediate disputes between carriers during the voluntary negotiation period, § 251(c)(1), and—after the negotiations have run their course—to arbitrate any "open issues." § 252(b)(1). In conducting these arbitrations, state commissions are directed to ensure that open issues are resolved in accordance with the requirements of § 251, "establish ... rates for interconnection, services, or network elements" according to the standards that Congress set forth in § 252(d), and to provide a schedule for implementing the agreement reached during arbitration. § 252(c).

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The state commissions are also to approve or reject any interconnection agreement, whether adopted by negotiation or arbitration, § 252(e)(1), guided by the standards set forth in § 252(e)(2). The 1996 Act permits the FCC to intervene in this process only as a last resort, when "a State commission fails to act to carry out its responsibilit[ies]." § 252(e)(5). In that event, "the Commission shall issue an order preempting the State commission's jurisdiction ... and shall assume the responsibility of the State commission ... and act for the State commission." Ibid.

To be sure, the Act directs the state commissions, in conducting arbitrations, to ensure that open issues are resolved in accordance with the "regulations prescribed by the [FCC] pursuant to section 251," § 252(c)(1), and provides that the state commissions may reject an arbitrated agreement if it does not meet the requirements of § 251, "including the regulations prescribed by the Commission pursuant to section 251," § 252(e)(2)(B). But the scope of the FCC's rulemaking authority under the Act is quite limited. Section 251(d)(1) directs the Commission to "complete all actions necessary to establish regulations to implement the requirements of this section" within a certain time period. I believe that this subsection is a time limitation upon, and a mandate for, the exercise of rulemaking authority conferred elsewhere. The source of that authority, as I describe below, is not § 201(b), but rather, § 251 itself. Section 251 specifically identifies those subjects upon which the FCC may regulate. The FCC has authority to regulate on the subject of number portability, § 251(b)(2); those network elements that the carrier must make available on an unbundled basis for purposes of § 251(c), § 251(d)(2); numbering administration, § 251(e); exchange access and interconnection requirements in effect prior to the Act's effective date, § 251(g); and treatment of comparable carriers as incumbents, § 251(h)(2).

II

The regulations that are the subject of respondents' jurisdictional challenge contravene the division of authority set forth in the 1996 Act and disregard the 100-year tradition of state authority over intrastate telecommunications. In the introduction to its First Report and Order, the FCC peremptorily declared that §§ 251 and 252 "require [it] to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under sections 251 and 252." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15544-15545 (1996) (emphasis added). In fulfilling its perceived statutory mandate, the FCC promulgated painstakingly detailed regulations dictating to the state commissions how they must implement §§ 251 and 252. I agree with the Eighth Circuit that the FCC lacked jurisdiction to promulgate the regulations challenged on jurisdictional grounds. [FN3]

FN3. I agree with the majority, ante, at 18, that respondents' challenge to the FCC's assertion that it has authority under 47 U.S.C. § 206 to consider complaints arising under the 1996 Act is not ripe for review. It appears to me, however, that the Court of Appeals conclusion that the FCC lacks such authority carries considerable force.

A

*21 In endorsing the FCC's claim that it has general rulemaking authority to implement the local competition provisions of the 1996 Act, the majority relies upon a general grant of authority that predates the Act, 47 U.S.C. § 201(b). The last sentence of that provision, upon which the majority so heavily relies, provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." This grant of authority, however, cannot be read in isolation. As the first Justice Harlan once observed: "[I]t is a familiar rule in the interpretation of ... statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' " Neal v. Clark, 95 U.S. 704, 708, 24 L.Ed. 586 (1878). Section 201(a) refers exclusively to "interstate or foreign communication by wire or radio," and the first sentence of § 201(b) refers to "charges, practices, classifications, and regulations for and in connection with such communication service." "Under the principle of ejusdem generis, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991). Applying this principle here, it is clear that the last sentence of § 201(b) only gives the FCC authority to promulgate regulations governing interstate and foreign communications. By failing to read § 201(b)'s grant of rulemaking authority in light of the limitation that precedes it, the majority attributes to the provision a meaning so broad that it is inconsistent with its

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accompanying words, thus giving 'unintended breath to the Acts of Congress.' " Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)).

That Congress apparently understood § 201(b) to be so limited is demonstrated by the fact that the FCC is specifically charged, under the 1996 Act, with issuing regulations that implement particular portions of § 251, as I have described, supra, at 7. If Congress believed, as does the majority, that § 201(b) provided the FCC with plenary authority to promulgate regulations implementing all of the 1996 Act's provisions, it presumably would not have needed to make clear that the FCC had regulatory authority with respect to particular matters.

B

Moreover, I cannot see how § 201(b) represents an "unambiguous" grant of authority that is sufficient to overcome § 2(b)'s jurisdictional fence. In my view, the majority's interpretation of § 201(b) necessarily implies that Congress sub silentio rendered § 2(b) a nullity by extending federal law to cover intrastate telecommunications. That conclusion is simply untenable in light of the fact that § 2(b) is written in the disjunctive. Section 2(b), 47 U.S.C. § 152(b), provides that "nothing in this chapter shall be construed to apply to or to give the Commission jurisdiction with respect to ... intrastate telecommunications service (Emphasis added.) Contrary to the majority's suggestion, ante, at 12, there is nothing "subtle" or "imaginative" about the principle that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise...." Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (citation omitted). Nor is the majority correct that Louisiana supports its reading of § 2(b). Indeed, the disjunctive structure of the provision led us to conclude in Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), that § 2(b) contains both "a rule of statutory construction" and a "substantive jurisdictional limitation on the FCC's power." Id., at 372-373.It follows that we should give independent legal significance to each. Thus, it is not enough for the majority simply to demonstrate that the 1996 Act "appl[ies] to" intrastate services; it must also point to "unambiguous" and "straightforward" evidence that Congress intended to eliminate § 2(b)'s "substantive jurisdictional limitation."

*22 This they cannot do. Nothing in the 1996 Act eliminates § 2(b)'s jurisdictional fence. Congress has elsewhere demonstrated that it knows how to exempt certain provisions from § 2(b)'s reach; it has done so quite recently. For example, in 1992, Congress enacted legislation providing that § 336 shall apply "except as provided in sections 223 through 227 of the Communications Act of 1934. Pub.L. 102-243. The following year, Congress also exempted § 301 from § 2(b)'s purview. Pub.L. 103-66. With the 1996 Act, Congress neither eliminated § 2(b) altogether nor added §§ 251 and 252 to the list of provisions exempted from its jurisdictional fence. I believe that we are obliged to honor that choice.

C

Even if the rulemaking authority granted by § 201(b) was not limited to interstate and international communications and the 1996 Act rendered § 2(b) a nullity, the FCC's argument would still fail with respect to its pricing rules and its rules governing the state commissions' approval of interconnection agreements. We have made it clear that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) (emphasis omitted; internal quotation marks omitted). Section 201(b) at best gives the FCC general rulemaking authority. But the 1996 Act gives the state commissions the primary responsibility for conducting mediations and arbitrations and approving interconnection agreements. Indeed, as I have described, Congress set forth specific standards that the state commissions are to adhere to in setting pricing, § 252(d), and in approving interconnection agreements, § 252(e). The majority appears to believe that Congress expected that the FCC would promulgate rules to "guide the state commission judgments." Ante, at 18. I do not agree. It seems to me that Congress consciously designed a system that respected the States' historical role as the dominant authority with respect to intrastate communications. In giving the state commissions primary responsibility for conducting mediations and arbitrations and for approving interconnection agreements, I simply do not think that Congress intended to limit States' authority to mechanically apply whatever methodologies, formulas, and rules that the FCC mandated. Because

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Congress set forth specific provisions giving primary responsibility in certain areas to the States, and because the subsections setting forth the standards that the state commissions are to apply make no mention of FCC regulation, I believe that we are obliged to presume that Congress intended the specific grant of primary authority to the States to control. [FN4]

FN4. My conclusion applies with equal force to other FCC regulations that trump the state commissions' responsibilities, including exemptions, suspensions, and modification, § 251(f); approval of agreements predating the Act, § 252(a); and pre-emption of state access regulations that are inconsistent with FCC dictates, § 251(d)(3).

D

My interpretation, of course, would require the state commissions to interpret and implement the substantive provisions of the 1996 Act in those instances where the 1996 Act gave the state commissions primary authority. Several parties have suggested that it is inappropriate for the States to do so. One of the many petitioners in this case goes so far as to suggest that under our decision in Printz v. United States, 521 U.S. 898 (1997), the "legitimacy of any such delegation of federal substantive authority [to the States] would be suspect." Brief for Petitioner in No. 97-829, p. 40. To be sure, we held in Printz that the Federal Government may not commandeer state executive agencies. But I do not know of a principle of federal law that prohibits the States from interpreting and applying federal law. Indeed, basic principles of federalism compel us to presume that States are competent to do so. As Justice Field observed over 100 years ago in a decision upholding a federal law delegating to the States the authority to determine compensation in takings cases:

*23 "[I]t was the purpose of the Constitution to establish a general government independent of, and in some respects superior to, that of the State governments—one which could enforce its own laws through its own officers and tribunals .... Yet from the time of its establishment that government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. Their use has not been deemed violative of any principle as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense." United States v. Jones, 109 U.S. 513, 519-520, 3 S.Ct. 346, 27 L.Ed. 1015 (1883).

When, in 1996, Congress decided to attempt to introduce competition into the market for local telephone service, it deemed it wise to take advantage of the policy expertise that the state commissions have developed in regulating such service. It is not for us—or the FCC—to second-guess its decision.

* * *

Contrary to long-standing historical practice, this Court's precedent respecting that practice, and the 1996 Act's adherence to it, the majority grants the FCC unbounded authority to regulate a number of state concern. Because I do not believe that Congress intended such a result, I respectfully dissent from Part II of the majority's opinion.

JUSTICE BREYER, concurring in part and dissenting in part.

A statute's history and purpose can illuminate its language. When read in light of history, purpose, and precedent, the Telecommunications Act of 1996 (1996 Act or Act), Pub.L. 104-104, 110 Stat. 56, is not the "model of ambiguity" or "self-contradiction" of which the majority complains. Ante, at 29. Neither does it permit the Federal Communications Commission to promulgate the pricing and unbundling rules before us.

I

The FCC's pricing rules fall outside its delegated authority because both (1) a century of regulatory history establishes state authority as the local telephone service ratemaking norm and (2) the 1996 Act nowhere changes, or creates an exception to, that norm. JUSTICE THOMAS' opinion describes the history that has created the norm. Ante, at 2-3. In my view, the Act's purposes, its language, relevant precedent, and the nature of the FCC's rules provide added support for his conclusion.

A

The Act's purposes help explain why its language and structure foresee, not national rate uniformity, but traditional local ratemaking—FCC views to the contrary notwithstanding. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, ¶ para.113, 11 FCC Rcd 15499, 15558 (1996) (First Report & Order). To understand those purposes, one must recall that AT & T once dominated the national telecommunications industry. It controlled virtually all

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long-distance telephone service, most local telephone service, and a substantial amount of all telephone equipment manufacturing. See generally United States v. American Tel. & Tel. Co., 552 F.Supp. 131, 165 (DC 1982) (describing AT & T's "commanding position" in the Nation's telecommunications business), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). In 1982, however, AT & T entered into an antitrust consent decree, which ended its industry dominance. See 552 F.Supp., at 160-170.

*24 The decree split AT & T from its local telephone service subsidiaries. By doing so, the decree sought to encourage new competition in long-distance service by firms such as MCI and Sprint. And it also encouraged new competition in telephone equipment markets. But the decree did not introduce new competition into the local telephone service markets. Rather, it left each local market in the hands of a single state-regulated local service supplier, such as NYNEX in New York, or Bell Atlantic in Washington, D.C. That circumstance may have reflected the belief, current at the time, that local service competition could prove wasteful, leading to the unwarranted duplication of expensive physical facilities by requiring, say, the unnecessary digging up of city streets to install unneeded wires connecting each house with a series of new but redundant local switches. See, e.g., United States v. Western Elec. Co., 673 F.Supp. 525, 537-538 (DC 1987); P. Huber, M. Kellogg, & J. Thorne, The Geodesic Network II: 1993 Report on Competition in the Telephone Industry pp. 2.3-2.5 (1992).

At the same time, the decree forbade most such local service suppliers from entering long-distance markets. United States v. American Tel. & Tel. Co., supra, at 186-188. That prohibition, by preventing entry by local firms willing and able to supply long-distance service, risked less long-distance competition. Cf. P. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 179-183 (1996). But the decree reflected a countervailing concern. Local firms might enjoy special long-distance advantages not available to purely long-distance companies. See United States v. American Tel. & Tel., supra, at 186-188. Perhaps a local service company would find it unusually easy to attract local customers to its long-distance service; perhaps it could use its control of local service to place its long-distance competitors at a disadvantage. See T. Krattenmaker, Telecommunications Law and Policy 411-412 (2d ed.1998) (explaining rationale of the decree). And though some argued that any such special advantages were innocent, rather like those enjoyed by a transcontinental airline that dominates a local hub, others claimed they were unfair, like those that had once helped AT & T (through its control of local service) maintain long-distance dominance. See United States v. American Tel. & Tel., supra, at 163; see generally A. Kahn, Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness 37-38 and n. 53 (1998) (discussing the debate). Whether the decree's trade-off made sense—i.e., whether the existence of some such local-firm/long-distance-service advantage warranted the decree's prohibition limiting the number of potential long-distance competitors—became a fertile source for later argument. See, e.g., MacAvoy, supra, at 171-177 (arguing that oligopolistic conditions in long-distance markets have produced supranormal profits that would not be sustainable with increased competition); Robinson, The Titanic Remembered: AT & T and the Changing World of Telecommunications, 5 Yale J. Reg. 317, 337 (1988) (arguing that the rationale for the decree's restrictions on local service companies was "just as persuasive" as that underlying the decree).

*25 The Act before us responds to this argument by changing the postdecree status quo in two important ways. First, it creates a legal method through which local telephone service companies may enter long-distance markets, thereby providing additional long-distance competition. See 47 U.S.C. § 271(c)(1)(B) (1994 ed., Supp. II) (listing 14 conditions that, if met, permit incumbent local firms to enter long-distance market). Second, it conditions that long-distance entry upon either (1) the introduction of competition into local markets, or (2) the failure of a competing carrier to request access to or interconnection with the local service supplier (or the competing carrier's failure to engage in "good faith" negotiations). §§ 271(c)(1)(A), (B). The existence of these two alternatives is important. In setting forth the first alternative, actual local competition, the statute recognizes that local service competition would diminish any special long-distance advantages that the local firm has, thereby lessening the need for the decree's long-distance-market entry prohibition. See supra, at 4; Krattenmaker, The Telecommunications Act of 1996, 49 Fed. Comm. L.J. 1, 15-16 (1996). In setting forth the second alternative, the Act recognizes that actual local competition might not prove practical in some

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places, to some extent, local markets may not support more than a single firm, at least not without wasteful duplication of resources. See Note, The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation, 11 Harv. J.L. & Tech. 797, 810, n. 57 (1998).

These alternatives raise a difficult empirical question. To what extent is local competition possible without wasteful duplication of facilities? The Act does not purport to answer this question. Rather, it creates a set of legal rules which, through interaction with the marketplace, aims to produce sensible answers. In particular, the Act permits new local entry by dismantling existing legal barriers that would otherwise inhibit it. 47 U.S.C. § 253(a) (1994 ed., Supp. II). Equally important, the Act promotes new local entry by requiring incumbents (1) to "interconnect" with new entrants (thereby allowing even a partial new entrant's small set of subscribers to call others within an entire local area), § 251(c)(2); (2) to sell retail services to new entrants at wholesale rates (thereby allowing newly entering firms to become "resellers," competing in retailing), § 251(c)(4); and (3) to provide new entrants "access to network elements," say, house-to-street telephone lines, "on an unbundled basis" (thereby allowing new entry in respect to some aspects of the local service business without requiring wasteful duplication of the entire business), § 251(c)(3). The last mentioned "unbundling" requirement does not specifically state which elements must be unbundled, a difficult matter that I shall discuss below. See infra, at 18-21. But one can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the remaining aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition both as an end in local markets and as a means towards more competition, and fair competition, in long-distance markets.

*26 For the present cases, the most important characteristic of the Act's purposes is what those purposes do not require. Those purposes neither require nor suggest reading the Act's language to change radically the scope of local regulators' traditional rate-setting powers. A utility's rate structure consists of complex sets of typically interdependent individual rates, the determination of which depends upon numerous considerations, many of which are local in nature and fall outside the Act's purview. The introduction of competition into a particular locality does not diminish the importance of place-specific factors, such as local history, geography, demands, and costs. And local regulators are likely more familiar than are national regulators, for example, with a particular utility's physical plant, its cost structure, the pattern of local demand, the history of local investment, and the need for recovery of undepreciated fixed costs.

Moreover, local regulators have experience setting rates that recover both the immediate, smaller, added costs that demand for additional service imposes upon a local system and also a proper share of the often huge fixed costs (of local loops, say, or switches) and overhead needed to provide the dial tone itself. Indeed, local regulators would seem as likely, if not more likely, than national regulators to know whether, when, or the extent to which, particular local charges or systems of charges will lead new entrants to abandon efforts to use a local incumbent's elements, turning instead to alternative technologies. And local regulators would seem as likely as national regulators to know whether or when use of such alternative technologies in the local circumstances will prove more beneficial than wasteful. It is the local communities, and, hence, local regulators, that will directly confront the problems and enjoy the benefits associated with local efforts to integrate new and old communications resources and communications firms. These factors, along with the fact that the relevant technology changes rapidly, argue in favor of, not against, local rate-setting control, including local rate-setting differences, for those differences can contribute to the kind of "experimentation" long thought a strength of our federal system.

At most, the Act's purposes argue for a grant to the FCC of authority to set federal limitations preventing States from adopting forms of ratemaking that would interfere with the Act's basic objectives. The Act explicitly grants the FCC a particular pre-emption tool, not here invoked, which is apparently suited to that job. 47 U.S.C. § 253(d) (1994 ed., Supp. II) (permitting the FCC to pre-empt, after notice and comment, any state legal requirement that has the effect of prohibiting entry into local service). Such a grant could not help the FCC here, however, for, as I discuss below, infra, at 13-17, the FCC's rules do not

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just create an outer envelope or simply prevent the States from going too far. Rather, they effectively supplant much of a local regulator's local rate-setting work.

B

*27 Read in light of its purposes, the Act's language more clearly foresees retention, not replacement, of the traditional allocation of state-federal rate-setting authority. Ante, at 6-7 (THOMAS, J., concurring in part and dissenting in part). Sections 251 and 252, which establish and provide for implementation of new local service obligations, contain the relevant language.

Section 251 lists basic obligations that the Act imposes upon local incumbents. These include obligations to interconnect, to unbundle, to sell at wholesale rates, to provide "number portability," to assure "dialing parity," to negotiate with potential entrants in good faith, and generally to encourage local competition. Section 251 also refers to the FCC, but only in respect to some of these obligations. See, e.g., § 251(d)(2) ("[T]he Commission shall consider" certain standards in determining which network elements must be unbundled); § 251(b)(2) (local firms have duty to provide "number portability in accordance with requirements prescribed by the Commission"); see ante, at 7 (THOMAS, J., concurring in part and dissenting in part). It makes no mention of a regulator in respect to other matters, which others include ratemaking. Thus, § 251's language leaves open the relevant question—which regulator has the authority to set rates.

Section 252, which specifically describes how § 251's obligations are to be implemented, is less ambivalent. Its implementation system consists of negotiation between incumbents and new entrants, followed by state regulatory commission arbitration if negotiations fail. § § 252(a), (b). Certain of § 252's language, I concede, can be read to favor the majority—in particular its statement that the results of state arbitration must be consistent with § 251 and with "regulations prescribed by the [FCC] pursuant to section 251." § 252(c)(1). But the word "regulations" here might or might not include rate regulations. Ante, at 13-14. And the immediately following language indicates that it does not.

That immediately following language, beginning with the immediately subsequent subsection and including nine paragraphs, speaks separately, and specifically, of rates. § § 252(c)(2), (d). And that language expressly says that the "State commission[s] " are to "establish any rates." It adds that they are to do so "according to" a further subsection, "subsection (d)." And this further subsection (d), headed by the words "Pricing standards" and focusing upon "charges," sets forth the pricing standards for use by the state commissions. It speaks of "[d]eterminations by a[S]tate commission of the just and reasonable rate" (which, it adds, must be "nondiscriminatory" and "based on ... cost"), but it says nothing about a rule for the FCC. § 252's references to the state commissions, its rate-setting detail, and its silence about the FCC's role all favor a reading of the earlier word "regulations" that excludes, rather than includes, FCC rate regulations.

*28 Thus, § 251 is silent about local rate-setting power. Section 252 speaks of state, not federal, ratemaking. As most naturally read, the structure and language of those sections foresee the traditional allocation of ratemaking authority—an allocation that within broad limits assumes local rates are local matters for local regulators.

I recognize that the majority finds the relevant rulemaking authority, not in §§ 251 and 252, but in a different section containing a general grant of rulemaking authority. Ante, at 9-10 (citing 47 U.S.C. § 201(b)). But Congress enacted that language in 1938, see 52 Stat. 588. The scope of the FCC's legal power to apply an explicit grant of general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates. Cf. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 376-377, n. 5, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). And here, as just explained, the 1996 Act foresees the reservation of most local rate-setting authority to local regulators.

C

The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("presumption against the pre-emption of state police power regulations"); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct.

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1146, 91 L.Ed. 1447 (1947) (requiring "clear and manifest" showing of congressional intent to supplant traditional state police powers). Moreover, the Communications Act itself, into which Congress inserted the provisions of the 1996 Act with which we are here concerned, comes equipped with a specific instruction that courts are not to "construe" the FCC's statutory grant of authority as

> "giv[ing] the Commission jurisdiction with respect to ... charges ... for or in connection with intrastate communication." 47 U.S.C. § 152(b).

Thus, as JUSTICE THOMAS points out, ante, at 10, it is not surprising to find that this Court has interpreted the Communications Act as denying the FCC authority to determine local rate-related practices in the face of statutory language far more helpful to the FCC than anything present here. Louisiana Pub. Serv. Comm'n v. FCC, supra. That precedent requires a similar result here.

Louisiana raised a question almost identical to the one before us: Does a statute granting the FCC authority to set certain general rate-related rules (there, depreciation rules) also grant the FCC authority to set primarily local rate-related rules (i.e., local depreciation rules)? Writing for the Court, Justice Brennan stated that the basic "rule of statutory construction" contained in § 152(b) and just quoted above requires interpretations that favor the reservation of ratemaking authority to the States. Louisiana, id., at 373. Hence, the statute did not permit the FCC to write depreciation rules that would apply to equipment insofar as it was used for local service. Ibid.

*29 Consider the similarities between Louisiana and the present cases. The relevant rules of statutory construction—the general and explicit presumptions favoring retention of local authority—are the same. See id., at 369 (asking whether "Congress intended that federal regulation supersede state law" and citing Rice v. Santa Fe Elevator Corp., supra); 476 U.S., at 371-373 (relying on § 152(b)). The subject matter is highly similar—both cases involve the way in which local rates will be set for equipment used for both intrastate and interstate calls. Compare Brief for Federal Petitioners 36- 38, with Louisiana, supra, at 374-376. And both cases involve intrastate charges that could affect interstate rates, here because of local competition's interstate impact, see First Report & Order & para;84, 11 FCC Rcd, at 15544, in Louisiana because more (or less) stringent local depreciation rules would affect the rate of replacement of equipment used for interstate calls, 476 U.S., at 362-363.

Consider, too, the differences. The language of the relevant statute here explicitly refers to "State commission[s]," which, it says, will "establish any rates." 47 U.S.C. § 252(e)(2) (1994 ed., Supp. II) (emphasis added). The language of the relevant statute in Louisiana, by contrast, was far more easily read as granting the FCC the authority it sought. That statute said that the FCC would "prescribe" depreciation practices for the relevant local telephone companies, and it prohibited "any depreciation charges ... other than those prescribed by the [FCC]." § 220(b); it made it "unlawful ... to keep any other [depreciation] accounts ... than those so prescribed or ... approved" by the FCC, § 220(g); it ordered the FCC to hear from state commissions before establishing its own rules, § 220(i); and it authorized the FCC to exempt state-regulated companies from its depreciation rules, § 220(h). See Louisiana, supra, at 366-367. These differences, of course, make the argument for local ratemaking in these cases stronger, not weaker, than in Louisiana.

The majority says its view is "unaffected" by § 152(b). Ante, at 11. But Congress apparently was not, for when it enacted the 1996 Act, it initially considered amending § 152(b) to make it inapplicable to the provisions that we here consider, thereby facilitating an interpretation, like the majority's, that would give the FCC the local rate-setting power it now seeks to exercise. See S. 652, 104th Cong., 1st Sess., § 101(c)(2) (1995); H.R. 1555, 104th Cong., 1st Sess., § 101(e)(1) (1995). The final legislation, however, rejected that proposed language. See 47 U.S.C. § 152(b). It cannot be thought that Congress "intend[ed] sub silentio to enact statutory language that it ha[d] earlier discarded in favor of other language." INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (internal quotation marks and citation omitted).

D

*30 The FCC's strongest argument, in my view, is that its rate rules do not actually supplant local rate-setting authority; they simply set forth limits, creating a kind of envelope marking the outer bounds of what would constitute a reasonable local rate-setting system. The majority may accept a version of this argument, for it says the FCC has prescribed a "requisite pricing methodology" that "no more

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prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in § 252(d)." Ante, at 16. That, however, is not what the FCC has done.

The FCC's rate regulations are not at all like § 252(d)'s pricing standards. The statute sets forth those standards in general terms, using such words as, "based on ... cost," "nondiscriminatory," and "just and reasonable." Terms such as these give rate-setting commissions broad methodological leeway; they say little about the "method employed" to determine a particular rate. FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The FCC's rules, on the other hand, are not general. The dozens of pages of text that set them forth are highly specific and highly detailed. See First Report & Order & para; & para;672-715, supra, at 15844-15862. They deprive state commissions of methodological leeway. Their rate-setting instructions grant a state commission little or no freedom to choose among reasonable rate-determining methods according to the State's policy-related judgments, assessing local economic circumstance or community need. I grant the fact that the rules leave it to the state commissions to fix the actual rate, but that is rather like giving a restaurant chef the authority to choose a menu while restricting him to one dish, an omelette, and to one single favorite recipe.

Nor can the FCC successfully argue that the Act requires the particular rate- setting system that its regulations contain. The FCC's system, which the FCC calls "forward-looking," bases the charge for the use of an unbundled element (say, a set of local wires connecting a subscriber to a local switch) upon a hypothetical set of costs--the costs of providing that service using the incumbent's actual wire center, but otherwise assuming use of the most efficient technology that the incumbent could use (not the equipment the incumbent actually does use). See First Report & Order & para; & para;682, 685, supra, at 15847-15849. The FCC does not claim that the statute's language (though ruling out certain kinds of rate-of-return proceedings, 47 U.S.C. § 252(d)(1)(A)(i) (1994 ed., Supp. II)) forces use of this forward-looking cost determination system. Moreover, I have explained above why I do not believe the Act's purposes demand what its language denies, namely, a single nationwide rate-setting system. Supra, at 7-8; compare First Report & Order & para;114, supra, at 15558-15559 (arguing that a single pricing methodology is needed to assure uniform administration of the Act).

*31 The FCC does argue that the Act's purpose, competition, favors its system. For competition, according to the FCC, tends to produce prices that reflect forward-looking replacement costs, not actual historical costs. E.g., id., & para;672, 11 FCC Rcd, at 15844. But this argument does not show that the Act compels the use of the FCC's system over any other. How could it? The competition that the Act seeks is a process, not an end result; and a regulatory system that imposes through administrative mandate a set of prices that tries to mimic those that competition would have set does not thereby become any the less a regulatory process, nor any the more a competitive one.

Most importantly, the FCC's rules embody not an effort to circumscribe the realm of the reasonable, but rather a policy-oriented effort to choose among several different systems, including systems based upon actual costs or price caps, which other systems the FCC's rules prohibit. A few examples, focusing upon some of the claimed weaknesses of the FCC's preferred system, will illustrate, however, how easily a regulator weighing certain policy considerations (for example administrative considerations) differently might have chosen a different set of reasonable rules.

—Consider the FCC's decision to deny state commissions the choice of establishing rates based on actual historic, rather than hypothetical forward-looking, costs. See First Report & Order & para;705, 11 FCC Rcd, at 15857- 15858. Justice Brandeis, joined by Justice Holmes, pointed out the drawback of using a forward-looking, rather than an actual historic, cost system many years ago. They wrote that whatever the theoretical economic merits of a "reproduction cost" system (a system bearing an uncanny resemblance to the FCC's choice), the hypothetical nature of the regulatory judgments it required made such a system administratively unworkable. See Missouri ex rel. Southwestern Bell Telephone Co. v. Public Serv. Comm'n of Mo., 262 U.S. 276, 292-296, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (Brandeis, J., dissenting).

The passage of time has not outdated the Brandeis and Holmes criticism. Modern critics question whether regulators can accurately determine the "efficient" cost of supplying telephone service, say, to a particular group of Manhattan office buildings, by means of hypothetically efficient up-to-date equipment

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connected to a hypothetically efficient New York City network built to connect with NYNEX's existing (nonhypothetical) wire center. See, e.g., Kahn, Letting Go, at 93, and n. 135. The use of historic costs draws added support from one major statutory aim—expeditious introduction of competition. That is because efforts to determine hypothetical (rather than actual) costs means argument, and argument means delay, with respect to entry into both local and long-distance markets. See supra, at 4-5. Though the FCC disfavors actual or historic costs, it does not satisfactorily explain why their use would be arbitrary or unreasonable.

*32 --Consider the FCC's decision to prohibit use of an "efficient component pricing rule." See First Report & Order & para;708-711, supra, at 15859-15860. Where an incumbent supplies an element to New Entrant B that it otherwise would have provided Old Customer A, that rule, roughly speaking, permits the incumbent to charge a price measured by either (1) the element's market price, if it is sold in the marketplace, or (2), if it is not, the incumbent's actual costs (including the net revenue the incumbent loses from foregoing the sale to Old Customer A). See generally, e.g., W. Baumol & J. Sidak, Toward Competition in Local Telephony 95-97 (1994). This pricing system seeks to assure the incumbent that it will obtain from B the contribution, say, to fixed costs or to overhead, that A had previously made. Many experts prefer such a system. See, e.g., Sidak & Spulber, The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996, 97 Colum. L.Rev. 1081, 1111-1113, and nn. 75-85 (1997); Kahn & Taylor, The Pricing of Inputs Sold to Competitors: A Comment, 11 Yale J. Reg. 225, 228-230 (1994). The FCC rejected that system, but in doing so it did not claim, nor did its reasoning support the claim, that the use of such a system would be arbitrary or unreasonable. See Sidak & Spulber, supra, at 1095-1098.

--Consider the FCC's decision to forbid the use of what regulators call "Ramsey pricing," see First Report & Order & para;696, supra, at 15852- 15853. Ramsey pricing is a classical regulatory pricing system that assigns fixed costs in a way that helps maintain services for customers who cannot (or will not) pay higher prices. See generally, e.g., 1 A. Kahn, The Economics of Regulation: Principles and Institutions 137-141 (reprint 1988). Many experts strongly prefer the use of such a system. See, e.g., Sidak & Spulber, supra, at 1109 (arguing that the FCC's prohibition of Ramsey pricing will "minimize rather than maximize consumer welfare"). The FCC disfavors Ramsey pricing, but it does not explain why a contrary judgment would conflict with the statute or otherwise be arbitrary or unreasonable.

These examples do not show that the FCC's rules themselves are unreasonable. That question is not now before us, and I express no view on the matter. The examples simply help explain why the FCC's rules could not set forth the only rate-setting system consistent with the Act's objectives. The FCC's regulations do not set forth an outer envelope surrounding a set of reasonable choices; instead, they constitute the kind of detailed policy-related rate-setting that the statute in respect to local matters leaves to the States.

* * *

Two Terms ago the Court held that Congress could not constitutionally require a state sheriff to fill out a form providing background information about a buyer of a gun. Printz v. United States, 521 U.S. 898, 935 (1997). Dissenters in that case noted that the law deprived the States of a power that had little practical significance. See id., at 961 (STEVENS, J., dissenting); id., at 977 (BREYER, J., dissenting). Today's decision does deprive the States of practically significant power, a canal compared with Printz 's gnat. The language of the statute nowhere reveals any "clear and manifest purpose," Rice, 331 U.S., at 230, that such was Congress' intent. History, purpose, and precedent all argue to the contrary. I would hold that, in respect to local ratesetting, the FCC's reach has exceeded its legal grasp.

II

*33 I agree with the Court's disposition of the FCC's "unbundling" rules. As earlier explained, the Act seeks to introduce competition into local markets by removing legal barriers to new entry, by requiring interconnection, by requiring incumbents to sell to potential retail competitors at wholesale rates, and by requiring the sharing, or "unbundling," of certain facilities. Supra, at 6; see 47 U.S.C. §§ 251(c)(2)-(4), 253(a) (1994 ed., Supp. II). The Act expresses this last-mentioned sharing requirement in general terms, reflecting congressional uncertainty about the extent to which compelled use of an incumbent's facilities will prove necessary to avoid waste. Will wireless

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technology or cable television lines, for example, permit the efficient provision of local telephone service without the use of existing telephone lines that now run house to house?

Despite the empirical uncertainties, the basic congressional objective is reasonably clear. The unbundling requirement seeks to facilitate the introduction of competition where practical, i.e., without inordinate waste. Supra, at 6-7. And although the provision describing which elements must be unbundled does not explicitly refer to the analogous "essential facilities" doctrine (an antitrust doctrine that this Court has never adopted), the Act, in my view, does impose related limits upon the FCC's power to compel unbundling. In particular, I believe that, given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or "unbundled") where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available. § 251(d)(2); see generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841, 852-853 (1989).

As the majority points out, the Act's language itself suggests some such limits. Ante, at 20-25. The fact that compulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes suggests the same. Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing. Moreover, a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. And as one moves beyond the sharing of readily separable and administrable physical facilities, say, to the sharing of research facilities, firm management, or technical capacities, these problems can become more severe. One would not ordinarily believe it practical, for example, to require a railroad to share its locomotives, fuel, or workforce. Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. See generally 1 H. Demsetz, Ownership, Control, and the Firm: The Organization of Economic Activity 207 (1988). And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide. The greater the administrative burden, for example, the more the need for complex proceedings, the very existence of which means delay, which in turn can impede the entry into long-distance markets that the Act foresees. See supra, at 5.

*34 Nor are any added costs imposed by more extensive unbundling requirements necessarily offset by the added potential for competition. Increased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.

The upshot, in my view, is that the statute's unbundling requirements, read in light of the Act's basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.

I believe the FCC's present unbundling rules are unlawful because they do not sufficiently reflect or explore this other side of the unbundling coin. See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). They do not explain satisfactorily why, for example, an incumbent must share with new entrants "call waiting," or various operator services. Nor do they adequately explain why an incumbent should be forced to share virtually every aspect of its business. As the majority points out, ante, at 22-23, they seem to assume, without convincing explanation, that the more the incumbent unbundles, the better. Were that the Act's objective, however, would Congress have seen a need for a separate wholesale sales requirement (since the "unbundling" requirement would have led to a similar result)? Indeed, would Congress have so emphasized the importance of competition? A totally unbundled world—a world in which competitors share every part of an incumbent's existing system,

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including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges)—in a world in which competitors would have little, if anything, to compete about.

I understand the difficulty of making the judgments that the statute entrusts to the FCC and the short time that it gave the FCC in which to make them. 47 U.S.C. § 251(d)(1) (1994 ed., Supp. II). I also understand that the law gives the FCC considerable leeway in the exercise of its judgment. E.g., R. Pierce, S. Shapiro, & P. Verkuil, Administrative Law and Process § 7.4, p. 353 (2d ed.1992). But, without added explanation, I must conclude that the unbundling rules before us go too far. They are inconsistent with Congress' approach. They have not been adequately justified in terms of the statute's mandate, read in light of its purposes. See 5 U.S.C. § 706(2). For this reason, as well as the reasons set forth in the majority's opinion, I agree with its conclusion that Rule 319 must be vacated.

END OF DOCUMENT

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 1999, the original and 11 copies of the Joint Request for Approval of the Arbitrated Interconnection Agreement Between AT&T Communications of the Midwest, Inc. and U S WEST Communications, Inc. were delivered via overnight delivery to:

William Bullard, Jr
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

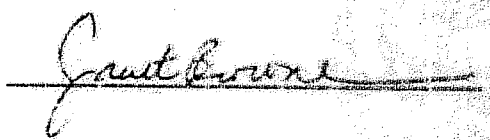
and a true and correct copy was hand delivered on this 2nd day of February, 1999 to:

James H. Gallegos
U S WEST COMMUNICATIONS, INC.
1801 California Street, Suite 5100
Denver, CO 80202

and true and correct copies were delivered via regular mail on this 2nd day of February, 1999 to:

Thomas Welk, Esq.
Boyce, Murphy McDowell & Greenfield
P.O. Box 5015
101 N. Phillips, #600
Sioux Falls, SD 57117

John Devaney, Esq.
Perkins Coie
607 14th Street, N.W.
Washington, D.C. 20005



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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

ADMISSION OF SERVICE

LASKA SCHOENFELDER

LASKA SCHOENFELDER, one of the Defendants in the above-entitled matter, hereby admits service of a true and correct copy of the Summons and Complaint in this matter.

Dated this 9th day of April, 1999.

Laska Schoenfelder

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

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Defendants.

Civ. No. 99-5024

ADMISSION OF SERVICE

PAM NELSON

PAM NELSON, one of the Defendants in the above-entitled matter, hereby admits service of a true and correct copy of the Summons and Complaint in this matter.

Dated this 6th day of April, 1999.

Pam Nelson

Pam Nelson

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DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

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JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

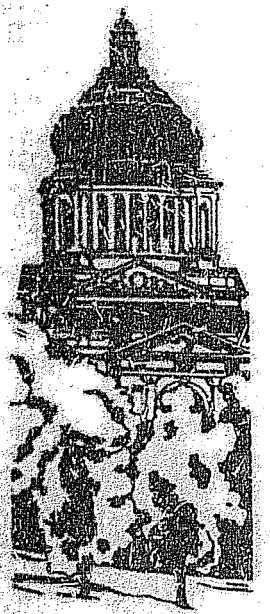
ADMISSION OF SERVICE

JAMES A. BURG

JAMES A. BURG, one of the Defendants in the above-entitled matter, hereby admits service of a true and correct copy of the Summons and Complaint in this matter.

Dated this 6th day of April, 1999.

James A. Burg



South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

April 22, 1999

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Mr. Haas:

Enclosed you will find original and copy of State Defendants' Motion to Dismiss Complaint and original and copy of Brief in Support of State Defendants' Motion to Dismiss in the above captioned matter for filing.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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Pam Nelson
Vice-Chairman
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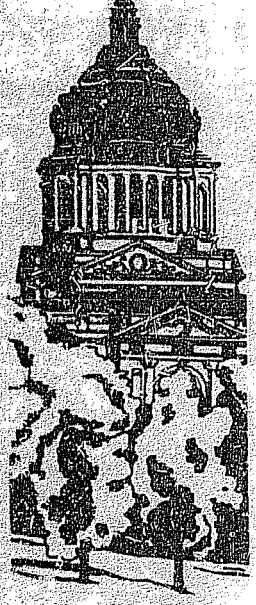

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

April 22, 1999

Honorable Richard H. Battey
Chief Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find courtesy copies of State Defendants' Motion to Dismiss Complaint and Brief in Support of State Defendants' Motion to Dismiss Complaint in the above captioned matter. The originals have been filed with the Clerk.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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Rolayne Ailts Wiest

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Jeffrey P. Lorensen
Charlene Lund
Terry Norum
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

April 22, 1999

Mr. Todd L. Lundy
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1801 California, Suite 5100
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Mr. John S. Lovald
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Pierre, SD 57501-0066

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Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Ms. Lolly Friesen
Attorney at Law
AT&T Communications of the Midwest
1875 Lawrence Street, Suite 1500
Denver, CO 80202

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

Enclosed each of you will find copies of State Defendants' Motion to Dismiss Complaint and Brief in Support of State Defendants' Motion to Dismiss in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation Defendants.	Civ. No. 99-5024 STATE DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants James A. Burg, Pam Nelson and Laska Schoenfelder (State Defendants), by and through their undersigned counsel of record, Special Assistant Attorney General Rolayne Ailts Wiest, hereby move this Court to dismiss Plaintiff's Complaint against them under Rule 12(b)(1) and (2) of the Federal Rules of Civil Procedure. The reasons for such a dismissal are as follows: (1) the Eleventh Amendment to the United States Constitution renders the Defendant Commissioners immune to this suit and (2) the Court lacks jurisdiction over the Plaintiff's takings claim because the claim is premature.

Now therefore, State Defendants hereby respectfully request this Court to dismiss Plaintiff's Complaint against them with prejudice.

Dated at Pierre, South Dakota, this 22nd day of April, 1999.

Rolayne Ailts Wiest

Rolayne Ailts Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of State Defendants' Motion to Dismiss Complaint were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 22nd day of April, 1999.

Mr. Todd L. Lundy
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
P. O. Box 66
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Mr. Thomas J. Welk
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P. O. Box 5015
Sioux Falls, SD 57117-5015

Ms. Letty Friesen
Attorney at Law
AT&T Communications of the Midwest, Inc.
1875 Lawrence Street, Suite 1500
Denver, CO 80202

Rolayne Wiest

Rolayne Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation Defendants.	Civ. No. 99-5024 BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS COMPLAINT

INTRODUCTION

The Commissioners of the South Dakota Public Utilities Commission, James A. Burg, Pam Nelson, and Laska Schoenfelder, have moved to dismiss the Complaint of Plaintiff, U S WEST Communications, Inc. (hereafter "U S WEST"), because the Complaint is barred by the Eleventh Amendment to the United States Constitution. The Commissioners also seek to dismiss the tenth claim for relief based on lack of jurisdiction. The Defendant Commissioners submit the following memorandum in support of their motion to dismiss the Plaintiff's case.

STATEMENT OF THE CASE

I. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (hereafter "Telecommunications Act" or "Act") provides for the development of competition in the

telecommunications industry. The Telecommunications Act permits competitors to enter the local exchange market that has historically been served by incumbent local exchange carriers (hereafter "LECs"). Not only does the Act allow for competition, it also places upon the incumbent LEC the duty to interconnect with competitive telecommunications carriers, provide other carries access to the incumbent LEC's network elements on an unbundled basis, and provide its retail services to other carriers at wholesale rates. 47 U.S.C. § 251(c).

In the Telecommunications Act, Congress envisioned that the competitive carrier and the incumbent LEC would negotiate interconnection agreements that would set forth the prices, terms, and conditions relating to the provisioning of interconnection, access to network elements, and retail services at wholesale prices. 47 U.S.C. § 251(c)(1). However, Congress also recognized that the parties may be unable to reach a negotiated agreement so the Telecommunications Act allows a party to request that a State Commission resolve any disputed issues. 47 U.S.C. § 252(b).

After the unresolved issues have been decided by the State Commission, the parties may incorporate the State Commission's decision into their interconnection agreement and then submit the agreement to the State Commission for approval. 47 U.S.C. § 252 (e)(1). The State Commission may reject the agreement but only for certain reasons specified in the Act. Id. If a State Commission refuses or fails to carry out its responsibilities as required by the Act, the Federal Communications Commission (FCC) is required to "issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure

and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5).

II. PROCEEDINGS BEFORE THE COMMISSION.

On November 20, 1996, the Public Utilities Commission (hereafter "Commission") received a filing from AT&T Communications of the Midwest, Inc. (hereafter "AT&T") pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST. U S WEST filed its response on December 10, 1996.

A hearing was held on the open issues on February 3, 1997, through February 7, 1997, in Pierre, South Dakota. On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997. The Commission's decision contained detailed findings of fact and conclusions of law setting forth its decision on each of the unresolved issues as presented by the parties. In that same order, the Commission told the parties to file a complete Interconnection Agreement containing both negotiated and arbitrated issues within 30 days. However, the parties requested numerous delays and presented the Commission with additional unresolved issues with the result being that an Interconnection Agreement was not filed for approval until February 3, 1999. Even this Interconnection Agreement was still not complete in that the parties had agreed to "park" certain issues pending FCC and court decisions.

In a letter of transmittal presenting the Interconnection Agreement, the parties requested approval of the Interconnection Agreement as filed. Although the parties, in separate statements referred to modifications to the Interconnection Agreement, the

parties agreed "that the Interconnection Agreement can be approved and become effective at this time without the requested modifications and further negotiation toward resolution of the parked issues." The parties acknowledged the issuance of the recent U.S. Supreme Court decision and AT&T stated that the parties will attempt to negotiate resolutions of the parked issues in light of that recent decision. *See AT&T Corp. v. Iowa Utilities Board, et al*, --U.S.--, 119 S.Ct. 721 (1999).

At its March 3, 1999, meeting, the Commission approved the agreement. In its written Order approving the agreement issued March 4, 1999, the Commission made no findings on whether the Interconnection Agreement accurately reflected the Commission's arbitrated decisions since the parties were free to further negotiate and decide upon mutually agreeable terms and conditions that differed from the Commission's arbitrated decisions. The Commission noted that its arbitrated decisions were made in accordance with the Eighth Circuit's decisions, that were in effect at the time, concerning the local competition provisions of the federal Act. The Commission further recognized that the U.S. Supreme Court recently reversed a number of issues contained in the Eighth Circuit's decisions. Notwithstanding the issuance of that U.S. Supreme Court decision, the Commission noted that the parties requested that the Interconnection Agreement be approved as filed. The Commission further stated that it also anticipated that the FCC will issue new orders to address the effects of the Supreme Court's decision on interconnection agreements and other issues are on remand to the Eighth Circuit. Pending those anticipated FCC orders and the Eighth Circuit remand decision and because the parties were not requesting that the Commission revisit issues affected by the

Supreme Court's decision, the Commission approved the Interconnection Agreement as requested by the parties without modifications. The Commission specifically stated that it expected that the parties would comply with the anticipated orders of the FCC and court decisions and, if unable to negotiate revisions to comply with those orders, that the parties would return to the Commission for arbitration. This appeal followed.

SUMMARY OF THE ARGUMENT

This Court lacks the necessary subject matter jurisdiction to hear this case because the Eleventh Amendment bars this action against the Commissioners. The Eleventh Amendment gives a State immunity from suit in federal court. Although there are some exceptions to this grant of immunity, none of the exceptions can be applied to this case. It is the Commissioners' position that the Eleventh Amendment immunity of the States was not abrogated by the Telecommunications Act because (1) Congress did not intend to abrogate the Commission's Eleventh Amendment immunity; and (2) even if they did so intend Congress lacked the authority to do so. Further, the Commissioners assert that South Dakota did not waive its Eleventh Amendment immunity. In addition it is our position that *Ex parte Young* fails to provide an exception to the State's Eleventh Amendment immunity.

As an additional ground for the dismissal of the Tenth Claim, the Commission asserts that this takings claim must be dismissed for lack of jurisdiction because it is not ripe for review.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS THIS ACTION AGAINST THE COMMISSIONERS.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI.

The United States Supreme Court has interpreted the Eleventh Amendment to bar federal jurisdiction over suits against a State arising under the Constitution or laws of the United States when brought by citizens of another State or by a State's own citizens. *Idaho v. Coeur d'Alene*, 521 U.S. 261, 267-268, 117 S.Ct. 2028, 2033, 138 L.Ed. 2d 438 (1997). Eleventh Amendment immunity is applicable to the Commission as an agency of the State of South Dakota. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed. 2d 67 (1984).

There are three exceptions to a State's Eleventh Amendment immunity. The first is when Congress has abrogated the States' immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed. 2d 171 (1985). The second exception occurs when a State has waived its immunity and consented to suit in federal court. *Id.* The third exception is referred to as the doctrine of Ex parte Young and allows a suit against a State official to go forward if the suit seeks prospective injunctive relief in order to end a continuing violation of federal law. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed. 2d 371 (1985). None of these exceptions are applicable in this case.

A. The Eleventh Amendment Immunity Of The States Was Not Abrogated By The Telecommunications Act.

The question of whether Congress abrogated the States' Eleventh Amendment immunity by the passage of the Telecommunications Act requires a two part analysis. The first question to be answered is whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity." *Green*, 474 U.S. at 68, 106 S.Ct. at 425-426. The second question is whether Congress has acted "pursuant to a valid exercise of power." Id.

1. Congress did not Intend to Abrogate the Commission's Eleventh Amendment Immunity.

U S WEST has asserted jurisdiction pursuant to 47 U.S.C. § 252(e)(6). That section provides, in relevant part, as follows:

> In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

As stated above, Congressional intent to abrogate State's constitutionally secured immunity must be unequivocally expressed. *Green*, 474 U.S. at 68, 106 S.Ct. at 425-426. The Supreme Court has made it clear that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero*, 473 U.S. at 246, 105 S.Ct at 3149.

In *Seminole Tribe of Florida v. Florida*, the Supreme Court reaffirmed that any intent to abrogate must be obvious from "a clear legislative statement." 517 U.S. 44, 55, 116 S.Ct. 1114, 1123, 134 L.Ed. 2d 252 (1996) *(citing Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S.Ct. 2578, 2584, 115 L.Ed. 2d 686 (1991)). In *Seminole Tribe* the

issue before the Supreme Court was whether the State of Florida was immune from suit in federal court. The Seminole Indian Tribe had sought to compel negotiations under the Indian Gaming Regulatory Act (IGRA). IGRA requires a tribe that desires to conduct certain types of gaming to enter into negotiations with the State for a Tribal-State compact that will govern the conduct of the games. 25 U.S.C. § 2710(d)(3)(A). The State of Florida raised the defense of Eleventh Amendment immunity. The Supreme Court first analyzed the federal statutes to determine whether the language of IGRA evinced a clear intent to abrogate the States' immunity. *Seminole Tribe*, 517 U.S. at 56-57, 116 S.Ct at 1123-1124. The Court answered in the affirmative, finding that the statutory language contained a clear legislative statement of intent to abrogate the States' immunity. Id. As a basis for this finding, the Court noted the repeated references "to the 'State' in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe . . . ." *Seminole Tribe*, 517 U.S. at 56-57, 116 S.Ct. at 1124.

In contrast to the language used in IGRA, section 252(e)(6) of the Telecommunications Act makes no reference to the State commission as a *defendant* in a suit brought by a party to the interconnection agreement. The language of the Act does not provide that a State or its officials are subject to suit. It provides only that a federal court may review the agreement to determine whether it complies with Sections 251 and 252 of the Telecommunications Act. 47 U.S.C. § 252(e)(6). The section merely authorizes a general type of review in federal district court and, as stated earlier, a general authorization for suit is not sufficient to abrogate the States' immunity. There is no indication, much less "unequivocal statutory language," that the States will relinquish their

Eleventh Amendment immunity by complying with the Act. A clear legislative statement of intent to abrogate the States' immunity could easily have been expressed if that were Congress' intent. For example, the Patent Act specifically provides that a State or officer or employee "shall not be immune, under the eleventh amendment . . . or under any doctrine of sovereign immunity, from suit in Federal court . . . ." *College Sav. Bank v. Florida Prepaid Post secondary Educ. Expenses Bd.*, 948 F.Supp. 400, 420 (D.N.J. 1996). Obviously, Congress knows how to "unequivocally" waive the States' immunity if it so desires. Instead, it chose to write general language providing for federal court review. Thus, section 252(e)(6) lacks the clear legislative intent necessary to abolish the Commission's Eleventh Amendment Immunity.

2. Congress Lacks the Authority to Abrogate the States' Eleventh Amendment Immunity Through the Act.

Assuming, arguendo, that this Court finds that Congress unequivocally expressed an intent to waive the States' immunity by the passage of section 252(e)(6), *Seminole Tribe* teaches that Congress lacks the authority to do so. In deciding whether Congress may unilaterally abolish the States' immunity from suit, the Supreme Court had to answer the following question: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 59, 116 S.Ct at 1125.

Prior to the *Seminole Tribe* decision, the Supreme Court had found that § 5 of the Fourteenth Amendment and the Interstate Commerce Clause, Art. I, § 8, cl.3, allowed Congress the power to abrogate the States' Eleventh Amendment immunity. *Id.* In *Seminole Tribe*, the Court expressly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S.

1, 109 S.Ct. 2273, 105 L.Ed. 2d 1 (1989) which was the case that had found Congress had the authority to abrogate the States' immunity under the Commerce Clause. The Court concluded:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioners suit against the State of Florida must be dismissed for a lack of jurisdiction.

Seminole Tribe, 517 U.S. at 72-73, 116 S.Ct at 1131-1132.

This finding, that the Commerce Clause is not a valid constitutional source for the abrogation of States' immunity, makes any attempt by Congress to abrogate the States' immunity by the passage of section 252(e)(6) invalid. The Telecommunications Act of 1996 amends the Communications Act of 1934 which was enacted pursuant to the Commerce Clause. *See* 47 U.S.C. § 151. If Congress did indeed attempt to abrogate the States' immunity, it is clear that Congress exceeded its constitutional authority. *See Humenansky v. Regents of University of Minnesota*, 152 F.3d 822, 826 (8th Cir. 1998) ("The Commerce Clause, part of Article I of the Constitution, cannot be used to abrogate the Eleventh Amendment's limitation on the Article III jurisdiction of the federal courts.").

B. South Dakota Did Not Waive Its Eleventh Amendment Immunity.

The Supreme Court has ruled that a State may waive the protection of the Eleventh Amendment. *Atascadero*, 473 U.S. at 238, 105 S.Ct. at 3145. A State may expressly

"specify [its] intention to subject itself to suit in *federal court*" by State statute or constitutional provision. *Atascadero*, 473 U.S. at 241, 105 S.Ct. at 3146-3147 (citations omitted) (emphasis in original). The state of South Dakota has not expressly stated that it subjects itself to suit in federal court.

The question then becomes whether by complying with the Act's mandate that the States approve interconnection agreements or be preempted by the FCC, a State can be found to have waived its Eleventh Amendment immunity by participating in the interconnection agreement process.[1] This is commonly referred to as constructive consent or implied waiver. However, it appears that the doctrine of "constructive consent" is no longer viable following the *Seminole Tribe* decision. Under the doctrine of constructive consent, it is argued "that a state impliedly consented to suit in federal court when it undertook non-sovereign activities in areas regulated by the federal government." *Chavez v. Arte Publico Press*, 157 F.3d 282, 285 (5th Cir 1998) (interpreting *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964))

The Fifth Circuit Court of Appeals found in *Chavez* that the Supreme Court's *Seminole Tribe* decision means "that Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent.'" *Chavez*, 157 F.3d at 287. In

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[1] A number of federal courts have rejected other state commissions' Eleventh Amendment immunity defense in similar Telecommunications Act litigation. *See, e.g., U S WEST Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *GTE South, Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va. 1997); *GTE Florida Inc. v. Johnson*, 964 F. Supp. 333 (N.D. Fla. 1997). However, a federal district court in Louisiana recently ruled that the Public Service Commission of Louisiana was entitled to Eleventh Amendment immunity and dismissed the action. *AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.*, et al, 1999 WL 181674 (M.D. La.)

support of its finding that implied consent can no longer be found, the Fifth Circuit noted that the *Seminole Tribe* decision had incorporated most of the reasoning of Justice Scalia's dissent in *Union Gas* which criticized the implied waiver theory. The dissent concluded:

> [T]o acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers–that is, to adopt the very principle [abrogation of state sovereignty] I have just rejected.

Union Gas, 491 U.S. at 44, 109 S.Ct. at 2304 (Scalia, J., concurring in part and dissenting in part). Thus, the Commission could not impliedly waive the State's Eleventh Amendment immunity by complying with federal law and approving an interconnection agreement between U S West and AT&T because *Seminole Tribe* provides that implied waivers can no longer be found. *See AT&T v. BellSouth*, 1999 WL 181674, *7 (M.D. La.)("In light of Chavez, this court holds that the Public Service Commission could not constructively waive its Eleventh Amendment immunity.")

Even if this Court were to conclude that the theory of implied waiver survived *Seminole Tribe*, the Commission did not impliedly waive the State's Eleventh Amendment immunity. First, a State agency has no power to waive the State of South Dakota's Eleventh Amendment immunity. *Ford Motor Co. v. Dept of Treasury of State of Indiana*, 323 U.S. 459, 466-67, 65 S.Ct 347, 352 (1945)(State officials can only waive a State's Eleventh Amendment immunity if they are specifically authorized to do so by the State's Constitution, statute or decision.).

Further, the doctrine of constructive consent is very narrowly defined. In *Atascadero*, the Supreme Court found that the State's participation in programs funded by the Rehabilitation Act of 1973 was not a consent to suit in federal court. *Atascadero*, 473 U.S. at 247, 105 S.Ct. at 3149-50. The Supreme Court has further stated:

> If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment. But, because "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," the Court will find a waiver by the State "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"

Welch v. Department of Highways & Pub. Transp., 438 U.S. 468, 473, 107 S.Ct. 2941, 2946, 97 L.Ed. 2d 389 (1987) (citations and internal quotations omitted).

By participating in the interconnection agreement process, the Commission did not impliedly waive its Eleventh Amendment immunity. This is not a non-sovereign activity concerning an area regulated by the federal government. Interconnection agreements are entered into in order to allow a competitive carrier to compete with an incumbent local exchange carrier for the incumbent LEC's local exchange customers. Local exchange service, as an intrastate service, has traditionally been regulated by State Commissions. The Telecommunications Act mandated that State Commissions arbitrate disputed issues and, following arbitration, approve or reject interconnection agreements. Although it has been described as an "opt in" statutory scheme, the actual language provides that State Commissions "*shall* approve or reject an agreement." 47 U.S.C. § 252(e)(1)(emphasis added). The Act further provides that if a State Commission "fails to act to carry out its responsibility" the FCC shall preempt the State Commission. 47 U.S.C. § 252(e)(5). Thus,

if State Commissions chose to disobey the mandates of the Act, the FCC would be allowed to assume control of a previously State regulated activity -- the regulation of local service. As the Louisiana federal district court recently observed:

> Upon passage of the 1996 Act, the states were forced to either abide by the federal regulations or cede the power to regulate to the FCC--a classic Hobson's choice. The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that this court sees as voluntary.

AT&T v. BellSouth, 1999 WL 181674, *7.

C. *Ex parte Young* Does Not Provide An Exception To The State's Eleventh Amendment Immunity.

U S WEST has named the individual commissioners in an apparent attempt to invoke the *Ex parte Young* doctrine in order to circumvent the State's Eleventh Amendment immunity. The *Ex Parte Young* doctrine allows suit against State officials in federal court for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Thus, *Ex parte Young* can only be used when the suit is not in reality a suit against the State and only when the relief sought is prospective and not retroactive. A further restriction on its use can be found in the *Seminole Tribe* decision where the Supreme Court cautioned that "where Congress has prescribed a detailed remedial scheme for the enforcement of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a State officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74, 114 S.Ct. at 1132. Based on these limitations, the *Ex parte Young* doctrine cannot be applied to this case.

U S WEST has named the three Commissioners in their official capacity in an apparent attempt to invoke *Ex parte Young*. However, it is obvious that the State is the real, substantial party in interest. The test for whether the State is in fact the real party in interest is whether the relief sought against an officer would in fact operate against the State. *Pennhurst*, 465 U.S. at 101, 104 S.Ct. at 908. In this case, only State Commissions are empowered to act under section 252 of the Act. An individual Commissioner cannot approve or reject an interconnection agreement. In fact, there is no reference to "Commissioners" anywhere in the Telecommunications Act. The Act repeatedly refers to "State commissions" and it is the State Commission which is required to act. *See, e.g., Seminole Tribe*, 517 U.S. at 75, n. 17,116 S.Ct at 1133, n. 17 (The Court relied on the fact that the federal statues at issue referred to the State rather than individual State official's.) Although U S WEST repeatedly references the Commissioners in its complaint, it acknowledges that it is the "Commission" which is "a 'State commission' within the meaning of 47 U.S.C. §§ 153(41), 251, and 252." U S WEST Complaint at ¶ 3. None of the actions complained of by U S WEST could be accomplished by any of the three Commissioners acting alone. The Commission can act only by a majority vote. The Act clearly requires action by a State Commission acting as an entity as a prerequisite to judicial review. Moreover, U S WEST has included a takings claim. "And when the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . . ." *Ford Motor Co.*, 323 U.S. at 464, 65 S.Ct. at 350.

Second, this suit does not involve an ongoing violation of a federally protected right. The *Ex Parte Young* doctrine allows suit against State officials in federal court only if the relief requested is prospective. *Ex parte Young*, 209 U.S. at 159, 28 S.Ct. at 454. The acts complained of are in the past. U S WEST appears to be complaining of the continued existence of the Commission's order. This cannot be equated with an ongoing violation.

The third barrier to the invocation of *Ex parte Young* is that this doctrine cannot compel discretionary acts. *Ex parte Young*, 209 U.S. at 158, 28 S.Ct at 453 (stating that the injunction "can only direct affirmative action where an official having some duty to perform not involving discretion, but merely ministerial in nature, refuses or neglects to take such action."). The Commission's decisions that form the bases for U S WEST's complaint involved highly discretionary acts. The Commission's decisions set rates for interconnection, services, network elements as well as setting wholesale prices for resold services. The decisions also set terms and conditions for service. These decisions, which involved highly complex issues, can hardly be viewed as ministerial acts.

Further, the Supreme Court's narrowing of the *Ex parte Young* doctrine in *Seminole Tribe* cannot be ignored. In *Seminole Tribe*, the Court looked at whether Congress created a remedial scheme for the enforcement of a statutorily created right against a State and whether that remedial scheme had limited the type of liability or sanctions that could be imposed for failure to comply. 517 U.S. at 75-76, 114 S.Ct. at 1132-33. The Supreme Court found that the enforcement statutes at issue in *Seminole Tribe* were "quite modest" especially when compared to the type of relief that would be available under *Ex parte Young*, which could include contempt sanctions. 517 U.S. at 75, 114 S.Ct. at 1133.

Notwithstanding the fact that the Court had just found that Congress lacked the constitutional authority to make the state of Florida suable in federal court, the Court still found that the limitation of liability imposed by Congress under IGRA strongly indicated that Congress did not intend to subject a State official to the type of liability that could be found under *Ex parte Young*. *Id.*

Likewise, the enforcement statute of the Telecommunications Act limits the relief in federal court to a determination of "whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. § 252(e)(6). There is nothing in this language to suggest that Congress intended individual State commissioners to be subject to the liabilities that could be imposed under the doctrine of *Ex parte Young*. It is the determination of a State Commission that Congress attempted to make subject to federal appeal and only for the limited purpose of determining whether an interconnection agreement meets the requirements of the Act. The application of *Ex parte Young*, which may subject individual commissioners to liability, clearly goes beyond the Congressional intent as evidenced by section 252(e)(6).[2]

Finally, under the Ex parte Young doctrine the claim must be for prospective injunctive relief and may not be a claim for damages. *Edelman v. Jordan*, 415 U.S. 651, 668-69, 94 S.Ct 1347, 1358-60, 39 L.Ed. 2d 662 (1974). In this case, U S WEST has alleged a taking, claiming that the Commission's decisions resulted "in the taking for public

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[2] The Louisiana federal district court found that the Telecommunications Act "contains no provisions that authorize suit against the members of the Public Service Commission." AT&T v. BellSouth, 1999 WL 1811674, *8. The court reasoned that if it "were to apply the Ex Parte Young exception, it would expose the state regulators to a more severe action than anticipated by section 252(e)(6)." *Id.*

use of U S WEST's enormous investment in its network without just compensation." U S WEST Complaint, ¶ 83. U S WEST's inclusion of a takings claim precludes the use of the *Ex parte Young* doctrine to this case because an order may not issue against an individual State officer for payment of damages if those payments will, in reality, come from the State treasury. Under these circumstances, the suit is treated as actually being brought against the State and, thus, the doctrine of *Ex parte Young* is inapplicable. *Ford Co.*, 323 U.S. 464, 65 S.Ct. at 350.

II. U S WEST'S TAKINGS CLAIM MUST BE DISMISSED FOR LACK OF JURISDICTION BECAUSE THE CLAIM IS PREMATURE.

The Tenth Claim for Relief (¶¶ 80-84) alleges that the Commissioners, as State actors, imposed contractual provisions on U S WEST which constituted a taking of U S WEST's property for public use without just compensation. The alleged acts by the Commission which U S WEST complains of include the following: "the discounted resale of below-cost and already-discounted services, the requirement of providing combinations, the rejection of a rebundling charge, the requirement of unrestricted collocation and the required collocation of RSUS, the requirement that U S WEST make vertical features available through unbundling without cost recovery, and provide that facilities be constructed for the benefit of AT&T without the payment of the full costs of such construction by AT&T . . . ." *See* U S WEST Complaint, ¶ 83.

U S WEST further alleges that the Commission's decision did not provide just compensation to U S WEST for the taking of its property for public use therefore violating the Fifth and Fourteenth Amendments to the U.S. Constitution and entitling U S WEST to injunctive and declaratory relief under 42 U.S.C. § 1983.

As a general rule, plaintiff must seek compensation from the State before proceeding to federal court if adequate State procedures are available. This is so because when the State provides an adequate process for obtaining compensation, no Fifth Amendment violation occurs until compensation is denied. *See McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997).

In the matter presently before this Court, U S WEST has not sought compensation from the State before proceeding to federal court. Rather U S WEST, following the approval of the Interconnection Agreement, proceeded to file its Complaint in federal court. No proceedings regarding this matter were filed in State court.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194, n. 13, 105 S.Ct. 3108, 3120, n. 13 (1985), the Supreme Court stated,

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action. (Emphasis in original.)

The Court went on to state,

> Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking. [cites omitted] If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claims against the Government" for a taking. [cites omitted] Thus we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 USC § 1491. [cites omitted] Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. at 473 U.S. at 194-195, 105 S.Ct. at 3120-21.

The requirements that U S WEST obtain a final decision and attempt State compensation procedures are not exhaustion requirements, but are necessary predicates to showing there has been a taking of property without just compensation. U S WEST's allegations that the Commission took its property without just compensation are not ripe because U S WEST has not sought just compensation from the State.

In conclusion, the Commission requests dismissal of the takings claim for lack of jurisdiction.

CONCLUSION

For the reasons set forth above, the Commissioners respectfully request that this Court dismiss U S WEST's Complaint.

Dated at Pierre, South Dakota, this 22nd day of April, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that copies of Brief in Support of State Defendants' Motion to Dismiss Complaint were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 22nd day of April, 1999.

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FILED
MAY 04 1999
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	CIV 99-5024 ORDER FOR FORM 35 REPORT AND SCHEDULING INFORMATION

RECEIVED
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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Pursuant to the terms of Fed. R. Civ. P. 26(f), within thirty days following the appearance of a defendant, or within sixty days after the complaint has been served on a defendant, the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. Within ten days after the Rule 26(f) meeting, counsel shall jointly prepare and file with the Clerk of Court a complete written report of the 26(f) meeting. The report shall comply with Rule Form 35, Report of Parties' Planning Meeting, and shall include the following:

A. Date and Place of the Meeting and Identification of the Parties, and their Attorneys

1. The date and place at which the meeting was held;

2. Name, address and occupation of each party, together with the name and address of the attorney or attorneys who represented each party at the meeting;

3. Name of the insurance carriers and amount of liability coverage available;

B. Description of the Case

4. A brief narrative of the facts giving rise to the lawsuit, including a description of the legal claims and defenses;

5. A concise statement of the jurisdictional basis of the case, giving a brief narrative description as well as statutory references number;

6. A brief statement of the material issues to be resolved;

C. Pleadings

7. A statement of whether all pleadings have been filed, and description of any amendments to the pleadings the party proposes to make including the identification of any new parties to be added (if non so state);

8. The date by which all motions which seek to amend the pleadings or add parties will be filed;

9. Whether jury trial is available under the law, and whether a jury trial has been timely demanded;

D. Discovery Plan[1]

10. Date by which all prediscovery disclosures required by Rule 26(a)(1) will be completed; [Note: discovery is not filed with the Court.]

11. The number of interrogatories each party shall be permitted to serve;

12. The number of depositions each party shall be permitted to take (excluding expert witness depositions);

13. The date by which all discovery (including expert discovery shall be completed;

14. A statement of how many, if any expert witnesses each party anticipates calling at trial, and a brief (one or two words) description of the type of experts anticipated, e.g., medical doctor economist, accident reconstructionist, accountant;

15. The date by which each party shall disclose the identify of expert witnesses and disclose the reports required under Rule 26(a)(2);

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[1]If the parties are unable to agree upon a discovery plan, the report shall separately set forth each party's proposed plan

16. Whether the parties anticipate expert depositions;

17. The number of expert depositions each party shall be permitted to take;

18. The frequency with which discovery responses must be supplemented pursuant to Rule 26(a);

E. **Dispositive Motions and Trial**

19. Date by which all dispositive motions shall be filed;

20. Date by which the case will be ready to commence trial;

21. Estimated trial time including jury selection and instructions.

F. **Settlement**

22. The parties should fully explore the possibility settling this case at the Rule 26(f) meeting. If the case does not settle, the parties shall be fully prepared to advise the court about the status of settlement discussions.

23. Plaintiff is directed to make a written settlement demand prior to the Rule 26(f) meeting. Defendant shall respond in writing to this demand as soon as possible.

24. If the plaintiff is unable to make a settlement demand, plaintiff shall be fully prepared:

25. To explain the inability;

26. To advise the court what is needed to evaluate settlement; and

27. To advise the court of the earliest date the parties can realistically evaluate settlement.

Dated May 4, 1999.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES SENIOR DISTRICT JUDGE

5-4-99

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U S WEST Communications Inc.
1801 California, Suite 5100
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Rolayne Wiest
Public Utilities Commission General Counsel
500 E. Capitol
Pierre, SD 57501

Re: US WEST v. Burg, et al., Civ. 99-5024

Enclosed please find AT&T'S Answer with respect to the above captioned action.

This is intended to be service by mail.

Yours very truly,

James Robbennolt Jr.

JOHN S. LOVALD
Attorney at Law

JSL:mmh

COPY
ORIG. FILED
MAY 3 1999
JOSEPH HAAS
Clerk

RECEIVED
MAY 05 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., and Iowa corporation

Defendants.

Civil Action No. 99-5024

AT&T'S ANSWER TO U S WEST'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant AT&T and AT&T Communications of the Midwest, Inc. ("AT&T"), by their attorneys for their Answer states as follows:

FIRST DEFENSE

Except as otherwise admitted or alleged, AT&T denies all allegations of U S WEST Communications, Inc.'s ("U S WEST") Complaint.

1. AT&T admits on information and belief that U S WEST is a common carrier as defined by South Dakota law, is incorporated under the laws of the State of Colorado with its principal place of business in Denver, Colorado, and that U S WEST is authorized to provide certain telecommunication services in South Dakota. AT&T denies any remaining allegations of ¶ 1

2. AT&T admits the first sentence in ¶ 2. To the extent that the remaining allegations in ¶ 2 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 2.

3. AT&T admits on information and belief the allegations in the first sentence of ¶ 3. AT&T admits the remaining allegations in ¶ 3.

4. AT&T admits the first two sentences in ¶ 4. To the extent that the remaining allegations in ¶ 4 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 4.

5. AT&T admits that U S WEST purports to bring this action under the Act, 47 U.S.C. § 153 et seq., the United States Constitution and 47 U.S.C. § 1983. To the extent that the remaining allegations in ¶ 5 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 5.

6. To the extent that the allegations in ¶ 6 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T admits that the corporate defendants conduct business in the district, and that the events giving rise to U S WEST's claim occurred in this district. AT&T is without sufficient information to form a belief as to the truth of the allegation regarding where the individual defendants reside and therefore denies such allegation. AT&T denies any remaining allegations in ¶ 6.

7. AT&T admits the Telecommunications Act of 1996 was enacted in February 1996. To the extent that the allegations in ¶ 7 purport to characterize the Act and Congress' legislative purpose and intent, AT&T respectfully refers the Court to the Act as the best available evidence of

2. AT&T admits the first sentence in ¶ 2. To the extent that the remaining allegations in ¶ 2 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 2.

3. AT&T admits on information and belief the allegations in the first sentence of ¶ 3. AT&T admits the remaining allegations in ¶ 3.

4. AT&T admits the first two sentences in ¶ 4. To the extent that the remaining allegations in ¶ 4 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 4.

5. AT&T admits that U S WEST purports to bring this action under the Act, 47 U.S.C. § 153 et seq., the United States Constitution and 47 U.S.C. § 1983. To the extent that the remaining allegations in ¶ 5 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 5.

6. To the extent that the allegations in ¶ 6 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T admits that the corporate defendants conduct business in the district, and that the events giving rise to U S WEST's claim occurred in this district. AT&T is without sufficient information to form a belief as to the truth of the allegation regarding where the individual defendants reside and therefore denies such allegation. AT&T denies any remaining allegations in ¶ 6.

7. AT&T admits the Telecommunications Act of 1996 was enacted in February 1996. To the extent that the allegations in ¶ 7 purport to characterize the Act and Congress' legislative purpose and intent, AT&T respectfully refers the Court to the Act as the best available evidence of

congressional purpose and intent and for its contents and terms and denies all allegations in ¶ 7 inconsistent with the Act. AT&T denies any remaining allegations of ¶ 7.

8. AT&T admits that the Act imposed certain duties on local exchange carriers to promote competition in local telephone service. To the extent that the allegations in ¶ 8 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 8 inconsistent with the Act. AT&T denies any remaining allegations in ¶ 8.

9. To the extent that the allegations in ¶ 9 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 9 inconsistent with the Act. AT&T denies any remaining allegations in ¶ 9.

10. To the extent that the allegations in ¶ 10 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required.

11. To the extent that the allegations in ¶ 11 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 11 inconsistent with the Act. AT&T denies any remaining allegations in ¶ 11.

12. To the extent that the allegations in ¶ 12 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 12 inconsistent with the Act.

13. To the extent that the allegations in ¶ 13 purport to characterize the Act and the Commission's Order, AT&T respectfully refers the Court to the Act and the Order for their contents and terms and denies all allegations in ¶ 13 inconsistent with the Act. To the extent that the remaining allegations in ¶ 13 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 13.

14. To the extent that the allegations in ¶ 14 purport to quote from or characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 14 inconsistent with the Act. To the extent that the remaining allegations in ¶ 14 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 14.

15. AT&T admits that the Act authorizes the Federal Communications Commission ("FCC") to issue regulations implementing the Act. To the extent that the allegations in ¶ 15 purport to quote from or characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 15 inconsistent with the Act. AT&T denies any remaining allegations in ¶ 15.

16. AT&T admits that FCC issued its First Report and Order on August 8, 1996. AT&T admits that the Eighth Circuit issued its decision on the challenge of the FCC's First Report and Order on July 18, 1997 and a subsequent order on October 14, 1997. To the extent that the allegations in ¶ 16 purport to characterize the FCC's Order and the Eighth Circuit's Orders, AT&T respectfully refers the Court to the FCC's Order and the Eighth Circuit's Orders for their contents and terms and denies all allegations in ¶ 16 inconsistent therewith. AT&T denies any remaining allegations in ¶ 16.

17. AT&T admits that Supreme Court issued a decision on January 25, 1999. To the extent that the allegations in ¶ 17 purport to characterize the Supreme Court's decision, AT&T respectfully refers the Court to the Supreme Court's decision for its contents and terms and denies all allegations in ¶ 17 inconsistent therewith. AT&T denies any remaining allegations in ¶ 17.

18. To the extent that the allegations in ¶ 18 purport to characterize the Supreme Court's decision, AT&T respectfully refers the Court to the Supreme Court's decision for its contents and

terms and denies all allegations in ¶ 18 inconsistent therewith. AT&T denies any remaining allegations in ¶ 18.

19. To the extent that the allegations in ¶ 19 purport to characterize the Supreme Court's decision, AT&T respectfully refers the Court to the Supreme Court's decision for its contents and terms and denies all allegations in ¶ 19 inconsistent therewith. AT&T denies any remaining allegations in ¶ 19.

20. To the extent that the allegations in ¶ 20 purport to characterize the Supreme Court's decision, AT&T respectfully refers the Court to the Supreme Court's decision for its contents and terms and denies all allegations in ¶ 20 inconsistent therewith. To the extent that the allegations in ¶ 20 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any remaining allegations in ¶ 20.

21. To the extent that the allegations in ¶ 21 purport to characterize the Supreme Court's decision, AT&T respectfully refers the Court to the Supreme Court's decision for its contents and terms and denies all allegations in ¶ 21 inconsistent therewith. AT&T denies any remaining allegations in ¶ 21.

22. To the extent that the allegations in ¶ 22 purport to characterize the Supreme Court's decision, AT&T respectfully refers the Court to the Supreme Court's decision for its contents and terms and denies all allegations in ¶ 22 inconsistent therewith. AT&T denies any remaining allegations in ¶ 22.

23. AT&T admits on information and belief the allegations in the first sentence of ¶ 23. AT&T admits the parties attempted to negotiate the terms of an interconnection agreement. AT&T denies any remaining allegations of ¶ 23.

24. AT&T admits the allegations of ¶ 24.

25. AT&T admits the second and fourth sentences of ¶ 25. To the extent that the allegations in ¶ 25 purport to the record before the Commission, AT&T respectfully refers the Court to the record decision for its contents and terms and denies all allegations in ¶ 25 inconsistent therewith. AT&T denies any remaining allegations of ¶ 25.

26. AT&T admits the allegations of ¶ 26.

27. AT&T admits the allegations of ¶ 27.

28. AT&T denies the allegations of ¶ 28.

29. AT&T denies the allegations of ¶ 29.

30. To the extent the allegations in ¶ 30 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. To the extent that the remaining allegations in ¶ 30 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any allegations in ¶ 30.

31. To the extent the allegations in ¶ 31 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 31.

32. To the extent the allegations in ¶ 32 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 32.

33. To the extent the allegations in ¶ 33 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 33.

34. To the extent the allegations in ¶ 34 purport to characterize the record before the Commission and the Commission's Order, AT&T respectfully refers the Court to the record and the Commission's Order for their contents and terms and denies any allegation inconsistent therewith. To the extent that the remaining allegations in ¶ 34 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any allegations in ¶ 34.

35. To the extent the allegations in ¶ 35 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 35.

36. To the extent the allegations in ¶ 36 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 36.

37. To the extent the allegations in ¶ 37 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 37.

38. To the extent the allegations in ¶ 38 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. To the extent that the remaining allegations in ¶ 38 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any allegations in ¶ 38.

39. To the extent the allegations in ¶ 39 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. To the extent that the allegations in ¶ 39 purport to the record before the Commission, AT&T respectfully refers the Court to the record decision for its contents and terms and denies all allegations in ¶ 39 inconsistent therewith. AT&T denies any allegations in ¶ 39.

40. To the extent the allegations in ¶ 40 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 40.

41. To the extent the allegations in ¶ 41 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. To the extent that the allegations in ¶ 41 purport to the record before the Commission, AT&T respectfully refers the Court to the record decision for its contents and terms and denies all allegations in ¶ 41 inconsistent therewith. AT&T denies any allegations in ¶ 41.

42. To the extent the allegations in ¶ 42 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. AT&T denies any allegations in ¶ 42.

43. To the extent the allegations in ¶ 43 purport to characterize the Commission's Order, AT&T respectfully refers the Court to the Commission's Order for its contents and terms and denies any allegation inconsistent therewith. To the extent that the remaining allegations in ¶ 43 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies any allegations in ¶ 43.

44. As to ¶ 44, AT&T incorporates ¶¶ 1 through 43 of this Answer by reference as if set forth fully herein.

45. To the extent that the allegations in ¶ 45 purport to quote from or characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 45 inconsistent therewith. AT&T denies the remaining allegations of ¶ 45.

46. To the extent the allegations in ¶ 46 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations inconsistent with those statutes or regulations. AT&T denies all remaining allegations of ¶ 46.

47. AT&T denies the allegations of ¶ 47.

48. As to ¶ 48, AT&T incorporates ¶¶ 1 through 47 of this Answer by reference as if set forth fully herein.

49. To the extent that the allegations in ¶ 49 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 49 inconsistent therewith. AT&T denies the remaining allegations of ¶ 49.

50. To the extent that the allegations in ¶ 50 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 50 inconsistent therewith. AT&T denies the remaining allegations of ¶ 50.

51. AT&T denies the allegations of ¶ 51.

52. As to ¶ 52, AT&T incorporates ¶¶ 1 through 51 of this Answer by reference as if set forth fully herein.

53. To the extent that the allegations in ¶ 53 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 53 inconsistent therewith. AT&T denies the remaining allegations of ¶ 53.

54. To the extent that the allegations in ¶ 54 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 54 inconsistent therewith. AT&T denies the remaining allegations of ¶ 54.

55. AT&T denies the allegations of ¶ 55.

56. As to ¶ 56, AT&T incorporates ¶¶ 1 through 55 of this Answer by reference as if set forth fully herein.

57. To the extent that the allegations in ¶ 57 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 57 inconsistent therewith. AT&T denies the remaining allegations of ¶ 57.

58. AT&T admits the first sentence of ¶ 58. AT&T denies the remaining allegations of ¶ 58.

59. To the extent that the allegations in ¶ 59 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 59 inconsistent therewith. AT&T denies the remaining allegations of ¶ 59.

60. AT&T denies the allegations of ¶ 60.

61. As to ¶ 61, AT&T incorporates ¶¶ 1 through 60 of this Answer by reference as if set forth fully herein.

62. To the extent that the allegations in ¶ 62 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 62 inconsistent with the Act. To the extent that the allegations in ¶ 62 are conclusions of law, AT&T respectfully refers all questions of law to the Court, and no response is required. AT&T denies the remaining allegations of ¶ 62.

63. To the extent that the allegations in ¶ 63 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 63 inconsistent therewith. AT&T denies the remaining allegations of ¶ 63.

64. AT&T denies the allegations of ¶ 64.

65. As to ¶ 65, AT&T incorporates ¶¶ 1 through 64 of this Answer by reference as if set forth fully herein.

66. To the extent that the allegations in ¶ 66 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 66 inconsistent therewith. AT&T denies the remaining allegations of ¶ 66.

67. To the extent that the allegations in ¶ 67 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 67 inconsistent therewith. AT&T denies the remaining allegations of ¶ 67.

68. To the extent that the allegations in ¶ 68 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 68 inconsistent therewith. AT&T denies the remaining allegations of ¶ 68.

69. AT&T denies the allegations of ¶ 69.

70. As to ¶ 70, AT&T incorporates ¶¶ 1 through 69 of this Answer by reference as if set forth fully herein.

71. To the extent that the allegations in ¶ 71 purport to characterize the Act, AT&T respectfully refers the Court to the Act for its contents and terms and denies all allegations in ¶ 71 inconsistent therewith. AT&T denies the remaining allegations of ¶ 71.

72. To the extent that the allegations in ¶ 72 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 72 inconsistent therewith. AT&T denies the remaining allegations of ¶ 72.

73. AT&T denies the allegations of ¶ 73.

74. As to ¶ 74, AT&T incorporates ¶¶ 1 through 73 of this Answer by reference as if set forth fully herein.

75. To the extent that the allegations in ¶ 75 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for its contents and terms and denies all allegations in ¶ 75 inconsistent therewith. AT&T denies the remaining allegations of ¶ 75.

76. AT&T denies the allegations of ¶ 76.

77. AT&T denies the allegations of ¶ 77.

78. As to ¶ 78, AT&T incorporates ¶¶ 1 through 77 of this Answer by reference as if fully set forth herein.

79. To the extent that the allegations in ¶ 79 purport to characterize the Interconnection Agreement, AT&T respectfully refers the Court to the Interconnection Agreement for their contents and terms and denies all allegations in ¶ 79 inconsistent therewith. AT&T denies the remaining allegations of ¶ 79.

80. As to ¶ 80, AT&T incorporates ¶¶ 1 through 79 of this Answer by reference as if set forth fully herein.

81. To the extent that the allegations in ¶ 81 purport to characterize the United States Constitution, AT&T respectfully refers the Court to the Constitution for its contents and terms and denies all allegations in ¶ 81 inconsistent therewith. AT&T denies the remaining allegations of ¶ 81.

82. To the extent that the allegations in ¶ 82 purport to characterize the Commission's Orders, AT&T respectfully refers the Court to the Orders for their contents and terms and denies all allegations in ¶ 82 inconsistent therewith. AT&T denies the remaining allegations of ¶ 82.

83. AT&T denies the allegations of ¶ 33.

84. AT&T denies the allegations of ¶ 84.

85. AT&T denies that U S WEST is entitled to any of the relief it requests.

SECOND DEFENSE

U S WEST's Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

To the extent that U S WEST's Complaint raises constitutional claims, those claims are not ripe for adjudication.

FOURTH DEFENSE

U S WEST's claim for injunctive relief are barred by the doctrine of waiver, estoppel, laches and unclean hands.

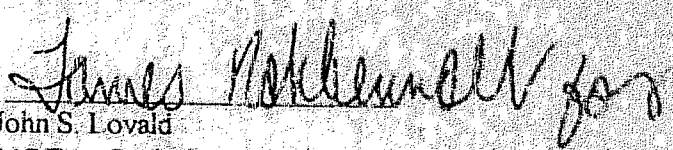
CONCLUSION

WHEREFORE, Defendant AT&T asks that the Complaint be dismissed with prejudice and that AT&T be awarded its costs, disbursements and attorneys fees together with such other relief as the Court deems proper.

DATED: May 3, 1999.

Respectfully submitted,

OLINGER, LOVALD, ROBBENNOLT & McCAHREN, P.C.

By: 

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ORIG. FILED
MAY 3 1999
JOSEPH HAAS
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., and Iowa corporation Defendants.	Civil Action No. 99-5024 **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have served a true and correct copy of **AT&T'S ANSWER TO U S WEST'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** by first class mail, on the date designated below, postage prepaid, upon the following:

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Blair A. Rosenthal
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Denver, CO 80202

Rolayne Wiest
Public Utilities Commission General Counsel
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Pierre, SD 57501

dated this 3rd day of May, 1999.

James Robbennolt for

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John S. Murphy (1924-1988)

May 14, 1999

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST'S Brief in Opposition to State Defendant's Motion to Dismiss Complaint and Certificate of Service. This is intended as service by mail upon you.

Thank you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Wilka

Tamara A. Wilka

TAW/vjj
Enclosures
cc: Todd Lundy
Blair A. Rosenthal
Larry Toll
Jon Lehner

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

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J.W. Boyce (1884-1945)
John S. Murphy (1924-1986)

May 14, 1999

VIA UPS OVERNIGHT

RECEIVED

MAY 17 1999

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Clerk of Courts
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of U S WEST'S Brief in Opposition to State Defendant's Motion to Dismiss Complaint and Certificate of Service.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

COPY

Tamara A. Wilka

TAW/vjj
Enclosure
cc: Rolayne Ailts Wiest
John Lovald
Letty S.D. Friesen
Todd Lundy
Blair A. Rosenthal
Larry Toll
Jon Lehner

RECEIVED
MAY 17 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC. an Iowa corporation,

Defendants.

Civ. No. 99-5024

U S WEST'S BRIEF IN OPPOSITION TO STATE DEFENDANT'S MOTION TO DISMISS COMPLAINT

INTRODUCTION

Plaintiff U S WEST Communications, Inc. ("U S WEST") submits this brief in opposition to the motion to dismiss brought by James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota ("the Commissioners"). The Commissioners' motion should be dismissed because this Court has jurisdiction to hear claims against state officers for violation of federal law, and because the Commissioners have otherwise consented to this suit by voluntarily participating in the arbitration and approval of the underlying interconnection agreement pursuant to the Telecommunications Act of 1996 (the "Act"). Alternatively, if the Court were to conclude that the Eleventh Amendment invalidates §252(e)(6) of the Act, then the entire process for state commission implementation of the Act must be invalidated as well.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION.

A. State Officers Purporting To Exercise Federal Mandates Are Routinely Sued In Federal Court For Violating Federal Law.

The Supreme Court has long held that the Eleventh Amendment grants states sovereign immunity from suit in federal court by a private citizen of another state as well as citizens of the state being sued. *Hans v. Louisiana*, 134 U.S. 1 (1890). Shortly after the Supreme Court decided *Hans v. Louisiana*, however, it carved out an exception to Eleventh Amendment immunity. *Ex Parte Young*, 209 U.S. 123 (1908). In *Ex Parte Young*, the Court held that the Eleventh Amendment does not bar suits against state officers who act in violation of federal rights and that allowing such suits is necessary to vindicate those rights and give substance to the supremacy of federal law. *Kentucky v. Graham*, 473 U.S. 159, 169 n. 18 (1985) ("In an injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants"). The rationale of *Ex Parte Young* is that states cannot authorize an officer to violate the United States Constitution. Thus an officer who acts in derogation of federal law is stripped of the Eleventh Amendment immunity that might otherwise cover him as an agent of the state. The right to sue state officials, the Court reasoned, balances federal supremacy and state sovereignty in order to effectuate the overriding concept of federalism in our society. *See Ex Parte Young*, 209 U.S. at 159-160.

The courts have extended *Ex Parte Young* to permit federal courts to entertain actions against state officers for violations of federal statutory law as well as for constitutional violations. *See, e.g., In re SDDS, Inc.*, 97 F.3d 1030 (8th Cir. 1996); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253 (8th Cir. 1995); *Almond Hill Sch. v. Dep't of Agric.*, 768 F.2d 1030, 1034 (9th Cir. 1985); *Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167, 1174 (3d Cir.

1984); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights . . . . A Plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question [over] which the federal courts have jurisdiction. . . .")

The Supreme Court recently reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho v. Coeur d'Alene Tribe*, 512 U.S. 261, 117 S. Ct. 2028, 2034 (1997). Moreover, the case of *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996), upon which the Commissioners rely, actually reinforces the *Ex Parte Young* doctrine. Nothing in *Seminole* suggests that the usual rule permitting suits in federal court against state officers for violations of federal law is inapplicable here. *Seminole* makes clear that the availability of relief under *Ex Parte Young* is a matter of congressional intent. *Id.* at 1133 n. 17. The *Seminole* Court concluded that Congress had intentionally limited the sanctions courts could impose on states for failing to comply with the Indian Gaming Regulatory Act ("IGRA"), and that injunctive relief under *Ex Parte Young* would be inconsistent with that limitation. *See id.* at 1132-33. If a state failed to negotiate a gaming compact in good faith with a tribe, all a court could do under IGRA was order the parties to complete negotiations with 60 days or submit to a mediator. 25 U.S.C. § 2710(d)(7)(B)(iii). Allowing tribes to bypass these limits through *Ex Parte Young* would nullify IGRA. *Id.*

Unlike IGRA, however, Congress authorized *Ex Parte Young* suits in the Act. The Act gives federal district courts plenary jurisdiction over "any case in which a State commission makes a determination," and nothing in the Act limits the court's remedial powers. 47 U.S.C.

§ 252(e)(6). Whereas IGRA spoke exclusively in terms of the responsibilities of "the State" and authorized suits against "the State" for noncompliance, 116 S. Ct. at 1133 n.17, the Act imposes responsibilities on the "State commission" -- a sign under *Seminole* "that Congress had implicitly authorized suit under *Ex Parte Young*." *Id.* (collecting similarly phrased statutes). Finally, the state official's role under the Act is very different from its role under IGRA. The State of Florida itself, as opposed to its officers, was a party to the compact at issue in *Seminole*, since only a state can enter into a compact with another sovereign. *See id.* By contrast, the Commissioners are merely arbitrators in disputes under the Act, not parties to the interconnection agreements. Thus, their federal duties are "of the sort likely to be performed by an individual state executive officer or . . . group of officers," not the state. *Id.* Thus, the Act imposes its duties directly on individual state officers and expressly authorizes suit in federal court against them.

Indeed, since the Supreme Court's decision in *Seminole*, civil suits against state officers in federal court for violations of federal constitutional and statutory rights when acting as the "agent" of the federal government have continued unabated. *See, e.g., Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) (even though citizens could not sue state directly for violations of the FLSA after *Seminole*, *supra*, they could sue state officials under the "broad exception" to Eleventh Amendment immunity recognized in *Ex Parte Young*); *National Resources Defense Council v. California Dep't. of Transp.*, 96 F.3d 420, 423-24 (9th Cir. 1996) (plaintiff may bring *Ex Parte Young* suit for injunctive relief under Clean Water Act); *Armstrong v. Wilson*, 942 F. Supp. 1252, 1263-64 (N.D. Cal. 1996) (same result under Americans with Disabilities Act); *Prisco v. New York*, Docket No. 91 Civ. 3990 (RLC), 1996 U.S. Dist. LEXIS 14944, *54 (S.D.N.Y. Oct. 9, 1996) (same result under RCRA). There is nothing unusual about U S WEST's complaint against the Commissioners.

This civil action is precisely the type of suit authorized by *Ex Parte Young*. Indeed, numerous courts have held *Ex Parte Young* permits suits pursuant to 47 U.S.C. § 252(e)(6). *See Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 16 F.Supp.2d 817, 825-26 (W.D. Mich. 1998) (collecting cases); *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 9 F.Supp.2d 766, 770-71 (E.D. Ky. 1998); *U S WEST Comm. Inc. v. Public Servs. Comm'n*, 991 F Supp. 1299, 1301 (D. Utah 1998).

The Commissioners are state officers purportedly carrying out the mandate of a federal regulatory scheme who have violated both federal law and U S WEST's federal Constitutional rights. U S WEST seeks to vindicate those rights in federal court as the Act permits and indeed requires it to do. The Act states that federal court is the *exclusive* forum for vindication of those rights. Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an [interconnection] agreement . . . ." The Commissioners' motion must be denied.

B. The Commissioners Cannot Avoid Application of *Ex Parte Young* Based Upon the Relief U S WEST Seeks.

The Commissioners argue that this case is not appropriate for application of the *Ex Parte Young* doctrine because *Ex Parte Young* is limited to prospective injunctive relief, and that U S WEST's action seeks retrospective relief. This is simply untrue. U S WEST seeks an injunction prohibiting the continuing effect of the Commissioners' order approving the interconnection agreement and prohibiting the Commissioners from taking any action to enforce the agreement. The requested relief is well within the bounds of traditional suits against state officers and is prospective in nature. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Court stated that a "federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." *Id.* at 102-03 (citing *Edelman v. Jordan*, 415 U.S. 651, 669 (1974)).

An injunction against the state officials' conduct is precisely what is sought here. Numerous courts have found that *Ex Parte Young* permits a suit such as this one in federal court. *See, e.g., Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 16 F.Supp.2d 817, 825-26 (W.D. Mich. 1998) (collecting cases) *U.S. West Comm., Inc. v. Public Servs. Comm'n*, 991 F. Supp. 1299, 1301 (D. Utah 1998); *MCI Telecomm., Corp. v. BellSouth Telecomm., Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998).

These decisions are entirely consistent with a whole body of precedent following *Ex Parte Young*. Traditionally, the limits on relief in an *Ex Parte Young* suit have depended upon whether there was a claim for monetary relief that required payment from the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 669 (1974). The Court clarified in *Green v. Mansour*, 474 U.S. 64, 73 (1985), that a declaratory judgment that served solely as a predicate for monetary relief, and where there could be no prospective injunctive relief, had the same effect as a request for monetary relief. Of course, U S WEST does not seek monetary relief in its complaint, nor is the relief it seeks a predicate for a request for monetary relief. Thus, its complaint does not implicate South Dakota's sovereignty, the central concern in *Edelman* and *Mansour*.

Furthermore, no court can possibly issue a prospective injunction without first determining and declaring whether the conduct in question in fact violates federal law. U S WEST seeks a declaration that the agreements approved by the Commissioners violate federal law and an injunction against their implementation or enforcement. The Supreme Court has recognized that this type of request is entirely appropriate under *Ex Parte Young*. *See, e.g., Kentucky v. Graham*, 473 U.S. at 169 n. 18 ("In an injunctive *or declaratory action* grounded on federal law, the State's immunity can be overcome by naming state officials as defendants") (emphasis added). No case the Commissioners cite, and indeed, no case U S WEST has found, requires an *Ex Parte Young* suit to be filed *before* the state officer acts. In this case neither the Court, nor U S WEST, could have known in advance that the Commissioners would approve agreements that violated federal law until they had done so. Thus, the Commissioners are simply incorrect in asserting that the relief sought is beyond the scope of an *Ex Parte Young* suit.

Finally, to the extent the Commissioners argue they are one and the same with the Board, and thus are entitled to Eleventh Amendment immunity, this argument also fails. In *Powder River Basin Resource Council v. Babbitt et al.*, 54 F.3d 1477, 1482 (10th Cir. 1995), the Court confronted the same argument the Commissioners make. The state official in *Powder River* contended the *Ex Parte Young* doctrine did not apply because the suit against him was, in reality, against the state. The court rejected the defendant's argument holding that, "[w]hether the state is the real party in interest turns on the relief sought by the plaintiff. Suits that seek prospective relief are deemed to be suits against the official, while suits that seek retroactive relief are deemed to be suits against the state. *Id.* (citing *Edelman v. Jordan*, 415 U.S. at 664-666). Since this lawsuit seeks to enjoin state officials from carrying out the terms of a state-imposed order and a state-imposed agreement, it is prospective only.

C. The Commissioners Have Consented To Suit In Federal Court.

In any event, by participating in the process of arbitrating interconnection agreements under the federal Telecommunications Act, the Commissioners have consented to suit in federal court and waived their immunity under the Eleventh Amendment. Countless courts have so held. *See MCI Telecomm. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, (7th Cir. 1999); *Michigan Bell Tel.*, 16 F.Supp.2d at 825-26; *MCI Telecomm. v. BellSouth Telecomm.*, 9 F.Supp.2d at 770; *U S WEST Comm. v. TCG Seattle*, 971 F.Supp. 1365; *U S WEST Comm.*, 991 F.Supp. at 1301-02. Indeed, it is well settled that a State may consent to suit and waive its sovereign immunity by participating in a federal regulatory program if: (a) the state voluntarily participates in the program; and (b) the condition of federal court jurisdiction is expressly stated by statute or is clear from the statutory framework. *Petty v. Tennessee-Missouri Bridge Comm'n*,

359 U.S. 275 (1959) (waiver found by adopting state compact); *County of Monroe v. Florida*, 678 F.2d 1124 (2d Cir. 1982) (invocation of Federal Extradition Act led to waiver).

Here the Commissioners freely, willingly and fully participated in the arbitration process. In addition, they were plainly on notice, based on the explicit provision of Section 252(e)(6), that they were thereby subjecting their decisions to exclusive review in the federal courts. Under those circumstances, the Commissioners' actions "leave no room for any other reasonable construction" but that they have waived their Eleventh Amendment immunity. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

The Commissioners' voluntary participation is confirmed by the fact that they had an "opt out" from the Act if they so chose. Specifically, if they choose not to participate in the process of arbitrating interconnection agreements, Section 252(e)(5) states as follows:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [Federal Communications] Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5). This provision confirms that if the Commissioners fail or decline to carry out their responsibility under any provision of § 252, including § 252(e)(6), the FCC may preempt their authority. *Id.*[1] Thus, states are not compelled to conduct arbitrations and discharge other responsibilities under § 252. Indeed, Congress cannot compel them to participate in this federal program. In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court held that Congress cannot "require . . . States to govern according to Congress' instructions." *Id.* at 162. Congress may only encourage states to regulate in a particular manner by, among other methods,

[1] Indeed, if this Court holds that it cannot exercise its jurisdiction under § 252(e)(6) and that the Commissioners have not consented to suit, then the FCC should preempt the Commissioners' authority for failure to carry out their responsibilities under § 252.

"offer[ing] States the *choice* of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167-68 (emphasis added).

Given this unequivocal option, it is clear that if a state commission chooses to assume its responsibilities under the Act, it cannot participate in the arbitration process without also consenting to federal court challenges to its actions. Section 252(e)(6) makes clear that review shall be in federal court in any case in which a State commission makes a determination under § 252, and Section 252(e)(4) precludes state courts from reviewing the actions of state commissions in approving interconnection agreements. Accordingly, the Commissioners consented to suit in this forum even if Congress did not have the authority to compel them to do so. They conducted the arbitration and approved the interconnection agreements at issue voluntarily, knowing, as the statute clearly provides, that by assuming those responsibilities, the agreements they approved would be subject to review in federal court. They also knew that if they did not wish to assume their role or subject themselves to a federal court action, the FCC would assume their role. Since the Commissioners voluntarily chose to participate in the federal program under § 252—a choice that includes subjecting themselves and the agreements they approve to federal court jurisdiction—the Commissioners consented to suit in this Court. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 438 n.1 (1985) ("A State may effectuate a waiver of its constitutional immunity by state statute or constitutional provision, *or by otherwise waiving its immunity to suit in the context of a particular federal program*") (emphasis added); *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 281-82 (1959) (state waived Eleventh Amendment immunity by accepting and acting under compact Congress approved with condition that it waive immunity); *Hankins v. Finnel*, 964 F.2d 853, 856 (8th Cir.1992), *cert. denied*, 506 U.S. 1013 (1992) (state may waive its Eleventh Amendment immunity by its conduct); *see also Employees of the Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279, 284-86 (1973) (a constructive waiver of Eleventh Amendment immunity may be found where it is explicit Congress intended states to be subject to suit in federal court and the activity is of the sort a state can voluntarily elect to implement).

In short, as the Seventh Circuit found:

> [U]nder the Telecommunications Act, Congress gave states a genuine choice: The states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court; or the states could retain their sovereign immunity and allow the FCC to carry out the federal regulatory functions without their participation. *See* 47 U.S.C. § 252(e)(5)-(6). Because this scheme results in a suit against a state entity in federal court only if the state choose to participate, the statute involves a constructive waiver—not an abrogation—of the Eleventh Amendment and therefore does not run afoul of *Seminole Tribe*.

MCI Telecomm. Corp., 168 F.3d 322.

The Commissioners' argument that they lacked the power to waive the State of South Dakota's sovereign immunity is not availing. *See* State Defendants' Brief at 12. To the contrary, the South Dakota Legislature specifically authorized—but did not compel—the Commission to participate in the arbitration and approval process, providing that "[t]he commission *may* implement and comply with the provisions of the federal Telecommunications Act of 1996." *See* SDCL § 49-31-81 (emphasis added). In passing legislation, the Legislature is presumed to be aware of exising law. *See Nelson v. School Bd. of the Hill City Sch. Dist.*, 459 N.W.2d 451, 455 (S.D. 1990). Thus, the Legislature is presumed to be aware of the judicial review provisions of the 1996 Act, providing for federal court review of state commission determinations, but specifically authorized the Commissioners to participate. The Commissioners' waiver of their sovereign immunity was clearly authorized.

Similarly unavailing is the Commissioners' argument that they have not waived their Eleventh Amendment immunity because they were faced with a "Hobson's choice" of either losing their ability to regulate local phone service or subjecting themselves to federal court jurisdiction. State Defendant's Brief at 13-14. Contrary to the Commissioners' suggestion, nothing precludes them from otherwise enforcing state law requirements that are consistent with the Act. *See* 47 U.S.C. § 261(a)-(c). Thus, they were not faced with the prospect of losing their ability to regulate under state law. The Commissioners' arbitration and approval of the underlying interconnection agreement subjects them to suit in federal court.

II. IF THE COURT CONCLUDES THAT THE JUDICIAL REVIEW PROVISIONS OF THE ACT ARE UNCONSTITUTIONAL, MAJOR PROVISIONS OF THE ACT MUST FALL AS WELL.

For the foregoing reasons, it is unnecessary for the Court to consider the constitutionality of § 252(e)(6). If this Court were to conclude, however, that the Eleventh Amendment bars judicial review of state commission determinations under § 252(e)(6), that holding would require that numerous other provisions of the Act fall as well. Indeed, section 252(e)(6) is so closely intertwined with the entire process in which Congress delegated authority to the state commissions to arbitrate and approve interconnection agreements, that section 252(e)(6) cannot be severed from those provisions of the Act. Accordingly, if this Court were to conclude that the Eleventh Amendment invalidates section 252(e)(6), then the entire process for state commission implementation of the Act (as well as the state commission determinations arising out of that process) must be invalidated as well.

In determining whether a particular provision of a statute is severable from the remainder, "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."[2] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 1480 (1987). In conducting this analysis, however, a reviewing court must determine whether the statute without the severed provision "will function in a *manner* consistent with the intent of Congress." *Id.* (emphasis in original). Thus, it is not sufficient to ask whether Congress would have enacted—in this case—some form of telecommunications deregulation without the severed provision; instead, a reviewing court must ask whether Congress would have

[2] There was no express severability clause enacted with the Act. *See* Pub. Law No. 104-104, 110 Stat. 56. The Supreme Court has applied, however, the severability clause of the Communications Act of 1934, 47 U.S.C. § 608 to amendments to that Act—though not consistently so. *Compare Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2350 (1997) (applying 47 U.S.C. § 608 to the Communications Decency Act, 47 U.S.C. § 223, which amended the Communications Act of 1934) *with Denver Area Educ. Telecom. Consortium v. FCC*, 116 S. Ct. 2374, 2397 (1996) (concluding that the Cable Television Consumer Act, 47 U.S.C. § 532, which amended the Communications Act of 1934, contained no express severability clause). Regardless, even where there is a severability clause, a reviewing court must determine whether Congress would have enacted the specific provisions of the statute in the absence of the severed provision. *Alaska Airlines*, 480 U.S. at 685-86, 107 S. Ct. at 1480-81.

enacted the specific provisions of the Telecommunications Act without the severed provision. *Id.* at 7.

In this case, the answer to that question must be an unequivocal "no"—Congress would not have enacted the specific provisions of the Telecommunications Act providing for state commission implementation of its terms in the absence of some form of federal oversight. Indeed, in construing section 252(e)(6), numerous courts have found that this provision demonstrates Congressional intent to provide for a uniform interpretation of federal law by the federal courts, and to ensure federal oversight of state commission decisions. *See, e.g., Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 636 (S.D. Ind. 1998); *AT&T Comm. Of The South Central States v. BellSouth Telecomm., Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998); *U S WEST Comm., Inc. v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997). As the Supreme Court stated: "[s]ome delegations of power . . . may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685, 107 S. Ct. at 1480. The express directive that state commission determinations be reviewable by the federal courts clearly demonstrates that Congress would have been unwilling to delegate authority to state commissions without such federal oversight and review.

Moreover, without section 252(e)(6), not only will *federal* oversight of state commission determinations be foreclosed, but *all* oversight of state commission determinations will be foreclosed. Section 252(e)(4) specifically prohibits state courts from exercising jurisdiction over challenges to interconnection agreements. The Court cannot read that provision out of the Act. *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 541 U.S. 122, 136, 115 S. Ct. 1278, 1288 (1995) (courts should not add features to statutes that will achieve statutory "purposes" more effectively); *Aberl v. United States*, 78 F.3d 241, 244 (6th Cir. 1996) (court may not reform statutes to correct perceived inadequacies). Such a judicial re-write of the statute would be directly contrary to Congress's intent to provide an exclusive *federal* forum for challenges to interconnection agreements.

Accordingly, if this Court were to hold § 252(e)(6) unconstitutional, that holding, combined with the fact that § 252(e)(4) precludes state court jurisdiction to review interconnection agreements, will deny aggrieved parties *any* forum to challenge interconnection agreements that state commissions approve. Because Congress was so obviously concerned that state commission determinations be subject to the oversight of the federal courts, Congress would not have delegated authority to the state commissions had it known that the delegation would be lacking in any oversight whatsoever. Accordingly, if this Court does invalidate section 252(e)(6), it must similarly invalidate all of section 252 (as well as any state commission determination and agreement adopted pursuant to section 252).

Moreover, the Commissioners fail to acknowledge that preclusion of any judicial review here raises serious doubts about the constitutionality of the Act. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (serious constitutional question would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1930) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly.") (Brandeis, J., concurring); *see also* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction of Federal Courts: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 911 n.113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights"). Thus, if this Court forecloses all judicial remedies by concluding that section 252(e)(6) is unconstitutional, then it must conclude that the entire Act is invalid.

III. U S WEST'S TAKINGS CLAIM SHOULD NOT BE DISMISSED.

The Fifth Amendment to the United States Constitution ensures that private property shall not be taken for public use without just compensation. U.S. Const. amend. V, cl. 3. When the government condemns private property to carry on the business, "as where public-utility property has been taken over for continued operation by a governmental authority," a taking has occurred for which just compensation must be paid. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12

(1949). If Congress requires U S WEST to maintain and operate its private network for the benefit of its competitors and/or the public, it must ensure that U S WEST is fully compensated for such use. *See Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 410 (1894).

Further, the requirement that U S WEST permit interconnection and access to unbundled elements is a physical occupation of U S WEST's property, a *per se* taking under the Fifth Amendment, regardless of whether the requirements serve an important public purpose or impose minimal economic burdens. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S. Ct. 3164 (1982). The Supreme Court has repeatedly stated that the right to exclude others from the occupation and use of one's private property is "one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *GTE Northwest, Inc. v. Public Util. Comm'n*, 900 P.2d 495, 506 (Or. 1995), *cert. denied*, 517 U.S. 1155 (1996). Indeed, the *Loretto* Court emphasized the importance of an owner's right to possess, use, and dispose of property. *Loretto*, 458 U.S. at 435. When a property owner's property has been permanently occupied, the owner no longer has the right to occupy the space itself or to exclude the occupier from possession and use of the space. *Id.* Moreover, the size of the area occupied is irrelevant since "a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Id.* at 438, n. 16.

Applying these principles, the District Court for the Northern District of Florida recently concluded that the obligation of a utility (including an incumbent LEC) under 47 U.S.C. § 224(a)(1) & (f) to provide nondiscriminatory access to its poles and conduits "amounts to a per se taking of property" for which the utility is entitled to just compensation. *Gulf Power Co. v. United States*, 998 F.Supp. 1386, 1395 (N.D. Fla. 1998)

Similarly, the Agreement at issue here imposes numerous obligations that amount to per se takings. For instance, U S WEST is obligated to provide access to its poles and conduits, which is a taking under *Gulf Power*. U S WEST's obligation to provide physical collocation — i.e., to allow a competitive local exchange carrier ("CLEC") to occupy a portion of U S WEST's

property and place terminating equipment therein—clearly amounts to a taking. Physical collocation deprives U S WEST of the fundamental rights to use, possess, and exclude others from its property. Similarly, U S WEST's obligation to provide unbundled network elements, such as a loop, also amount to a taking. When U S WEST is forced to unbundle a loop, it loses the right to "occupy" the loop as well as the right to exclude the CLEC that has obtained the unbundled loop. Because the physical occupation that accompanies unbundling network elements deprives U S WEST of these fundamental property rights, U S WEST's obligations to unbundle network elements constitutes a taking. For the same reason, U S WEST's obligation to provide access to dark fiber and other unused transmission media also constitutes a taking. Finally, the requirement that U S WEST construct at AT&T's request or resell its services to AT&T without adequate cost recovery also amounts to a takings.

Where a statute does not authorize a taking, an agency lacks the authority to impose one *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994). Indeed, the availability of compensation does not excuse federal courts from the duty to consider and rule on "whether the orders under review were indeed duly authorized by law." *Id.*, 24 F.3d at 1444 n.1. Moreover, Congress sought to compensate for the takings that it authorized under the Act by mandating full cost recovery to incumbent LECs, as described above. However, the Commission imposed Agreement in this case does not fully compensate U S WEST for the taking of its property. Thus, if the Agreement is upheld in its current form, the Commission Defendants will have taken U S WEST's property without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution.

The Commissioners asserts that U S WEST has not sought compensation from the state before proceeding to federal court. *See* State Defendants' Brief at 19. But that is precisely what U S WEST did in the arbitration proceedings below, and the Commissioners denied U S WEST compensation. Moreover, it is important to note that U S WEST is not seeking *compensation* for any taking before this Court. Instead, U S WEST is seeking declaratory and injunctive relief to *prevent* a taking, not just compensation. U S WEST's taking claim is intended to demonstrate

that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis. The fundamental point of U S WEST's taking claim in this proceeding is that this Court must interpret the Act and review the Agreement so as to avoid permitting enforcement of state-commission imposed interconnection agreements that threaten either an unauthorized taking of U S WEST's property or taking without just compensation.

> Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.

Bell Atlantic, 24 F.3d at 1445. Even if compensation for takings resulting from agreements imposed under the Agreement may be available to U S WEST at a later date, federal courts must nevertheless employ a "policy of avoidance" and interpret the Act and Agreement in a manner that does not "expose the Treasury to liability both massive and unforeseen." *See id.*

As set forth above, numerous provisions of the Agreement raise the spectre of a taking. Accordingly, the Court should not dismiss U S WEST's takings claim.

CONCLUSION

For the foregoing reasons, the Commissioners' motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 14th day of May, 1999, true and correct copies of U S WEST's Brief in Opposition to State Defendant's Motion to Dismiss Complaint were sent by U S mail, postage paid, to the following at the following addresses:

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RE: U S WEST v. Burg et al., Civ. 99-5024

Enclosed herewith please find a true and correct copy of AT&T COMMUNICATIONS OF THE MIDWEST, INC.'S OPPOSITION TO THE STATE DEFENDANTS' MOTION TO DISMISS COMPLAINT. This is intended as service by mail.

Yours very truly,

John S. Lovald
Attorney at Law

JSL:mmh

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JOSEPH HAAS
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	Civ. No. 99-5024 AT&T COMMUNICATIONS OF OF THE MIDWEST, INC.'S OPPOSITION TO THE STATE DEFENDANTS' MOTION TO DISMISS COMPLAINT

AT&T Communications of the Midwest, Inc. ("AT&T") respectfully submits this brief in opposition to the Motion to Dismiss the Complaint, and Brief in Support thereof, filed April 22, 1999 by the defendants James A. Burg, Pam Nelson, and Laska Schoenfelder, Commissioners of the South Dakota Public Utilities Commission (collectively, the "Commissioners").

INTRODUCTION AND SUMMARY

In their Motion, the Commissioners claim they are immune from suit under the Eleventh Amendment to the Constitution. Brief in Support of State Defendant's Motion to Dismiss Complaint ("Br."), at 6-18. They also argue that this Court lacks jurisdiction over the takings claim asserted by plaintiff U S West Communications, Inc. ("USWC") in its tenth claim for relief. Br., at 18-20. Neither argument has any merit. Thus, although AT&T believes this Court will ultimately conclude that USWC's claims for relief should be rejected, the Court should deny the instant Motion.

As the Seventh Circuit and at least twenty-two federal district courts have held, there is no Eleventh Amendment immunity in cases—like this one—arising under 47 U.S.C. § 252(e)(6). This is true for three independent reasons. First, the Commissioners waived any immunity by voluntarily electing to arbitrate and approve an interconnection agreement pursuant to section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Act"), in the face of unmistakably clear notice that their determinations would be reviewable exclusively in federal court. Second, in this action, USWC seeks prospective relief against the Commissioners to end what USWC claims (incorrectly) to be a continuing violation of federal law, thus presenting a straightforward and unremarkable application of the century-old doctrine of Ex parte Young, 209 U.S. 123 (1908). Third, even if no prospective relief were available against the Commissioners, this Court can nevertheless conduct appellate-style judicial review of the administrative record to correct any errors in the interpretation and application of federal law. Such appellate-style review is not a "suit" against the state within the meaning of the Eleventh Amendment.

With respect to the Commissioners' takings argument, USWC is not required to pursue state law remedies prior to seeking federal court review of the rates for interconnection and access arbitrated and approved by the Commissioners. The rule of Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), relied upon by the Commissioners, is by its own terms inapplicable where state law remedies are either "unavailable or inadequate." As two federal district courts have held, such is the case here because Congress foreclosed state court review of determinations made by the Commissioners in the course of their arbitration and approval of the interconnection agreement between AT&T and USWC (the "Agreement") and vested jurisdiction to review those determinations solely in federal court. See

§ 252(e)(4), (e)(6).[1] In addition, Congress gave to state commissions—not state courts—the opportunity to set rates for interconnection and access in accordance with the requirements of federal law. In order to determine the constitutional adequacy of the rates set by the Commissioners, a state court would have to determine what rates the Commissioners should have imposed under federal law. This would impermissibly usurp both the role of state commissions as rate-setters, see United States v. Jones, 336 U.S. 641, 670-71 (1949), and this Court's exclusive jurisdiction to review the determinations made below by the Commissioners.

BACKGROUND

Congress enacted the 1996 Act to foster "the rapid introduction of competition into local phone markets." Iowa Utilities Board v. FCC, 120 F.3d 753, 816-17 (8th Cir. 1997), rev'd on other grounds, AT&T Corp. v. Iowa Utilties Board, 119 S. Ct. 721 (1999); Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113 (1996). To that end, section 251 of the Act mandates that potential competitors be allowed to "interconnect" with the networks of incumbent local exchange carriers ("LECs"), § 251(c)(2), to purchase unbundled network elements at cost-based rates, § 251(c)(3), and to resell services currently sold by incumbent LECs, § 251(c)(4). See AT&T Corp., 119 S. Ct. at 726-27.

Congress established expedited procedures in section 252 to implement the Act's substantive rules governing competition. First, the Act directs incumbent LECs such as USWC to negotiate "interconnection agreements." § 252(a)(1) & (b)(5). Any party may petition a state commission to arbitrate any issues that cannot be resolved through negotiation. § 252(b)(1) & (2). The Act does not require state commissions to participate in these proceedings. Rather, if a

[1] The provisions of the Act dealing with local competition, sections 251 to 261, are codified at 47 U.S.C. §§ 251-261. Those provisions are hereafter cited simply by the Act's section numbers.

commission opts not to conduct the arbitration, the Federal Communications Commission ("FCC") will do so. § 252(e)(5). "The Act thus permits states to 'opt out' of their regulatory roles." US WEST Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997) ("TCG I"). If a state commission conducts the arbitration, however, it must ensure that the results comply with sections 251 and 252 and the FCC implementing regulations. § 252(c)(1); see First Report & Order, In re Local Competition Requirements in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996) ("Local Competition Order"). Likewise, a state commission must determine that the interconnection agreement itself complies with the Act or, if the commission fails to do so within 30 days, the agreement will be deemed approved. § 252(e)(4).

Once a state commission has approved or rejected an interconnection agreement, judicial review is available only in federal court. See § 252(e)(4) ("[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section"); § 252(e)(6) ("any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]"); Iowa Utils. Bd., 120 F.3d at 803.

Here, the Commissioners elected to arbitrate and approve the Agreement between USWC and AT&T. USWC, in its complaint, alleges that certain provisions of the Agreement arbitrated and approved by the Commissioners violate the Act, and asks for prospective relief requiring the Commissioners to comply with federal law.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION.

A. The Commissioners Waived Their Eleventh Amendment Immunity.

By voluntarily choosing to conduct the arbitration and approval proceedings and to implement the federal scheme set forth in sections 251 and 252 of the Act, with clear notice that it was subject to suit exclusively in federal court to review the Agreement, the Commissioners waived any Eleventh Amendment immunity they might otherwise have claimed. This is the same conclusion reached by the Seventh Circuit and twenty-two federal district courts.[2]

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[2] MCI Telecomms. Corp. v. Illinois Commerce Comm'n, 168 F.3d 315 (7th Cir. 1999); MCIMetro Access Transmission Servs., Inc. v. GTE Northwest, Inc., No. C97-742WL, slip op. (W.D. Wash. July 24, 1997); U S WEST Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365 (W.D. Wash. 1997); U.S. WEST Communications, Inc. v. Reinbold, No. A1-97-25, slip op. (D.N.D. July 28, 1997); U S WEST Communications, Inc. v. Thoms, No. 4:97-CV-70082, slip op. (S.D. Iowa Aug. 4, 1997); US WEST Communications, Inc. v. Hix, No. 97-D-152, slip. op. (D. Colo. Oct. 29,1997); GTE S., Inc. v. Morrison, No. 3:97CV493, slip op. (E.D. Va. Nov. 7, 1997); AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 5:97-CV-405-BR, slip op. (E.D.N.C. Nov. 20, 1997) ("North Carolina I"); AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 4:97cv262-RH, slip op. (N.D. Fla. Nov. 21, 1997); GTE Fla. Inc. v. Johnson, No. 4:97cv234-RH, slip op. (N.D. Fla. Nov. 21, 1997); AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 3:97-2164-17, slip op. (D.S.C. Dec. 11, 1997); AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 97-79, slip op. (E.D. Ky. Dec. 15, 1997); MCI Telecomms. Corp. v. Bell Atlantic-Virginia Inc., No. 3:97CV629, slip op. (E.D. Va. Dec. 24, 1997); U S WEST Communications, Inc. v. Public Serv. Comm'n, No. 2:97 CV 558, 1998 WL 28146 (D. Utah Jan. 23, 1998); BellSouth Telecomms., Inc. v. Tennessee Regulatory Auth., No. 3:97-0523, slip op. (M.D. Tenn. Jan. 27,1998); U.S. WEST v. Anderson, No. CV 97-9-H-CCL, slip op. (D. Mont. Jan. 30, 1998); U S WEST Communications, Inc. v. TCG Or., No. 97-858-JE, slip op. (D. Or. Jan. 30, 1998); U S WEST Communications, Inc. v. MFS Intelenet, Inc., No. 97-857-JE, slip op. (D. Or. Jan. 30, 1998); AT&T Communications, Inc., v. BellSouth Telecomms., Inc., No. 1:97-cv-884-RCF, slip op. (N.D. Ga. Feb. 11, 1998); U S WEST Communications, Inc., v. Serna, No. CIV 97-0539, slip op. (D.N.M. Mar. 2, 1998); AT&T Communications, Inc. v. Michigan Bell Tel. Co., No. 97-CV-60018-AA, slip op. (E.D. Mich. Mar. 19, 1998); GTE Midwest Inc. v. Johnson, No. 4:97CV3218, slip op. (D. Neb. Mar. 30, 1998); MCI Telecomms. Corp. v. Illinois Bell Tel. Co., No. 97 C 2225, 1998 WL 156678 (N.D. Ill. Mar. 31, 1998); AT&T Communications, Inc., v. Contel, No. 97-901, slip op. (D. Minn. May 1, 1998); U S WEST Communications, Inc. v. Jennings, No. Civ. 97-0026 PHX-RGS, Order, slip op. at 6-9 (D. Ariz. June 1, 1998); Mich. Bell Tel. Co. v. MFS Intelenet of Mich. Inc., No.

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It is well settled that a state may waive its Eleventh Amendment immunity. See Missouri v. Fiske, 290 U.S. 18, 24 (1933); Hankins v. Finnel, 964 F.2d 853, 856 (8th Cir. 1992); see also Parden v. Terminal Ry., 377 U.S. 184, 192 (1964); Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (Parden stands for the "unremarkable . . . proposition that the States may waive their sovereign immunity"). A state may waive immunity: (i) by voluntary appearance to defend the action on the merits, Clark v. Barnard, 108 U.S. 436, 447-48 (1883); (ii) by state statute or constitutional enactment, Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459 (1945); or (iii) by voluntary participation in a federal program in which Congress "manifest[s] a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity," Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238, 247 (1985); accord Barfield v. Blackwood, 7 F.3d 1140, 1145 (4th Cir. 1993); Tennessee Dep't of Human Svces. v. United States Dep't of Educ., 979 F.2d 1162, 1166 (6th Cir. 1992); BV Eng'g v. UCLA, 858 F.2d 1394, 1396 (9th Cir. 1988); Sullivan v. Georgia Dep't of Natural Resources, 724 F.2d 1478, 1481 (11th Cir. 1984); County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982). The Commissioners have waived any claim of Eleventh Amendment immunity under the third branch of the waiver doctrine.

The Supreme Court established the third branch of the waiver doctrine in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), where the Court held that federal law may determine whether a state agency's actions operate as a waiver of Eleventh Amendment immunity. In Petty, the Supreme Court considered whether the Tennessee-Missouri Bridge

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5:98 CV 18, slip op. (W.D. Mich. July 20, 1998); Southwestern Bell Tel., Co. v. Public Serv. Comm'n of Tex., No. A-97-CA-108-SS, slip op. (W.D. Tex. Aug. 07, 1998); MCI Telecomms. Corp. v. Bell Atlantic-Pa., Inc., No. 97-1857, slip op. (M.D. Pa. Aug. 11, 1998). AT&T is filing herewith a Compendium of these decisions that are unreported.

Commission, which was created by an interstate compact approved by Congress, could claim immunity from suit in federal court. The Court acknowledged that "when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity" as a matter of state law. Id. at 278. But in other circumstances, such as the construction of an interstate compact, federal law determines when waiver occurs. Id. at 278-79. In approving the compact that created the Bridge Commission, Congress specifically provided that the compact would not impair the jurisdiction of the federal courts. Petty, 359 U.S. at 277-78. In finding waiver, the Court did not require either state legislative ratification of the conditions Congress imposed or a state statute authorizing the Bridge Commission to waive Eleventh Amendment immunity in a particular case. Rather, the Court found waiver from the operation of the Bridge Commission pursuant to the express conditions Congress had imposed as a matter of federal law: "States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." Id. at 281-82.

As illustrated by the overwhelming body of case law on point, see supra at 4 n.2, there is no doubt that Congress conditioned state participation in the Act's interconnection proceedings on the state's consent to federal jurisdiction. Section 252(e)(5) provides for FCC jurisdiction over interconnection proceedings "[i]f a State commission fails to act to carry out its responsibility under this section." Thus "Congress has allowed the State opportunity to decline from participating in the Act's regulatory process." Reinbold, slip op. at 8; accord Thoms, slip op. at 5. But if a state commission does assume the role offered by Congress, it has clear notice that it will be subject to suit in federal court, see § 252(e)(6), and that federal jurisdiction will be exclusive, see § 252(e)(4). As the court in TCG held:

> The "overwhelming implication" of this statutory structure is that Congress conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted -- but not required -- to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court. There is "no room for any other reasonable construction" of the statute. Port Authority [Trans-Hudson Corp. v. Feeney, 495 U.S. 299,] 305 [1990]. By participating in this arbitration and approval process, [a state] consent[s] to review of its actions.

TCG I, 971 F. Supp. at 1369; see also US WEST Communications, Inc. v. Public Serv. Comm'n, 991 F. Supp. 1299, 1301-02 (D. Utah 1998) (subsections 252(e)(4)-(6) "evince a clear Congressional intention to condition regulation by a state commission upon review of that commission's actions in federal court"); Southwestern Bell Telephone Co. v. Public Serv. Comm'n, No. A-97-CA-108-SS, slip op. 3 (W.D. Tex. Aug. 7, 1998) (noting that "every federal court that has considered the issue" has found waiver from "a state's voluntary participation" in the section 252 process). As the North Carolina district court held, "[t]he conclusion is inescapable that any state accepting the Congressional invitation to immerse itself in the intricacies of the Telecommunications Act also recognizes and acknowledges that review of its action in federal district court is a distinct possibility. . . . Accordingly, [a commission], by its voluntary involvement in the consummation of the interconnection agreements, waive[s] its Eleventh Amendment immunity." North Carolina I, slip op. at 10-11.[3]

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[3] AT&T does not contend that Congress abrogated state immunity under the Act. Unless no other plausible construction is available, section 252(e)(6) cannot be read to abrogate state immunity, because that would raise serious constitutional questions under Seminole Tribe. "The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." Hooper v. California, 155 U.S. 648, 657 (1895); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The most natural, and clearly constitutional, interpretation of section 252(e)(6) is that Congress has made a state's participation in the interconnection proceedings conditional upon acceptance of federal judicial review.

Contrary to the Commissioners' argument, the Supreme Court's decision in Seminole Tribe does not alter this result. "[T]he limitation that Seminole Tribe placed on the ability of Congress to abrogate a state's sovereign immunity is entirely independent from the well-established exception to Eleventh Amendment immunity known as waiver." MCI, 1998 WL 196678, at *7. Accordingly, as both the Ninth and Seventh Circuits have recognized, the doctrine of conditional waiver clearly survives Seminole Tribe. See Premo v. Martin, 119 F.3d 764, 770 (9th Cir. 1997); Marie O. v. Edgar, 131 F.3d 610, 617 (7th Cir. 1997). Indeed, in recently affirming a decision by the Northern District of Illinois in a section 252(e)(6) appeal that a state commission constructively waived its Eleventh Amendment immunity, the Seventh Circuit noted the "fundamental difference between the sort of abrogation that the Supreme Court found constitutionally objectionable in Seminole Tribe and the concept of constructive waiver with which we deal in this case." MCI Telecomms. Corp. v. Illinois Commerce Comm'n, 168 F.3d 315, 321 (7th Cir. 1999). The court of appeals went on to hold that "[w]hen Congress gives states a genuine choice, clearly stated, as to whether or not to waive their sovereign immunity, the doctrine of constructive waiver survives Seminole Tribe." Ibid.

The Commissioners' reliance on Chavez v. Arte Publico Press, 139 F.3d 504 (5th Cir. 1998), where the Fifth Circuit rejected a claim of implied waiver that is indistinguishable from abrogation, is misplaced.[4] In Chavez, the court of appeals held that a state could not be deemed to have waived its immunity simply because its activities were regulated by the Copyright and Lanham Acts and Congress provided a cause of action against the states, reasoning that the broad

[4] The Commissioners also rely on AT&T Communications of the South Central States, Inc. v. BellSouth Telecomms., Inc., 1999 WL 181674, *6-7 (M.D. La. Mar. 29, 1999), where the district court relied exclusively on Chavez in holding that a state commission could not constructively waive its Eleventh Amendment immunity.

theory of constructive waiver under Commerce Clause enactments adopted in Parden could not be reconciled with the no-abrogation rule of Seminole Tribe. 139 F.3d at 506-08. See also Close v. New York, 125 F.3d 31, 40 (2d Cir. 1997) (Fair Labor Standards Act); DiGiore v. Illinois, 962 F. Supp. 1084, 1075 (N.D. Ill. 1997) (same). Regardless whether this holding of Chavez is correct, the case presently before this Court does not involve federal regulation of state activity. Rather, it involves a scheme of cooperative federalism whereby a state agency makes a voluntary choice to participate in a federal regulatory regime and that choice is conditioned on the state agency's consent to review of its implementation of the federal scheme in federal court. Because this case involves the Commissioners' voluntary acceptance of conditions enacted by Congress, it is squarely governed by Petty and Atascadero and not strictly by Parden.[5] The analysis is simply not the same as in Chavez because there is a substantial difference between forcing a state agency to answer a claim in federal court against its will simply because federal law regulates some state activity—i.e., under a theory of abrogation—and permitting the state agency to choose to appear in federal court as a condition of participating in a federal program from which it could otherwise be excluded—i.e., voluntary acceptance of congressional conditions. This distinction between coercion and consent "insulates the Telecommunications Act from constitutional infirmity [under the Eleventh Amendment] because . . . states are afforded a true choice regarding whether they consent to federal jurisdiction." North Carolina I, slip op. at 10.[6]

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[5] The Supreme Court in Parden recognized waiver simply from the state's commercial participation in an arena regulated by the federal government, without more. See 377 U.S. at 196. The Supreme Court modified the Parden rule in Employees v. Department of Public Health, 411 U.S. 279, 286-87 (1973), to require a clear statutory statement requiring consent to federal court jurisdiction, thus bringing it more into line with Petty.

[6] Indeed, even the DiGiore court, while refusing to find waiver where it would be tantamount to abrogation, recognized that waiver could still be found "where the state, with full knowledge that

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The Commissioners' argument that no provision of South Dakota law authorizes a state agency to waive Eleventh Amendment immunity is irrelevant. The state-authorization rule of Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945), applies only when waiver is an issue of state law. See id. at 467. Under the rule of Petty, waiver here is a matter of federal law, and the state-authorization rule of Ford Motor is "inapposite . . . where the waiver is asserted to arise from the State's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, has attached the condition of amenability to suit." Parden, 377 U.S. at 195. Otherwise, "the congressional power to condition such an act upon amenability to suit would be meaningless if the State, on the basis of its own law or intention, could conclusively deny the waiver and shake off the condition." Id. at 196; accord BellSouth Telecomms., Inc. v. Tennessee Reg. Auth., No. 3:97-0523, slip op. at 12 (M.D. Tenn. Jan. 27, 1998) ("under the Supremacy Clause, states cannot be allowed to circumvent federal law which calls for a waiver of immunity by invoking state law barriers"); North Carolina I, slip op. at 6 ("unilateral state action" cannot negate a federal legislative scheme designed "to elicit waiver"). When Congress invites state participation in a federal scheme, it may determine what state action constitutes waiver, so long as it indicates in the statute that consent to jurisdiction is a condition of participation. See In re Platter, 140 F.3d 676, 679-80 (7th Cir. 1998) (rejecting Eleventh Amendment immunity when state agency commenced an adversary proceeding in bankruptcy

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it faces federal court liability, nonetheless chooses to engage in the activity regulated by the federal program." 962 F. Supp. at 1074. Accord Goebel v. Colorado, No. 93-K-1227, 1996 U.S. Dist. LEXIS 20929, *30-31 (D. Colo. June 25, 1996) (finding that Seminole Tribe precludes waiver only where "the state has no realistic options and, thus, there is no practical distinction between constructive waiver and Congressional abrogation").

court, even though the Indiana Attorney General who initiated the action was not authorized to waive that immunity under state law).

B. The Commissioners May Be Sued Under *Ex Parte Young*.

Even if the Commissioners did not waive their immunity, they are subject to federal court jurisdiction to enjoin violations of federal law under Ex parte Young, 209 U.S. 123 (1908). A century of Supreme Court precedent holds that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." Quern v. Jordan, 440 U.S. 332, 337 (1979); Fond du lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 255-56 (8th Cir. 1995); Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1184 (9th Cir. 1997). Such suits against individual state officers in their official capacities are not actions against the state, because an official violating federal law cannot claim to represent the state, which is bound to follow federal law under the Supremacy Clause. Ex parte Young, 209 U.S. at 159-60. By enabling "federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States,'" Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (quoting Ex parte Young, 209 U.S. at 160), the Ex parte Young doctrine is essential to the federal-state balance.

Here, USWC seeks declaratory and injunctive relief preventing the Commissioners from imposing and enforcing an interconnection agreement that USWC alleges (incorrectly) is inconsistent with the 1996 Act. "As a result, this case seeks to vindicate important federal rights, and thus falls squarely within the doctrine of Ex parte Young." Thoms, slip op. at 4 (internal quotation marks omitted); see also, e.g., Reinbold, slip op. at 7; Hix II, slip op. at 2. Contrary to the Commissioners' suggestions, nothing in Seminole Tribe v. Florida, 517 U.S. 44 (1996), provides the Commissioners with refuge from the plain dictates of Ex parte Young.

1. *Seminole Tribe* Does Not Support An Inference That Congress Intended To Preclude *Ex Parte Young* Suits To Enforce The 1996 Act.

Seminole Tribe in no way undercuts the vitality of Ex parte Young. Indeed, "the Court in Seminole Tribe took great pains to assert the continued viability of Ex parte Young," Burgio & Campofelice, Inc. v. New York State Dep't of Labor, 107 F.3d 1000, 1007 (2d Cir. 1997), emphasizing that "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." Seminole Tribe, 517 U.S. at 74 n.14; see also id. at 72 n.16. The Seminole Tribe Court also disavowed any broad holding with respect to Ex parte Young and expressly limited its holding in to a construction of the statute before it: "[W]e do not hold that Congress cannot authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act [(IGRA)]." Id. at 75 n.17. The Court in Seminole Tribe simply interpreted IGRA as creating a "carefully crafted and intricate remedial scheme" against the State that would be inconsistent with the relief available under Ex parte Young. Id. at 75.

In addition, the very next term the Court (and indeed all nine Justices) reaffirmed "the continuing validity of the Ex parte Young doctrine." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997); see also id. at 298 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, J.J.) (Seminole Tribe left "the basic tenets of Ex parte Young untouched"). The opinion of Justice O'Connor in Coeur d'Alene Tribe, which sets forth the holding of the Court,[7]

[7] Justice O'Connor's opinion is controlling because it set forth the narrowest grounds supporting the judgment. See Marks v. United States, 430 U.S. 188, 193 (1977); Coeur d'Alene Tribe, 521 U.S. at 298 (Souter, J., dissenting) (recognizing that Justice O'Connor's view of Ex parte Young "is the controlling one"). In Coeur d'Alene Tribe, Justice O'Connor, joined by Justices Scalia and Thomas, simply refused to "extend [Ex parte Young] to reach" the specific action brought by

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emphasized that, absent exceptional circumstances not present here, jurisdiction under Ex parte Young turns on "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Id. at 296 (O'Connor, J., concurring in part and concurring in the judgment). Thus, seven Justices in Coeur d'Alene Tribe categorically affirmed the general rule for applying Ex parte Young.

Further, the 1996 Act is in no way comparable to IGRA, which compelled negotiation of a contract between an Indian tribe wishing to develop gaming enterprises on tribal lands and the State in which those lands were located. 25 U.S.C. § 2710(d)(3). In IGRA, Congress set forth specific remedies available directly against the State in federal court that "not only . . . define[d], but also significantly . . . limit[ed]" the State's duty to negotiate. Seminole Tribe, 517 U.S. at 74.[8] Because certain of the limited remedies authorized against the State—specifically, remedies for violations of court orders—were inconsistent with normal contempt sanctions that would be available in a suit against the officers, the Court concluded that Congress intended to prohibit the Tribe from invoking Ex parte Young to enforce the statute. See id. at 75-76. "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily

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the Tribe on the facts of that case, reasoning that "[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State." Id. at 296 (O'Connor, J., concurring in part and concurring in the judgment). Those three Justices sharply rejected the attempt by Justice Kennedy, author of the principal opinion, to "recharacterize[] and narrow[] much of our Young jurisprudence" by formulating a case-by-case balancing test. Id. at 291.

[8] The specific remedies in IGRA were: (i) for failure to negotiate in good faith, a court order directing the State and Tribe to conclude a compact within 60 days; (ii) for disregard of that court order, a court order to submit a proposed compact to a mediator; and (iii) for refusal by the State to accept a compact selected by the mediator, notification to the Secretary of the Interior that would trigger federal regulations of gaming on the tribal lands. Seminole Tribe, 517 U.S. at 74-75 (citing 25 U.S.C. § 2710(d)).

created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Id. at 74.

A comparison of IGRA with the 1996 Act makes clear that Ex parte Young relief is available here. Unlike IGRA, section 252(e)(6) of the Act "does not present such a detailed remedial scheme." Thoms, slip op. at 4. Rather, it authorizes, in a single sentence, an action in federal district court by any aggrieved party to determine "whether the agreement or statement meets the requirements" of the Act. § 252(e)(6). Because the statute is silent as to the remedies available in a section 252(e)(6) action, it necessarily fails to prescribe any specific limited remedies running exclusively against the State that would overcome the presumption, vital to the vindication of federal rights, that Ex parte Young actions are available. See Coeur D'Alene Tribe, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment) (declaring it a "basic principle of federal law" that "[w]hen a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"). The statute provides simply for judicial review; it does not prescribe any remedy or sanction that would generally be available against any defendant (agency, agency officer, or otherwise) in an action for judicial review. See, e.g., MCI Communications Corp. v. BellSouth Telecomms., Inc., No. Civ.A. 97-76, 1998 WL 352953, at *4 (E.D. Ky. June 29, 1998); North Carolina I, slip op. at 12; Thoms, slip op. at 4. Accordingly, there is no basis for inferring that Congress intended to preclude Ex parte Young suits to enforce the Act's requirements.[9]

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[9] In the short time since the Supreme Court issued its Seminole Tribe decision, a number of federal courts have rejected challenges to Ex parte Young actions under other federal statutes that do not have remedial schemes comparable to that of IGRA. See Marie O. v. Edgar, 131 F.3d 610, 616 (7th Cir. 1997) (Individuals with Disabilities Education Act); Natural Resources Defense Council v. California Dep't of Transp., 96 F.3d 420, 424 (9th Cir. 1996) (Clean Water Act); Value Behavioral Health, Inc. v. Ohio Dep't of Mental Health, 966 F. Supp. 557, 565 (S.D.

(continued . . .)

2. *Ex Parte Young* Permits An Action For Prospective Relief To End An Ongoing Violation Of Federal Law, Even If The Violation Is Caused By Past Conduct.

In this case, USWC has sought prospective relief—viz., a declaration of the invalidity of the challenged provisions of the Agreement and an injunction against their continued operation and enforcement. An action against state officers in their official capacity for prospective relief from an ongoing violation of federal law, even if the violation arises from past conduct, is squarely within the tradition of Ex parte Young. This rule was most clearly established in Milliken v. Bradley, 433 U.S. 267, 290 (1977). In that case, suit was brought under Ex parte Young against Detroit school system officials who had in the past engaged in de jure segregation of blacks and whites. The district court entered an injunction requiring the school system to adopt remedial programs "to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit." Id. at 290. The Supreme Court upheld the injunction even though it remedied "past misconduct" because it "operate[d] prospectively" to dissipate the effects of that misconduct. Id. See also Papasan v. Allain, 478 U.S. 265, 282 (1986) (Ex parte Young action available to correct unlawful disparity in school funding resulting from past disposition of public lands); Quern, 440 U.S. at 337 (key is whether relief acts prospectively).

As the Fourth Circuit has commented, a contrary view of Ex parte Young would be nonsensical because, under such a view, "no injunction could issue pursuant to Ex parte Young if

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Ohio 1997) (Medicaid statute); CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1580 n.5 (N.D. Ga. 1996) (ICC Termination Act); Armstrong v. Wilson, 942 F. Supp. 1252, 1264 (N.D. Cal. 1996) (Rehabilitation Act), aff'd, 124 F.3d 1019 (9th Cir. 1997); Strahan v. Coxe, 939 F. Supp. 963, 981-82 (D. Mass. 1996) (Endangered Species Act and Marine Mammal Protection Act), aff'd in part and vacated in part, 127 F.3d 155 (1st Cir. 1997).

the action to be enjoined had already been decided upon by a state official. But, of course, plaintiffs have no way to know they must sue to enjoin an official's action until after the official has decided to take that action." CSX Transp., Inc. v. Board of Pub. Works, 138 F.3d 557, 542 (4th Cir. 1998). Thus, courts routinely allow Ex Parte Young actions to proceed to enjoin the continuing unlawful effects of state action taken in the past. See, e.g., id. at 541-42 (tax unlawfully assessed in the past); Bennett v. Yoshina, 140 F.3d 1218, 1224 (9th Cir. 1998) (state election held in the past in violation of constitutional rights); Coakley v. Welch, 877 F.2d 304 (4th Cir. 1989) (past termination of government employee in violation of due process rights). Here, the fact that the Commissioners have concluded the arbitration and review process is irrelevant. The Commissioners' determinations, incorporated in the Agreement, continue to bind the parties, and to the extent any of those determinations violate the Act (and the determinations challenged by USWC do not), there is a continuing violation of federal law.

Thus there is nothing novel in USWC's bringing an Ex parte Young action against the Commissioners to enjoin alleged violations of federal law caused by their orders. Nearly 50 years ago, the Supreme Court summarily rejected an attempt by a state railroad commission to claim that its commissioners were not subject to suit under Ex parte Young, noting that "[t]he contention is not tenable in view of the many cases prior to and following Ex parte Young in which this Court has granted such relief over the same objection." Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341, 344 n.4 (1951).[10] Thus, as one district court has put it,

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[10] See also, e.g., Hutto v. Finney, 437 U.S. 678, 680 n.1, 689-91 (1978) (finding no Eleventh Amendment bar to suit against the Arkansas Commissioner of Correction and members of the Arkansas Board of Correction to enjoin unconstitutional prison conditions and recover attorneys' fees); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 391 (1894) (suit against railroad commission); Wisconsin Cent. Ltd. v. Public Serv. Comm'n, 95 F.3d 1359, 1365 (7th Cir. 1996) (suit against state utility commission); ANR Pipeline Co. v. Corporation Comm'n, 860 F.2d

(continued . . .)

USWC's naming of the Commissioners as defendants in this action "is a 'garden variety' application of the [Ex parte Young] doctrine." North Carolina I, slip op. at 13.

3. The Prospective Relief Requested By USWC Would Not Interfere With The Commissioners' Legitimate Regulatory Discretion.

The admonition in Ex parte Young that courts "may only direct affirmative action where the officer [has] some duty to perform not involving discretion, but merely ministerial in nature," 209 U.S. at 158, does not apply here. As is the case when any party seeks review of a state commission's determinations under section 252(e)(6), the relief requested here by USWC does not involve any admonition to the Commissioners to take any "affirmative action" involving discretion. Rather, by its complaint USWC is seeking an end to what it claims is the Commissioners' continuing violation of federal law. The Supreme Court recognized this distinction in Ex parte Young itself, which involved a suit in federal court to enjoin a state attorney general from enforcing a state statute that was allegedly unconstitutional because it set railroad rates at confiscatory levels. The Attorney General (Young) protested that the decision whether to bring an enforcement action was a matter in his discretion, and was not subject to an injunction. Ex parte Young, 209 U.S. at 158. The Supreme Court rejected his argument.

> The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he

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1571, 1576 (10th Cir. 1988) (same); Aluminum Co. of America v. Utilities Comm'n, 713 F.2d 1024, 1028 (4th Cir. 1983) (same); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1571 n.9 (10th Cir. 1995) (jurisdiction upheld in suit against state game and fish commission); Schulz v. Williams, 44 F.3d 48, 61 n.13 (2d Cir. 1994) (jurisdiction upheld in suit against members of state board of elections, and noting that "[i]t is well settled that a state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act if that official plays some role in the enforcement of the act") (internal quotation marks omitted).

> has no right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

Id. at 159. So too here an injunction to correct the Commissioners' violation of federal law does not interfere with its legitimate discretion.

C. The Eleventh Amendment Does Not Bar Appellate-Style Judicial Review Of The Agreement.

Because the Commissioners waived immunity by their participation in the section 252 proceedings, and because the Commissioners are in any event subject to suit in federal court under Ex parte Young, USWC's complaint properly requests declaratory and injunctive relief against the defendants. But even if this Court were to determine that no such relief could be ordered against the Commissioners, the Eleventh Amendment would not preclude this Court from conducting appellate-style review of the record below and correcting any errors of federal law as intended by Congress.

Actions for judicial review are based on the record below, absent a contrary statutory provision. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). In conducting this on-the-record judicial review, the district court, though in form exercising original jurisdiction, Cronin v. USDA, 919 F.2d 439, 443 (7th Cir. 1990), acts as an appellate court determining questions of law. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996), cert. denied, 519 U.S. 1077 (1997); North Carolina II, 1998 WL 300218, at *1 (action under section 252(e)(6) is "in the nature of an appeal").

Although USWC properly has sought broader relief against the Commissioners, at a minimum it asked the district court to review the record below to correct the defendants' allegedly erroneous interpretations of the Act. Insofar as USWC seeks appellate-style review of the record in federal court, without more, it has not brought "suit" against the state under the

Eleventh Amendment, even if the state or one of its agencies is a named party to the action. "The general rule is that a suit is against the sovereign 'if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Pennhurst, 465 U.S. at 101 n.11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)); Thomas v. FAG Bearings Corp., 50 F.2d 502, 505 (8th Cir. 1995) (Pennhurst definition of suit "articulat[es] . . . the Eleventh Amendment's reach"). In other words, the Eleventh Amendment protects states from being subject to "the coercive process of judicial tribunals at the instance of private parties." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (emphasis added and quotation marks omitted).

Appellate-style review of the record below does not in itself necessarily involve any coercive process against the state, as the Supreme Court long ago recognized. In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Court denied Virginia's motion to dismiss a writ of error based on Eleventh Amendment immunity, holding that the proceeding before it was not a "suit" in law and equity within the meaning of the Amendment:

> Under the [J]udiciary [A]ct, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. . . . [T]he transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined.

Cohens, 19 U.S. at 410; see also McKesson Corp. v. Division of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 28-30 (1990) (federal jurisdiction proper even when party made claims against State below). As in Cohens, a party seeking review under section 252(e)(6) "bring[s] the record into Court" for judicial review, see 19 U.S. at 410, to determine whether certain provisions of an

interconnection agreement, arbitrated and imposed by a state commission, violate federal law (namely, sections 251 and 252 of the Act). Whether or not all the relief USWC has requested here is available against the defendants,[11] this Court, at a minimum and consistently with the Eleventh Amendment, can review the record below for compliance with the commands of the Act and—if necessary—remand the case back to the Commissioners for further proceedings. Even if no affirmative relief is issued against the Commissioners, they are still a proper party to the action to defend their rulings in the arbitration and approval proceedings below. See Ingalls Shipbuilding, Inc. v. Director, OWCP, 519 U.S. 248, 265-66 (1997).

II. BECAUSE THE ACT FORECLOSES STATE COURT REVIEW OF THE COMMISSIONERS' DETERMINATIONS BELOW AND EMPOWERS STATE COMMISSIONS ALONE TO SET RATES, WILLIAMSON COUNTY DOES NOT APPLY.

In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the Supreme Court held that a plaintiff's claim for relief under the just compensation component of the Takings Clause is not ripe for federal court review where the plaintiff has failed to avail itself of any procedures available under state law for securing relief. 473 U.S. at 194-95, 197. The Supreme Court found that the "[r]espondent has not shown that the [state law] procedure is unavailable or inadequate, and until it has utilized that procedure, its takings claim is premature." Id. at 197. Relying on Williamson County, the Eighth Circuit likewise held in McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997), that "the plaintiff must seek compensation from the state before proceeding to federal court if adequate

[11] A court may still order relief that is consistent with the Eleventh Amendment even if other forms of relief are barred. See Edelman v. Jordan, 415 U.S. 651, 664 (1974). The declaratory relief sought here is not an end-run around Eleventh Amendment limitations because (given that section 252(e)(6) review is the sole forum for review of interconnection agreements) the (continued . . .)

state procedures are available." Thus, as the Eighth Circuit expressly stated in McKenzie, the rule of Williamson County by its own terms applies only where a plaintiff has an adequate remedy available under state law.

Mistakenly relying on these two decisions, the Commissioners argue that USWC's tenth claim for relief should be dismissed because USWC "has not sought compensation from the State before proceeding to federal court." Br., at 19. For two independent reasons, Williamson County does not apply in cases, like this one, where a party seeks judicial review under section 252(e)(6). Indeed, at least two federal courts have declined to apply Williamson County in other section 252(e)(6) appeals. See U S West Communications, Inc. v. Hix, No. 97-D-152, slip op. at 6 (D. Colo. Sept. 21, 1998); U S West Communications, Inc. v. TCG Oregon, No. 97-858-IE, slip op. at 25-27 (D. Or. Jan. 30, 1998).

First, no state law remedies are available. The Act makes clear that federal courts have exclusive jurisdiction to review determinations by state commissions during the arbitration and approval of interconnection agreements. Section 252(e)(6) limits judicial review to "an appropriate Federal district court," and even in those cases where Congress "has not expressly stated that statutory jurisdiction is exclusive[,] a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984). If there were any room for doubt regarding the intentions of Congress, section 252(e)(4) eliminates it by providing, in part, that "[n]o state court shall have jurisdiction to review the action of a state commission in approving or rejecting an interconnection agreement under this section." 47

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judgment here can never be claimed as res judicata in another forum to secure impermissible relief against the Commissioners. Cf. Green v. Mansour, 474 U.S. 64, 73 (1985).

U.S.C. § 252(e)(4), (e)(6). Together, these provisions definitively limit judicial review "of state commission determinations under the Act" to federal district court. Iowa Utils. Bd., 120 F.3d at 804; see id. at 803 (holding that section 252(e)(6) "is the exclusive means to attain review of state commission determinations under the Act").

Thus "state court review would improper[ly] abrogate this Court's exclusive statutory authority under the Act to review [the] adequacy of the PUC's pricing decisions." Hix, slip op. at 6. In reaching the same conclusion in another section 252(e)(6) appeal, the district court held as follows:

> In the present action, it appears that U S West cannot appeal the provisions of the Agreement of which it complains to any state agency or board. . . . [T]he Act explicitly precludes state court review of challenges to agreements such as the one at issue here, and confers review upon federal district courts.

U S West Communications, Inc. v. TCG Or., slip op. at 27. The same conclusion follows here. USWC's complaint raises issues concerning its recovery of the costs of providing AT&T interconnection and access to network elements pursuant to the requirements of sections 251 and 252 under the terms of the Agreement arbitrated by the Commissioners. Congress was unequivocal in confining review of such issues to federal district court. See 47 U.S.C. § 252(e)(4), (e)(6); Iowa Utils. Bd., 120 F.3d at 803.

Second, even if state court review were not precluded as a matter of federal law, no just compensation remedy would be available in state court because the Act gives state commissions—not state courts—the opportunity to set "just and reasonable" rates for the duties and obligations imposed on incumbent LECs such as USWC by the Act. See 47 U.S.C. § 252(b)(4)(C), (d)(1). It is well established that a court reviewing an agency rate-making decision "cannot fix rates" as part of its judgment of the case. Federal Power Comm'n v. Pacific Power & Light Co., 307 U.S. 156, 160 (1939). Thus when Congress delegates a rate-setting

decision to an agency, the "function of the reviewing court ends when an error of law is laid bare. At that point, the matter once more goes to the [agency] for reconsideration." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952).

The only way a state court could award monetary relief to USWC here would be to decide what rates the Commissioners should have set under the Act's pricing provisions. In making this decision, the court would necessarily have to substitute its own judgment regarding appropriate rates for the judgment of the agency to which Congress entrusted the decision. As held by a district court in another section 252(e)(6) appeal, this "would improperly abrogate the [Commissioners'] role as the rate setter[s]." Hix, slip op. at 6. See United States v. Jones, 336 U.S. 641, 670-71 (1949). In Jones, an interstate rail carrier had filed a takings claim in the United States Court of Claims based upon rates set by the Interstate Commerce Commission for the transportation of mail. Because the Court of Claims had "jurisdiction only to render a money judgment against the United States and none to remand to the [ICC] for further consideration a rate order which it might find confiscatory," the Court of Claims could award relief only by determining what rates should have been adopted under the statute. 336 U.S. at 670. The Supreme Court held the Court of Claims lacked jurisdiction to "short-circuit the commission in the rate-setting process" by "foreclos[ing] the commission from further consideration of the order and render[ing] final judgment for the amount by which it had found the order confiscatory." Id. at 670-71. Jones thus forbids state courts from awarding monetary compensation in cases, like this one, involving rates.

CONCLUSION

The Commissioners are not immune from suit under the Eleventh Amendment, and this Court has jurisdiction over USWC's claims for relief under the Takings Clause.

Respectfully submitted,

AT&T COMMUNICATIONS OF THE MIDWEST, INC.

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RE: U S WEST v. Burg et al., Civ. 99-5024

Enclosed herewith please find a true and correct copy of AT&T'S COMPENDIUM OF UNREPORTED DECISIONS. This is intended as service by mail.

Yours very truly,

John S. Lovald
Attorney at Law

JSL:mmh

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	Civ. No. 99-5024 AT&T'S COMPENDIUM OF UNREPORTED DECISIONS REGARDING ELEVENTH AMENDMENT IMMUNITY

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2) U.S. WEST Communications, Inc. v. Reinbold, No. A1-97-25, slip op. (D.N.D. July 28, 1997)

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7) AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 4:97cv262-RH, slip op. (N.D. Fla. Nov. 21, 1997)

8) GTE Fla. Inc. v. Johnson, No. 4:97cv234-RH, slip op. (N.D. Fla. Nov. 21, 1997)

9) AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 3:97-2164-17, slip op. (D.S.C. Dec. 11, 1997)

10) AT&T Communications, Inc. v. BellSouth Telecomms., Inc., No. 97-79, slip op. (E.D. Ky. Dec. 15, 1997)

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14) U S WEST Communications, Inc. v. TCG Or., No. 97-858-JE, slip op. (D. Or. Jan. 30, 1998)

15) U S WEST Communications, Inc. v. MFS Intelenet, Inc., No. 97-857-JE, slip op. (D. Or. Jan. 30, 1998)

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MCIMETRO ACCESS TRANSMISSION SERVICES, INC., Plaintiff, v. GTE NORTHWEST, INC., et al., Defendants.	NO. C97-742WD
MCIMETRO ACCESS TRANSMISSION SERVICES, INC., Plaintiff, v. GTE NORTHWEST, INC., et al., Defendants.	NO. C97-905WD
GTE NORTHWEST, INC., Plaintiff, v. MCIMETRO ACCESS TRANSMISSION SERVICES, INC., et al., Defendants.	NO. C97-928WD ORDER ON MOTION OF COMMISSIONERS' TO DISMISS

For the reasons stated in US West Communications, Inc. v. TCG Seattle, et al., --- F. Supp. --- (W.D. Wash. July 24, 1997), the court finds and rules as follows:

1. The invididual commissioners' motion to dismiss on Eleventh Amendment grounds is denied.

2. The Washington Utilities and Transportation Commission is joined as a party defendant purusant to Fed. R. Civ. Proc. 19(a).

The clerk is directed to send copies of this order to all counsel of record.

Dated: July 24, 1997.

William L. Dwyer
United States District Judge

does not transform employers into insurers. Therefore, plaintiff cannot show a causal connection between defendant's alleged negligent act and his injuries.

CONCLUSION

Essentially, plaintiff is asking that this court create a duty under FELA requiring railroads to provide uninsured and underinsured motorist coverage. Such a duty is not supported by statute, caselaw, or the purpose of the FELA. Moreover, even if such a duty existed, plaintiff fails to show that lack of insurance caused his injuries. Accordingly,

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment is GRANTED. Plaintiff's complaint is HEREBY DISMISSED.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and an Order of Judgment and forward copies to counsel.

US WEST COMMUNICATIONS, INC., Plaintiff,

v.

TCG SEATTLE, et al., Defendants.

No. C97-354WD.

United States District Court, W.D. Washington.

July 24, 1997.

Incumbent local exchange carrier (LEC) brought action against competitive carrier seeking to enter market and individual Commissioners of Washington Utilities and Transportation Commission (WUTC) for review of Commission determinations in approving interconnection agreement between carriers under Telecommunications Act. Commissioners moved to dismiss, and United States and Federal Communications Commission (FCC) moved to intervene to defend constitutionality of Act provision purporting to grant district courts authority to review state commission determinations as to interconnection agreements. The District Court, Dwyer, J., held that: (1) United States was entitled to intervene as of right; (2) FCC was not entitled to intervene as of right; (3) it would not grant FCC permissive intervention; (4) by participating in interconnection agreement process under Act, State of Washington waived its immunity from federal judicial review of its actions and, thus, State's sovereign immunity under Eleventh Amendment from suit in federal court did not preclude present action; and (5) WUTC was necessary party and would be joined as defendant.

Motions granted in part and denied in part and WUTC joined as party defendant.

1. Federal Civil Procedure ⇐338

United States was entitled to intervene as of right to defend constitutionality of Telecommunications Act provision purporting to grant district courts authority to review state commission determinations as to interconnection agreements between incumbent local exchange carriers (LEC) and competitive carriers seeking to enter market, in light of statute providing United States with unconditional right to intervene when constitutionality of act of Congress affecting public interest is drawn in question, in incumbent carrier's action seeking review of Washington Utilities and Transportation Commission (WUTC) determinations in approving interconnection agreement between incumbent carrier and competitive carrier under Act. 28 U.S.C.A. § 2403(a); Telecommunications Act of 1996, § 101a(e)(6), 47 U.S.C.A. § 252(e)(6); Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

2. Federal Civil Procedure ⇐338

Federal Communications Commission (FCC) was not entitled to intervene as of right to defend constitutionality of Telecommunications Act provision purporting to grant district courts authority to review state commission determinations as to inter-

connection agreements between incumbent local exchange carriers (LEC) and competitive carriers seeking to enter market, in light of intervention of United States, in incumbent carrier's action seeking review of Washington Utilities and Transportation Commission (WUTC) determinations in approving interconnection agreement between incumbent carrier and competitive carrier under Act; FCC had no statutory entitlement to intervention, and its interest in defending constitutionality of Act provision would be adequately represented. Telecommunications Act of 1996, § 101a(e)(6), 47 U.S.C.A. § 252(e)(6); Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

3. Federal Civil Procedure ⇐338

District court would not grant Federal Communications Commission (FCC) permissive intervention to defend constitutionality of Telecommunications Act provision purporting to grant district courts authority to review state commission determinations as to interconnection agreements between incumbent local exchange carriers (LEC) and competitive carriers seeking to enter market, in incumbent carrier's action seeking review of Washington Utilities and Transportation Commission (WUTC) determinations in approving interconnection agreement between incumbent carrier and competitive carrier under Act; FCC had no absolute or conditional statutory entitlement to intervention, nor did FCC assert claim or defense in an action which had question of law or fact in common with present action. Telecommunications Act of 1996, § 101a(e)(6), 47 U.S.C.A. § 252(e)(6); Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

4. Federal Courts ⇐269

State's immunity under Eleventh Amendment from suits brought against it in federal court extends to state agencies and state officials who act on behalf of state and can therefore assert state's sovereign immunity. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⇐267

If state waives its immunity and consents to suit in federal court, Eleventh Amendment does not bar action. U.S.C.A. Const.Amend. 11.

6. Federal Courts ⇐269, 272

Eleventh Amendment does not bar suit in federal court for prospective injunctive relief against state official acting in violation of federal law. U.S.C.A. Const.Amend. 11.

7. Federal Courts ⇐266.1

State will be deemed to have waived its sovereign immunity under Eleventh Amendment from suit in federal court when state expressly consents to suit, state statute or constitution so provides, or Congress clearly intended to condition state's participation in program or activity on state's waiver of immunity. U.S.C.A. Const.Amend. 11.

8. Federal Courts ⇐266.1

State will be deemed to have waived its sovereign immunity under Eleventh Amendment from suit in federal court only where stated by the most express language or by such overwhelming implication from text as will leave no room for any other reasonable construction. U.S.C.A. Const.Amend. 11.

9. States ⇐4.16(2)

Congress cannot require states to govern according to Congress' instructions.

10. Federal Courts ⇐266.1

By participating in interconnection agreement process under Telecommunications Act regarding incumbent local exchange carriers (LEC) and competitive carriers seeking to enter market, State of Washington waived its Eleventh Amendment immunity from federal judicial review of its actions and, thus, state's sovereign immunity from suit in federal court did not preclude incumbent carrier's action against Commissioners of Washington Utilities and Transportation Commission (WUTC) seeking federal district court review of Commission determinations in approving interconnection agreement between incumbent carrier and competitive carrier under Act; Congress conditioned state participation in interconnection agreement negotiation, arbitration, and approval process on consent to federal judicial review of state's participatory actions. U.S.C.A. Const.Amend. 11; Telecommunications Act of 1996, § 101a(a, b, e), (e)(4–6), 47 U.S.C.A. § 252(a, b, e), (e)(4–6).

11. Federal Civil Procedure ⇐219

Washington Utilities and Transportation Commission (WUTC) was necessary party and would be joined as defendant in incumbent local exchange carrier's (LEC) action against competitive carrier seeking to enter market and individual Commissioners for review of Commission determinations in approving interconnection agreement between carriers under Telecommunications Act, as action was essentially petition for judicial review of Commission's actions, where incumbent carrier's complaint asked court to remand case to Commissioners for further proceedings that adhered to declarations incumbent carrier sought. Telecommunications Act of 1996, § 101a(e)(6), 47 U.S.C.A. § 252(e)(6); Fed.Rules Civ.Proc.Rules 15(a), 19(a), 28 U.S.C.A.

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Shannon E. Smith, Attorney General's Office, Utilities & Transportation, Olympia, WA, for Sharon L. Nelson, Richard Hemstad, William P. Gillis.

Brian C. Kipnis, U.S. Attorney's Office, Seattle, WA, Theodore Hirt, U.S. Dept. of Justice, Civil Div., Federal Programs Branch, Washington, DC, for U.S.

Washington Utilities and Transportation Com'n, Secretary, WUTC, Olympia, WA, pro se.

ORDER ON MOTION OF UNITED STATES AND FCC TO INTERVENE AND COMMISSIONERS' MOTION TO DISMISS

DWYER, District Judge.

Plaintiff U.S. West Communications, Inc. ("US West") seeks review of determinations made by the Washington Utilities and Transportation Commission ("WUTC") in approving an interconnection agreement entered into pursuant to the Telecommunications Act of 1996. 47 U.S.C. § 252(e)(6) purports to grant this court authority to conduct such review:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

47 U.S.C. § 252(e)(6). US West has styled this suit as an *Ex parte Young* claim, naming the individual WUTC commissioners in their official capacities as defendants.[1] The commissioners have moved to dismiss for lack of jurisdiction, claiming Eleventh Amendment immunity. The United States and the Federal Communications Commission ("FCC") have moved to intervene to defend the constitutionality of section 252(e)(6). The motions have been thoroughly briefed and oral argument is not necessary.

I. THE UNITED STATES' AND THE FCC'S MOTION TO INTERVENE

[1] Federal Rule of Civil Procedure 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the ... subject of the action and ... is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. Proc. 24(a). Where, as here, "the constitutionality of ... [an] Act of Con-

1. The Eleventh Amendment does not prohibit a federal court from granting prospective injunctive relief against state officials to end a continuing violation of federal law. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

gress affecting the public interest is drawn in question" 28 U.S.C. § 2403(a) provides the United States with an unconditional right to intervene. The commissioners do not dispute this. The United States' motion to intervene is granted.

[2] The FCC, however, has no statutory entitlement to intervention. Because the United States is entitled to intervene, the FCC's interest in defending the constitutionality of section 252(e)(6) will be adequately represented. The FCC is thus not entitled to intervene as of right under Rule 24(a).

[3] The FCC also seeks permissive intervention under Rule 24(b). That rule permits a court to grant intervention where (1) a statute confers a conditional right to intervene; or (2) when the applicant's claim or defense and the main action have a question of law or fact in common. Fed. R. Civ. Proc. 24(b).[2] The FCC has no statutory entitlement to intervention, conditional or otherwise. Nor does the FCC assert a "claim or defense" in an action which has a question of law or fact in common with this action. The FCC's motion to intervene is denied.

II. THE MOTION TO DISMISS

[4] The basis of the commissioners' motion to dismiss is that the Eleventh Amendment bars these suits. The Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State.

Drawing on principles of sovereign immunity, the Supreme Court has construed the Amendment "to establish that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990) (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984)) (internal quotation marks omitted). State immunity extends to state agencies, such as the WUTC, and state officials, such as the commissioners, who act on behalf of the state and can therefore assert the state's sovereign immunity. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142–46, 113 S.Ct. 684, 685–89, 121 L.Ed.2d 605 (1993); *N.R.D.C. v. Cal. D.O.T.*, 96 F.3d 420, 421 (9th Cir.1996).

[5, 6] The Eleventh Amendment, however, is not absolute; there are "certain well-established exceptions" to its reach. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). "For example, if a state waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Id.* Further, the Eleventh Amendment does not bar a suit for prospective injunctive relief against a state official acting in violation of federal law. *N.R.D.C.*, 96 F.3d at 422 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

The parties differ over whether the present suit can proceed under *Ex parte Young*. That is a substantial question, compounded by the Supreme Court's recent decisions in *Seminole Tribe of Florida v. Florida*, — U.S. —, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) and *Idaho v. Coeur d'Alene Tribe of Idaho*, — U.S. —, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). But it is a question the court need not resolve because this case is controlled by "the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." *Seminole Tribe*, — U.S. at —, 116 S.Ct. at 1128.

[7, 8] "A state will be deemed to have waived its sovereign immunity when (1) the state expressly consents to suit; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity." *Primas v. Martin*, 119 F.3d 764 (9th Cir.1997) (citation omitted). A state will be deemed to

2. The rule also contains a provision for agency intervention where "a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency." That provision is not relevant here.

have waived its immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* (quoting *Port Authority*, 495 U.S. at 305, 110 S.Ct. at 1873) (alteration in original).

The State of Washington has not expressly waived its immunity by state statute or otherwise. The question is whether Congress conditioned state participation in the Telecommunication Act's interconnection agreement arbitration and approval process on the states' consent to federal judicial review of the states' participatory actions. This requires examination of the terms of the Act.

In order to foster the growth of open competition in local telephone markets, section 251 of the Act requires "incumbent local exchange carriers" (1) to permit other telecommunication carriers to "interconnect" with the incumbent's network (which permits calls to carry between the incumbent's network and the interconnecting carrier's); (2) to provide other carriers "unbundled" access to network elements (so interconnecting carriers can repackage elements and offer them to the public as a competitive service); and (3) to sell to new entrants at wholesale prices all telecommunications services offered to retail customers. 47 U.S.C. § 251(c)(2)-(4). Both incumbents and new entrants are required to negotiate interconnection agreements in good faith. 47 U.S.C. § 251(c)(1).

Congress contemplated that states would play an active regulatory role in the negotiation and approval process. Companies may enter agreements through voluntary negotiation, or may petition the appropriate "State commission" to mediate or arbitrate disputes. 47 U.S.C. § 252(a); (b). All agreements, whether reached by negotiation, mediation or arbitration, are subject to state commission approval. 47 U.S.C. § 252(e).

[9] Congress, of course, cannot "require States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162, 112 S.Ct. 2408, 2421, 120 L.Ed.2d 120 (1992). The Act thus permits states to "opt out" of their regulatory roles. Section 252(e)(5) provides:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5).

If the state commission does act, however, the Act makes clear that the commission's actions will be reviewable in federal court. Section 252(e)(6) provides that where a state commission makes a determination regarding an agreement, any aggrieved party "may bring an action in an appropriate Federal district court to determine whether the agreement meets the requirements" of the Act. Further, the Act prohibits state court review of state commission actions in approving or rejecting agreements. See 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.").

[10] The "overwhelming implication" of this statutory structure is that Congress conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted—but not required—to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court. There is "no room for any other reasonable construction" of the statute. *Port Authority*, 495 U.S. at 305, 110 S.Ct. at 1873. By participating in the arbitration and approval process, Washington consented to review of its actions.

Support for this conclusion is found in the Ninth Circuit's recent decision in *Premo v. Martin*, 119 F.3d 764, —— (9th Cir.1997). In *Premo*, the question was whether dam

ages awarded by an arbitral panel under the Randolph–Sheppard Vending Stand Act, 20 U.S.C. § 107–107f, could be enforced against the state in federal court. The Court of Appeals concluded that such awards were enforceable against the state in federal court because the state, by participating in the Randolph–Sheppard program, had waived its sovereign immunity from such enforcement suits. *Id.* 119 F.3d at ——. The statute, the court explained, required participating states to agree to certain conditions, including the submission of certain grievances to "binding" arbitration. *Id.* The statute further provided that the arbitration decisions "shall be subject to appeal and review as final agency action" under chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701–706. *Id.* "[B]y requiring the states to submit to 'binding' arbitration, and by providing for appeal and review under the APA," the court held, "the Randolph–Sheppard Act unequivocally guarantees that arbitration awards will be judicially enforceable." *Id.* Further, even though the statute did not designate federal courts as the fora for enforcement of such awards, and it was possible that awards could be enforced in state court, the court concluded that by participating in the program the state had consented to enforcement suits in federal court. *Id.*

The case for waiver here is stronger than that in *Premo*. The Randolph–Sheppard Act implies that arbitration awards are enforceable in federal court by stating that such awards are "binding" and that appeal and review may be had under the APA. It does not say explicitly that if the state participates in the program it is subject to suit in federal court. The Telecommunications Act, on the other hand, expressly states that state commission action is reviewable in federal court and nowhere else. 47 U.S.C. § 252(e)(4); (5). The implication that Congress conditioned state participation in the interconnection agreement process on waiver could hardly be clearer.

Accordingly, by participating in the interconnection agreement process the State of Washington has waived its Eleventh Amendment immunity from federal judicial review of its actions. The commissioners' motion to dismiss on Eleventh Amendment grounds is denied.

[11] A procedural matter remains. The commissioners argue that the present suit is really a petition for judicial review of the WUTC's actions, and that the WUTC is a necessary party. This contention is correct. Section 252(e)(6) is essentially an intersovereign judicial review provision. US West's complaint asks the court to "remand the case to the commissioners for further proceedings that adhere to the declarations" it seeks. See Complaint at 33. If this were a petition for review of a federal agency action, the agency would have to be named a respondent. See Fed. R. App. P. 15(a); *Ingalls Shipbuilding v. Director, Office of Workers' Comp. Prog.*, —— U.S. ——, 117 S.Ct. 796, 136 L.Ed.2d 736 (1997). The same should hold true where Congress has provided for federal review of actions taken by state agencies in implementing a federal legislative scheme. The WUTC should thus be joined pursuant to Fed. R. Civ. Proc. 19(a). Because the state has waived its sovereign immunity to this suit, the Eleventh Amendment poses no barrier to joinder.

III. CONCLUSION

The *United States'* motion to intervene is granted. The FCC's motion to intervene is denied. The commissioners' motion to dismiss on Eleventh Amendment grounds is denied. The WUTC is joined as a party defendant, pursuant to Fed. R. Civ. Proc. 19(a).

FILED
JUL 28 1997
CLERK, U.S. DISTRICT COURT
U.S. DISTRICT COURT, DISTRICT OF NORTH DAKOTA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

U.S. West Communications, Inc.,

Plaintiff,

vs.

Leo M. Reinbold, Bruce Hagen, Susan Wefald, Commissioners of the North Dakota Public Service Commission; and Western Wireless Corporation,

Defendants.

Civil No. A1-97-25

MEMORANDUM AND ORDER

Now before the Court are Defendants Leo M. Reinbold, Bruce Hagen and Susan Wefald, collectively the North Dakota Public Service Commission ("PSC"), moving to dismiss this action for lack of jurisdiction. Concurrently, the United States has moved to intervene in the action for the sole purpose of defending the constitutionality of the Telecommunications Act of 1996, from which the dispute between the primary parties arises. Plaintiff, U.S. West Communications, Inc. ("US West"), opposes the motion to dismiss. Defendant, Western Wireless Corporation ("Western") has not lodged a response to the motion to dismiss.

BACKGROUND

Congress enacted the Telecommunications Act of 1996, in an effort to promote competition within the monopolistic local telephone market. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various sections of Title 47 U.S.C.). The Act requires local area exchanges ("LEC"), such as US West, to allow other telecommunications carriers, Western, to interconnect

with existing local networks and compete for local telephone service. 47 U.S.C. § 251(c) (1997). The incumbent LEC is also required to provide access to elements of its local network on an "unbundled basis" and to sell to other telecommunications carriers, at wholesale rates, any services which the incumbent LEC provides to its retail customers. Id. The Act places an affirmative duty upon telecommunication carriers to privately negotiate interconnection agreements." 47 U.S.C. §§ 251(c)(1), 252(a) (1997). If the parties fail to reach a mutual agreement, a carrier may petition the state utilities commission, the PSC, to conduct binding arbitration of disputed issues. § 252(b). A final agreement, negotiated or arbitrated, is required to be approved by the state commission prior to implementation by the parties. 47 U.S.C. § 252(e)(1).

In the instant matter, on September 6, 1996, Western, d/b/a Cellular One, petitioned the PSC for arbitration of open issues remaining in the negotiations with US West for an interconnection agreement. The PSC appointed an arbiter and a hearing was held on October 25, 1996. The arbiter issued a decision on December 30, 1996. US West petitioned the PSC for reconsideration of the arbiter's decision and was denied such. On January 14, 1997, Western and US West jointly filed with the PSC for approval, their interconnection agreement, which incorporated the issues resolved through arbitration. On February 12, 1996, by order, the PSC approved the interconnection agreement between US West and Western. On March 14, 1997, US West filed the complaint at bar, seeking review of the finalized agreement and an injunction prohibiting enforcement of the agreement. The PSC has filed a motion to dismiss for lack of jurisdiction, citing immunity under the Eleventh amendment of the United States Constitution. The United States seeks to intervene to defend the constitutionality of the Telecommunications

Act, as a finding of immunity for the PSC may render certain portions of the Act unenforceable. Western as filed its answer to the complaint, but otherwise has not responded to the motions now pending. A hearing on the pending motions was held on June 13, 1997. Based upon the record, briefs of the parties, evidence presented at the hearing and relevant case law, the Court issues the following opinion.

RIPENESS

This controversy is properly before the Court as a matter raising a federal question. 28 U.S.C. § 1331 (1997). The Telecommunications Act provides for federal judicial review of an interconnection agreement which has been approved by a state utilities commission. 47 U.S.C. § 252(e)(6) (1997). With the US West-Western interconnection agreement having been approved in its final form by the PSC, the Court finds that the matter is ripe for adjudication. § 252(e)(6).

INTERVENTION

Rule 24 of the Federal Rules of Civil Procedure provide for an applicant to intervene in a legal action under the following conditions:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). In the instant action, the PSC by asserting Eleventh Amendment immunity, has questioned the constitutionality of the Telecommunications Act of 1996. Federal statute, 28 U.S.C. § 2403(a), mandates that the United States shall have all rights as a party to intervene in an action where the constitutionality of an Act of Congress it called into question. This Court

finds that §2403(a) "confers an unconditional right" upon the United States to intervene in the action for the purpose of defending the constitutionality of the Telecommunications Act. Fed. R. Civ. P. 24(a).

JURISDICTION

The PSC defendants assert that this action must be dismissed for lack of jurisdiction, as they are shielded from suit by the cover of sovereign immunity under the Eleventh Amendment to the United States Constitution:

> Suits against states - Restriction of judicial power.
>
> The Judicial power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The concept of State protection by Eleventh Amendment immunity has been broadened from the diversity actions articulated in the text of the Amendment, to suits against a State by its own citizens. Hans v. Louisiana, 10 S.Ct. 504 (1890), and suits against a State based upon federal-question. Seminole Tribe of Fla. v. Florida, 116 S.Ct. 1114 (1996). Immunity is clearly mandated for the State unless revoked by a recognized exception or waiver.

The United States Supreme Court has identified an exception to sovereign immunity in suits seeking declaratory and injunctive relief against state officers in their individual capacities. See, Ex parte Young, 28 S.Ct. 441 (1908). In Young, federal court jurisdiction was declared to exist over a state officer to enjoin official actions which violated federal law, even though the State itself remained immune from suit under the Eleventh Amendment. The elements of a Young type suit consist of a plaintiff seeking prospective relief to end a state officer's ongoing violation

of federal law. Milliken v. Bradley, 97 S.Ct. 2749, 2761-2762 (1977). US West seeks no money damages, a conspicuous bar to a Young suit. See, Edelman v. Johnson, 94 S.Ct. 1347, 1356 (1974). US West has named the PSC officers in their individual capacities as parties to the suit, and seeks a declaratory judgment reviewing the approved interconnection agreement and an injunction to enjoin enforcement of the allegedly deficient agreement. The Court finds the Complaint to state a prefatory claim under Ex parte Young, raising an issue of federal question. Seminole Tribe of Fla. v. Florida, 116 S.Ct. 1114 (1996).

The Young exception to Eleventh Amendment immunity has generally been found to apply in two instances. First, where no adequate state forum is available to safeguard the federal interests at issue. Ex parte Young, 28 S.Ct. 441, 455-457 (1907). The instant action presents an illustration directly on point with the above condition. The precise language of the Telecommunications Act precludes judicial review within a state forum: "No State court shall have jurisdiction to review the action of a State commission approving or rejecting an agreement under this section". 47 U.S.C. § 252(e)(4) (1997). While prohibiting US West from seeking review in state court, the Act does specifically provide for federal judicial review:

> "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [47 U.S.C. § 251] and this section [47 U.S.C. § 252]".

47 U.S.C. § 252(e)(6) (1997).

> Although the terms of subsection 252(e)(6) do not explicitly state that federal district court review is a party's "exclusive" remedy, courts traditionally presume that such special statutory review procedures are intended to be the exclusive means of review. We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act.

Iowa Board of Utilities v. Federal Communications Commission, __ F.3d ___, 1997 WL 403401, *14 (8th Cir. Jul. 18, 1997) (internal cites omitted). The Act's preclusion of state review is persuasive to the Court that the Young exclusion may be applicable in the matter at bar.

The second instance where Young may apply is when a case calls for the interpretation of federal law. Idaho v. Coeur d'Alene Tribe of Idaho, ___ S.Ct. ___, 1997 WL 338603, *10 (June 23, 1997). "This reasoning, which is described as the interest in having federal rights vindicated in federal courts, can lead to expansive application of the Young exception." Id. The Telecommunications Act's provision for federal judicial review of interconnection agreements is limited to determining compliance with federal law. 47 U.S.C. § 252(e)(6).

> Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials. Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar.

Idaho v. Coeur d'Alene Tribe at *11, (June 23, 1997). Under the specific fact pattern presented, the Young doctrine may have application in this case.

The Court must balance state and federal interests in reaching the ultimate conclusion of Young's application to this suit. Idaho at *13. Congress has dictated a strong federal interest in a restructuring of the local telephone service industry through the implementation of the Telecommunications Act of 1996. Pub L. No. 104-104, 110 Stat. 56 (1996). US West seeks review of an interconnection agreement formulated pursuant to the Act. Although the State has an interest in regulating local utilities, the federal interest in carrying out the mandate of the Act is overriding. U.S. Const. art. VI, cl. 2. Allowing for federal judicial review of the interconnection agreement, does not usurp the power of the PSC to regulate utilities, but merely ensures that the

State regulation is in compliance with federal law. The Court notes that US West seeks no monetary or retrospective relief which would impose a fiscal burden on the State. Edelman v. Jordan, 94 S.Ct. 1347, 1356 (1974) (suit which imposes liability upon State treasury is barred).

"As no one disputes, the Young fiction is an exercise in line-drawing. There is no reason why the line cannot be drawn to reflect the real interests of States consistent with the clarity and certainty appropriate to the Eleventh Amendment's jurisdictional inquiry." Idaho v. Coeur d'Alene Tribe of Idaho at *14. The Court believes that based upon the federal and state interests at stake, a line properly drawn, portrays an urgency for federal jurisdiction over this matter.

With the Act prohibiting review by the State and limiting federal review solely to interpretation, the Court finds that US West has succinctly plead a claim that rests squarely within the Ex parte Young exception. The Eleventh Amendment is not a bar to US West's suit against the individual PSC members for prospective relief.

Waiver

In addition to finding an exception to immunity under Young, the Court finds compelling the argument that the PSC in accepting regulatory authority under the Act, has waived a claim of Eleventh Amendment immunity. Generally, only an unmistakable and explicit waiver by the state itself, qualifies as a waiver of Eleventh Amendment immunity. Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3145 (1985). "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Edelman v. Jordan, 94 S.Ct. at 1360-1361 (citing Murray v. Wilson Distilling Co., 29 S.Ct. 458, 464 (1909)).

In the Telecommunications Act, Congress has mandated exclusive judicial review in a federal forum: "No State court shall have jurisdiction to review the action of a State commission...", 47 U.S.C. § 252(e)(4); "[A]ny party aggrieved by such determination [of the State Commission] may bring an action in an appropriate Federal district court. " § 252(e)(6). The Court finds this language an unmistakable expression of Congressional intent to place into the federal judicial forum, actions seeking review of interconnection agreements promulgated under the Telecommunications Act. Congress has allowed the State opportunity to decline from participating in the Act's regulatory process:

> Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (1996). The Court finds "by overwhelming implication" that this language places no obligation upon the State agency to participate in the process. To decline to participate, preserves sovereign immunity. Upon deciding to regulate under the Act, the State agency consents to review of its actions in a federal forum; the Court finds "no room for any other construction" in §§ 252(e)(4-6).

The PSC was not required to regulate the process used by Western and US-West in producing an interconnection agreement. The PSC had the opportunity to defer the matter to Federal Communications Commission for resolution. By deciding to take an active role in the approval of the agreement, the PSC, as an agency of the State, has affirmatively waived its Eleventh Amendment immunity and consented to federal review, as provided for by the

Telecommunications Act of 1996.

Conclusion

The Eleventh Amendment to the United States Constitution provides immunity to the State from legal attack in federal courts. The Ex parte Young exception to sovereign immunity, permits this Court to exercise jurisdiction over the individual PSC members for the purpose of reviewing compliance with the federal Telecommunications Act of 1996. By opting to regulate under authority of the Telecommunications Act, the PSC, as an agency of the State, has waived its immunity and consented to federal judicial review of its actions as explicitly called for by the Act.

Accordingly, it is hereby **ORDERED** that the Motion to Intervene by the United States of America and the Federal Communications Commission (Docket No. 19) is GRANTED for the limited purpose of defending the Constitutionality of the Telecommunications Act; and, that Defendants' Motion to Dismiss (Docket No. 4) is DENIED.

SO ORDERED.

Dated this 28th day of July, 1997.

Patrick A. Conmy, District Judge
United States District Court

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 25 day of July 1997.
EDWARD J. KLECKER, CLERK
By: Deputy

FILED

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

U S WEST COMMUNICATIONS, INC.,	*	CIVIL NO. 4-96-CV-70062
Plaintiff	*	
v.	*	MEMORANDUM OPINION AND RULING DENYING BOARD MEMBERS' MOTION TO DISMISS
ALLAN T. THOMS, et al.,	*	
Defendants.	*	

Plaintiff U S West Communications, Inc., ("U S West") brings this action against defendants Allan Thoms, Nancy Boyd, and Emmit George, Jr., in their official capacity as members of the Iowa Department of Commerce Utilities Board (the "Board members"), AT&T Communications of the Midwest, Inc., ("AT&T"), and MCI Metro Access Transmission Services, Inc., ("MCI"). Plaintiff seeks declaratory and injunctive relief under § 252(e)(6) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 153 et seq., and the Fifth and Fourteenth Amendments of the United States Constitution concerning interconnection agreements that the Iowa Utilities Board (the "Board") arbitrated between U S West and MCI and U S West and AT&T. The complaint cites 47 U.S.C. § 252(e)-(6), the Constitution, and 42 U.S.C. § 1983 as jurisdictional bases. Defendant Board members move to dismiss under Fed. R. Civ. P. 12(b)(1), claiming immunity under the Eleventh Amendment to the United States Constitution. Because the Board members' motion draws into question the constitutionality of the Act, I granted the United States of America and the Federal Communications Commission's motion to intervene. Plaintiff, the intervenors, and defendants AT&T and MCI resist the Board members' motion, and oral arguments were heard. The motion is submitted.

DISCUSSION

This is an action under § 252(e)(6) of the Act, seeking review of interconnection agreements between U S West and AT&T and U S West and MCI. Section 252(e)(6) provides

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

To foster competition in local telephone service, the Act imposes a duty on incumbent local exchange carriers to negotiate in good faith with new entrants to arrive at agreements concerning, inter alia, facilities access, interconnection, and resale of services. Pursuant to the Act, the parties may enter into voluntary agreements that become effective upon approval by the responsible state commission, or, failing negotiation of a voluntary agreement, any party to such negotiation may petition a State commission to arbitrate any open issues. See 47 U.S.C. §§ 251(c), 252.

Following this procedure, U S West received interconnection requests from AT&T and MCI in March 1996. After negotiations failed to resolve all outstanding issues, AT&T and MCI filed petitions for arbitration with the Board.[1] Arbitration proceedings occurred in the fall of 1996 with the Board issuing its final arbitration decision on November 27, 1996. U S West executed the arbitrated agreements on December 12, 1996 and the Board approved the final interconnection agreements on January 10, 1997. U S West filed this suit on February 7, 1997

In the motion to dismiss, the Board members contend that they are immune from suit under the Eleventh Amendment and that, to the extent that § 252(e)(6) is an attempt to abrogate Iowa's

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[1] The Board is the "State commission" in Iowa for purposes of the Act. See 47 U.S.C. § 153(41) and Iowa Code § 476.1 (1997).

sovereign immunity, it is unconstitutional. They further contend that the Board is an indispensable party under Fed. R. Civ. P. 19(b), requiring this case to be dismissed. Finally, in their brief, they urge that if the Board is immune and an indispensable party, the court should hold 47 U.S.C. § 252(e)(4) unconstitutional under the Due Process Clause of the Fifth Amendment.[2] Review could then proceed in state court under the state administrative procedure act. The resisting parties argue that this is a "garden variety" Ex parte Young case and that, in any event, the state waived any claim to immunity by performing the arbitration under the statutory scheme.

The Eleventh Amendment bars suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Absent a waiver, a suit against a State or one of its agencies or departments brought in federal court is proscribed by the Eleventh Amendment regardless of the nature of the relief sought. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). Suits brought against state officials in their official capacities seeking prospective, injunctive relief are not treated as actions against the State for purposes of the Eleventh Amendment. See Ex parte Young, 209 U.S. 123 (1908); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989); Pennhurst, 465 U.S. at 102-03; In re SDDS, Inc., 97 F.3d 1030, 1035 (8th Cir. 1996); Fond Du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 255 (8th Cir. 1995). Ex parte Young actions may be brought to enforce federal statutes, as well as the Constitution. See Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1131 n.14 (1996); Northern States Power Co. v. Prairie Island Mdewankanton Sioux Indian Community, 991 F.2d 458, 460-62 (8th Cir. 1993). The

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[2] The relevant portion of § 252(e)(4) provides: "No state court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."

doctrine of Ex parte Young is based on the idea that the power of federal courts to enjoin "continuing violation[s] of federal law [is] necessary to vindicate the federal interest in assuring the supremacy of that law." Green v. Mansour, 474 U.S. 64, 68 (1985).

I agree with the resisting parties that Ex parte Young allows this suit to proceed against the Board members in their official capacities. U S West has not sued the state of Iowa or the Board. Instead, it named individual board members, seeking prospective injunctive and declaratory relief for alleged violations of federal law. Although the Board members contend that the complaint seeks complete retrospective appellate review of the Board's actions in arbitrating and reviewing the interconnection agreements, the statute simply authorizes this court "to determine whether the agreement * * * meets the requirements of [federal law]." 47 U.S.C. § 252(e)(6). As a result, this case "seeks to vindicate important federal rights, and thus falls squarely within the doctrine of Ex parte Young." Fond Du Lac Band of Chippewa Indians, 68 F.3d at 256; see Edelman v. Jordan, 415 U.S. 651, 667-669 (1974) (holding that Eleventh Amendment does not bar suit to compel future state compliance with federal standards for processing welfare applications).

Contrary to the Board members' contentions, neither Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996) or Idaho v. Coeur d'Alene Tribe of Idaho, No. 94-1474, 1997 WL 338603, (June 23, 1997) alters Ex parte Young. Although the Court in Seminole Tribe held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young," Seminole Tribe, 116 S.Ct. at 1132, the Act does not present such a detailed remedial scheme.

I also agree with the resisting parties that even if an Ex parte Young action were not available, this court would still

have jurisdiction over the Board members (and the Board if it were a named party) because Iowa waived any Eleventh Amendment immunity when it chose to arbitrate interconnection agreements that are exclusively reviewable in federal court under § 252-(e)(4) and (6) rather than leaving the arbitration function to the Federal Communications Commission pursuant to § 252(e)(5).[3] A state waives its Eleventh Amendment immunity when it voluntarily participates in a federal statutory scheme that, in unmistakable terms, conditions participation on a state's willingness to be sued in federal court. See Edelman v. Jordan, 415 U.S. at 673; Seminole Tribe of Florida, 116 S.Ct. at 1128 (affirming that "States may waive their sovereign immunity"). By choosing to participate in the arbitration and approval scheme notwithstanding the express provision for exclusive federal jurisdiction, Iowa waived any claim of Eleventh Amendment immunity from becoming a defendant in a § 252(e)(6) action. Accordingly, the Board members' motion to dismiss will be denied.

The Board members, as part of their Eleventh Amendment argument, contend that the Board is an indispensable party under Fed. R. Civ. P. 19(b), that it cannot be made a party because of the Eleventh Amendment, and, therefore, that the entire case should be dismissed. Because of my rulings on the Ex parte Young

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[3] 47 U.S.C. § 252(5) provides

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

and waiver issues, I do not consider this argument or the constitutionality of § 252(e)(4).

RULING

Defendants Allan Thoms, Nancy Boyd, and Emmit George, Jr.'s motion to dismiss is DENIED.

Dated this 14th day of August, 1997.

Harold D. Vietor

HAROLD D. VIETOR
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-D-152 (Consolidated with Civil Action Nos. 97-D-387, 97-D-2047 and 97-D-2096)

U.S. WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

ROBERT J. HIX, BRENT ALDERFER, AND VINCENT LAJKOWSKI, MFS COMMUNICATIONS, CO., INC., MFS INTELNET OF COLORADO, INC., TCG COLORADO, TELEPORT COMMUNICATIONS GROUP, INC. AND ICG TELECOM GROUP, INC.,

Defendants.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

OCT 29 1997

JAMES R. MANSPEAKER
CLERK

ORDER ON HEARING DATED OCTOBER 15, 1997

THIS MATTER came before the Court at a hearing on October 15, 1997 upon Motions to Dismiss filed by the Commissioners of the Colorado Public Utilities Commission and the Commission itself; TCG Colorado and Teleport Communications Group, Inc. ("TCG") and MFS Intelenet of Colorado, Inc.; and the Motions for Consolidation by MCIMetro Access Services, Inc. and AT&T Communications of the Mountain States, Inc. As further explained by my rulings at the hearing, and consistent with such rulings, the Court enters the following written orders:

I. **Motion to Dismiss by the Commissioners of the Colorado Public Utilities Commission filed in 97-D-152 and Motion to Dismiss of the Colorado Public Utilities Commission filed in 97-D-387**

1. The Commissioners in 97-D-152 and the Colorado Public Utilities Commission in 97-D-387 moved to dismiss the Amended Complaint of U S West

Communications Inc. on grounds that they enjoy immunity under the Eleventh Amendment to the United States Constitution.

2. The motions of the Commission and its Commissioners are DENIED. As the Court more fully explained on the record at the hearing on these motions, the Court finds that the Colorado Public Utilities Commission and the Commissioners waived their Eleventh Amendment defense based upon their active participation in the arbitration process set forth in Section 252 of the Telecommunications Act of 1996. 47 U.S.C. § 252 (1996). See Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1123 (1996); see also USWest Communications, Inc. v. TCG Seattle Case No. C97-354WD (W.D. Wash. July 24, 1997) and USWest Communications, Inc. v. Reinbold, Civil Action No. A1-97-25 (D.N.D. July 28, 1997).

3. In addition, as the Court also explained more fully at the hearing, the Court finds that the exception to Eleventh Amendment immunity found in Ex Parte Young, 209 U.S. 123 (1908) applies to the Commissioners in their individual capacity. See Quern v. Jordan, 440 U.S. 332, 337 (1979) ("a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law"); Powder River Basin Resource Council v. Babbitt, 54 F.2d 1477, 1483 (10th Cir. 1995) ("[d]eclaratory judgments are construed as retroactive relief only when "[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction . . . . [d]eclaratory relief is prospective when sought to prevent a state's current violation of the law").

4. The Defendant Commissioners and the Colorado Public Utilities Commission shall file an Answer to U S West's Amended Complaint within ten (10) days from the date of this Order.

II. TCG's and MFS' Motions to Dismiss

5. TCG and MFS moved to dismiss Counts 12 and 13 of U S West's First Amended Complaint which seek relief under the United States Constitution. Count 12 asserts that certain actions taken by the Colorado Public Utilities Commission violated U S West's right to due process under the Fourteenth Amendment to the United States Constitution. Count 13 asserts that the interconnection agreements approved by the Commission imposed terms that constituted a taking of U S West's property without just compensation pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

6. I address Count 13 first because I find that it bears upon resolution of Count 12. With respect to Count 13, the motions of TCG and MFS are GRANTED. As the Court explained more fully at the hearing, the Court's grant of jurisdiction is to determine whether the interconnection agreements approved by the Commission comport with sections 251 and 252 of the Act. Although takings claims under the U.S. Constitution do constitute a federal question, such claims are not ripe until (i) there is a final decision by the state regarding the property; and (ii) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-197 (1985); Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996). Thus, the Court lacks jurisdiction to address U S West's

takings claims until there has been a final decision by the Commission regarding pricing and compensation and U S West has exhausted state compensation remedies.

7. With respect to Count 12, the motions of TCG and MFS are GRANTED IN PART AND DENIED IN PART. To the extent the due process claim encompasses the same injury or is coextensive with the takings claim, the motion to dismiss is GRANTED for the same reasons as the dismissal of Count 13. The Tenth Circuit in Bateman made clear that such due process claims are subsumed within the more particularized protections of the takings claim. Id., 89 F.3d at 709; see also Rocky Mountain Materials v. Bd. of County Comm'rs, 972 F.2d 309, 311 (10th Cir. 1992). However, to the extent that Count 12 alleges due process claims or injury distinct from the takings claim, the motion to dismiss is DENIED.

8. U S West's claims in Counts 12 and 13 of its Amended Complaint against Defendant ICG Telecom, Inc. are dismissed to the same extent as described in paragraphs 6 and 7 of this Order.

9. Further, Count I relating to TCG is dismissed as MOOT and Counts II, VI, VIII, X and XI are dismissed as MOOT against MFS. U S West stipulated at the hearing that it did not intend to assert these particular counts against TCG and MFS.

10. The remaining arguments in the motions to dismiss filed by TCG and MFS which relate to the merits of the individual counts of U S West's First Amended Complaint or require interpretation of the Telecommunications Act of 1996 are DENIED. As the Court more fully explained at the hearing, the Court finds that it

cannot determine these claims under the standards of Fed. R. Civ. P. 12. The Court has established a briefing and hearing schedule to address the merits of U S West's claims.

11. Defendants TCG and MSF shall file an Answer to U S West's First Amended Complaint within ten (10) days from the date of this Order.

III. Motions to Consolidate

12. On September 29, 1997, U S West filed a Complaint naming the Colorado Public Utilities Commission, the Commissioners thereof, AT&T Communications of the Mountain States, Inc. and MCIMetro Access Transmission Services, Inc. as Defendants. That matter has been docketed as 97-D-2096, and has been assigned to me as a related matter. At the hearing, AT&T orally moved for consolidation of this case with these consolidated cases, 97-D-152 and 97-D-387.

13. On September 22, 1997, MCI served a Complaint naming the Colorado Public Utilities Commission, the Commissioners thereof, and U S West as Defendants. That matter has been docketed as Civil Action No. 97-D-2047. On October 2, 1997, MCI filed a written motion to consolidate its Complaint with these consolidated cases, 97-D-152 and 97-D-387.

14. The Court GRANTS the motions to consolidate. For the reasons explained by the Court at the hearing, the Court shall consolidate Civil Action No. 97-D-2047 and 97-D-2096 with Civil Action No. 97-D-152 (consolidated with 97-D-387).

15. Finally on the matter of consolidation, Sprint shall have until October 22, 1997 in which to notify the Court that it has either stipulated to or objects to

the consolidation of its case with the others identified above in paragraph 14.

IV. Other Matters

16. A hearing shall be held on December 2, 1997, at 8:00 a.m. for oral argument on the standard of review applicable to judicial review under § 252(e)(6) of the Telecommunications Act of 1996.

DATED: October 28, 1997.

BY THE COURT:

WILEY Y. DANIEL
U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-D-152

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order was mailed to the following on October 29, 1997.

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Magistrate Judge Pringle

*Robert B. Kugler

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
NOV - 7 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

GTE South, Inc.

Plaintiff.

v.

Civil Action Number 3:97CV493

Theodore V. Morrison, et al.

Defendant.

ORDER

THIS MATTER comes before the Court as a Motion to Dismiss which Defendants Theodore V. Morrison, Jr., Hullihen Williams Moore, and I. Clinton Miller, sued in their official capacities as Commissioners of the Commonwealth of Virginia State Corporation Commission, have submitted. The Court will also consider intervenor Defendant Virginia Attorney General Richard Cullen's Motion to Dismiss. For the reasons stated below, the Court shall DENY Defendants' Motion to Dismiss.

THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. To find a violation of the Tenth Amendment the following must be true: (1) the challenged statute regulates "States as States;" (2) the federal regulation addresses matters which are indisputably "attributes of state sovereignty;" and (3) the State's compliance with the federal law would directly impair its ability to "structure integral operations in the areas of traditional governmental functions." Hodel v. Virginia Surface Min. & Reclam. Ass'n., 452 U.S. 264, 287-88 (1981).

A literal, if not substantive, conflict exists between the Telecommunications Act of 1996, ("the 1996 Act") and the Virginia State Constitution as it pertains to judicial review of State commission decisions. The 1996 Act provides: "In any case in which a State Commission makes a determination under this section, any party aggrieved . . . may bring an action in the appropriate Federal district court." The 1996 Act, 47 U.S.C. § 252 (e)(6). The Virginia Constitution requires, "All appeals from the Commission shall be to the Supreme Court only." Va. Const. Article IX, §4. Herein lies the heart of the Tenth Amendment conflict.

1. Regulation of the Commonwealth of Virginia

The Federal government does not have the authority to compel a State to administer a federal regulatory program. Printz v. U.S., 117 S.Ct. 2365, 2383 (1997); New York v. U.S., 505 U.S. 144, 188 (1992). Congress may not conscript the state governments as its agents. New York, 505 U.S. at 178. Congress may, however, offer States a choice. When Congress regulates a private activity which falls under the Commerce Clause, a State may regulate that activity pursuant to federal standards. Id. at 173. In the alternative, a State may forgo federally mandated regulation and have its state laws pre-empted by federal regulation. Id. at 173-74 (citing Hodel, *supra*, at 288; FERC v. Mississippi, 456 U.S. 742, 764-765 (1982)).

Contrary to Defendant Commissioners' argument, the 1996 Act does not force regulation on the Commission or the State. Instead, the 1996 Act offers aggrieved parties two forums in which they may secure approval of their agreement or resolution of any disputes. The first forum is the State commission which shall approve or reject submitted agreements. See The 1996 Act, *supra*, § 252(e)(1). In the event the State commission abdicates its authority under the 1996 Act, a second forum is available. The Federal Communications Commission ("FCC") shall issue a notice of

preemption and assume responsibility for the matter. See id. §252(e)(5). Therefore, the 1996 Act does not compel the Commission to act because any burden which results from their refusal would fall on the FCC. Cf. New York, *supra*, at 174 (holding that States were not compelled to act on regulating the disposal of radioactive waste because the burden would fall on those producing the waste and not the State as a sovereign). The Commissioners may decline to administer the federal program.

Congress passed the 1996 Act pursuant to its authority under the Commerce Clause. The Court FINDS that the 1996 Act offers States a choice; therefore, the 1996 Act does not violate the Tenth Amendment. Having concluded the 1996 Act does not regulate "States as States," the Court does not reach issues relating to State sovereignty or the 1996 Act's impact on integral state operations.

THE ELEVENTH AMENDMENT

The Eleventh Amendment to the United States Constitution reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. In effect, the Eleventh Amendment affords immunity to States from certain suits. However, a state and its officers are not entitled to Eleventh Amendment protection where the plaintiff seeks only prospective, injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 664-68 (1974) (interpreting Ex Parte Young, 209 U.S. 123 (1908)). An Ex Parte Young action enables an individual to bring suit against a state officer in federal court to ensure the officer's conduct is in compliance with federal law. See Seminole Tribe of Florida v. Florida, 116 S.Ct 1114, 1131 n. 14 (1996)(internal citations omitted). Moreover, where a state has waived its immunity, a case against it may go forward. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). In considering the facts of this case, the Court must resolve (1) whether Ex Parte Young applies and (2) whether the Commissioners waived their sovereign immunity.

1. Application of Ex Parte Young

Ex Parte Young applies to the case at bar. Plaintiff GTE South has sued the Commonwealth of Virginia or the State Corporation Commission. GTE South seeks prospective injunctive relief from the Commissioners who have been named in their official capacity.[1] The doctrine of Young permits "a federal court, consistent with the Eleventh Amendment, [to] enjoin state officials to conform their future conduct to the requirements of federal law." Quern v. Jordan, 440 U.S. 332, 337 (1979). However, the Defendant Commissioners' view of Young would serve as a complete evisceration.

The Court categorically rejects the Commissioners' arguments. They are proper Defendants in this case because Young authorizes suits against state officers in their official capacity. The 1996 Act's reference to review of "Commission" actions as opposed to the individual Commissioners is immaterial. See Pugh v. Alabama , 438 U.S. 781 (1978)(permitting suit against state officers although suit could not be brought against the state agency). Section 252(e)(6) does not interfere with the public administration because it also falls within the Ex Parte Young exception. See Ex Parte Young, 465 U.S. at 102.

2. Waiver of Immunity

A state may waive its immunity in the context of a particular federal regulatory program. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n. 1 (1985). The Supreme Court requires an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Id. Again, the Commission voluntarily undertook review pursuant to the 1996 Act which plainly indicates that review of any State commission decision would

[1] "A Young suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2043, 2046 (1997)(O'Connor, J., concurring in part).

occur in Federal district court. See, The 1996 Act, *supra*, §252(e)(4-6). Such voluntary review amounts to constructive waiver of any Eleventh Amendment immunity the Commissioners may have enjoyed. See Atascadero, 473 U.S. at 246-47; Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997)(a state may waive Eleventh Amendment Immunity by agreeing to participate in a federal program).

While not controlling, other district courts have similarly held that voluntary participation in the federal telecommunications regulatory program amounts to a waiver of Eleventh Amendment immunity. See, GTE Midwest, Inc. v. Thoms, Civil No. 4-97-CV-701 18, slip op. at 4-5; U.S. West Communications, Inc. v. Reinbold, Civil No. A1-97-25, slip op. at 7-8; U.S West Communications, Inc., v. TCG Seattle, 971 F.Supp. 1365, 1369 (W.D.Wash. 1997)("The statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court."). Having waived its Eleventh Amendment immunity, granting the Defendants' Motions to Dismiss on this issue would not be appropriate.

For the reasons hereinbefore stated, the Court shall DENY Defendants' Motion to Dismiss.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

NOV - 7 1997
DATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-405-BR

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., et al.,

Defendants.

ORDER

FILED
NOV 20 1997
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

No. 5:97-CV-425-BR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware corporation,

Plaintiffs,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., et al.,

Defendants.

ORDER

These matters are before the court on motions to dismiss by defendants North Carolina Utilities Commission and the individual Commissioners (all defendants will be referred to collectively as "NCUC"), in their official capacities. Because the motions in both cases are, for the most, identical, they will be addressed jointly in a consolidated order.

I. Background

In light of the pending arguments on the substantive issues in these cases, the court will forego a comprehensive review of the factual history. Instead, a brief chronology is all that is necessary for purposes of these motions.

On 17 July 1996 and 23 August 1996, AT&T and MCI, respectively, filed petitions with NCUC requesting arbitration of proposed interconnection agreements with BellSouth pursuant to 47 U.S.C. § 251 (1995). After conducting evidentiary hearings on the matters, a panel of three Commissioners issued recommended arbitration orders on 23 December 1996. In response to objections by all parties, the panel issued orders on 11 April 1997 requiring the parties to revise the proposed interconnection agreements. On 28 April 1997, the parties submitted signed interconnection agreements to the panel for review and final approval pursuant to 47 U.S.C. § 252(e)(1). The panel approved the agreements on 12 May 1997. AT&T and MCI have now sought review in this court through independent actions, naming BellSouth, NCUC, and the individual Commissioners in their official capacity as defendants. In response, NCUC and the individual Commissioners assert that the Eleventh Amendment bars suit by both AT&T and MCI.

II. Discussion

A. Eleventh Amendment

The Eleventh Amendment of the United States Constitutions provides:

> The Judicial power of the United States shall not be extended to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Relevant to this proceeding, the Amendment establishes that a "State is immune from suits brought in federal courts by her own citizens as well as citizens of another state." Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990) (quotations and citations omitted.) In Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1131 (1996), the Court added that "the background principle of sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."

Not surprisingly, however, this immunity is not absolute. In fact, the Supreme Court has acknowledged that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular program." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239 & n.1 (1985); see also Seminole Tribe, 116 S. Ct. at 1128. A state is deemed to have waived its Eleventh Amendment immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673 (1974) (internal quotations and citations omitted). In the case at hand, AT&T and MCI assert that NCUC waived its Eleventh Amendment

immunity by participating in the interconnection agreement procedures established in §§ 251 and 252.

To more fully explore this contention, it is helpful to review §§ 251 and 252 of the Telecommunications Act. In seeking to develop competitive markets in the local telephone industry, Congress has authorized telecommunications carriers and incumbent local exchange carriers to negotiate an interconnection agreement in good faith. 47 U.S.C. § 251(c). When negotiating this agreement, either party can request that the relevant State commission participate in the negotiations and arbitrate or mediate any open issues. Id. § 252(a) & (b). The State commission must limit its review to the issues presented and is directed to complete its resolution of the disputed issues within nine months after the request. Id. § 252(b)(4). "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Id. § 252(e)(1). The section further explains that "[n]o State court shall have jurisdiction to review any action of a State commission in approving or rejecting an agreement under this section." Id. § 252(e)(4).

The Act also provides how to proceed if the State commission does not become involved:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the

> responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Id. § 252(e)(5). Finally, section 252(e)(6) sets out the exclusive manner of judicial review:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC]'s actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Id. § 252(e)(6).

To the court's knowledge, only three courts have confronted whether § 252 violates the Eleventh Amendment. All three have reasoned that the state defendants, by voluntarily electing to participate in the federal telecommunications scheme, waived any Eleventh Amendment immunity. See US West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1363 (W.D. Wash. 1997); US West Communications, Inc. v. Thoma, No. 4:97-CV-70082 (S.D. Iowa Aug. 4, 1997); US West Communications, Inc. v. Reinbold, No. A1-97-25 (D.N.D. July 28, 1997). In interpreting § 252 as offering states a choice, the courts have emphasized that, if a state neglects to regulate, the FCC will assume the enumerated responsibilities. Thus, a state's failure to accept its suggested role merely defers regulation to the FCC and does not subject the state to any type of official sanction or reproach. Notably, under

§ 252, state commissions are only subject to suit in federal court if they actually participate in the federal procedures for regulation of private telecommunications activity. This condition is unequivocally announced to any participating state in § 252(e)(6). See Atascadero, 473 U.S. at 247 (implying that, where Congress provides clear notice that state involvement will subject it to federal judicial review, a state may be deemed to have waived Eleventh Amendment immunity by voluntarily participating in the regulatory program.)

NCUC insists, however, that its action was, in fact, compelled. Invoking North Carolina law rather than §§ 251 and 252, NCUC maintains that its actions were "not voluntary" and that it "had no choice but to deal with the interconnection agreement because of N.C. Gen. Stat. §§ 62-110(f1), 62-133.5, and regulations adopted by the Commission thereunder." (Defs.' Mem. in Supp. of Mots. to Dismiss, pp. 9-10.) Yet, assuming arguendo that state law even compels participation, state requirements cannot be offered to convert a federal "opt-in" program into a mandatory one. If this were the case, any legislative scheme, carefully drafted by Congress to be voluntary and to elicit waiver of Eleventh Amendment immunity if the state elects to participate, could be negated by unilateral state action. It simply cannot be that a state can avail itself of the opportunities extended to it by Congress but, at the same time, avoid mandated federal review by invoking the protective umbrella of the Eleventh Amendment.

Also, as noted by AT&T, it would be odd indeed to allow NCUC to claim that it is the state for purposes of Eleventh Amendment immunity but, at the same time, claim that "it participated in the interconnection proceedings under the external compulsion of state law." (AT&T's Mem. in Opp'n to Mot. to Dismiss. p. 12.) Finally, such legislation requiring NCUC involvement is just the type that would be expected if the state sought to signal its voluntary assent to participating in the federal program.[1] Thus, despite the analytical quagmire induced by NCUC's argument, the claim of state law coercion does not displace allegations of waiver of sovereign immunity.

Although NCUC predominantly relies on compulsion from state laws, in its reply brief, it alludes to the alleged mandatory language contained in § 252. Specifically, NCUC notes that § 252 repeatedly instructs that the State "shall" operate in a certain manner and characterizes a decision not to act as a "fail[ure] to carry out its responsibility." § 252(e). According to NCUC, this word choice allegedly removes any discretion on the part of the state regarding whether to participate.

Notwithstanding that Congress could have chosen language that more clearly illustrates the voluntariness of the state's role, the strength of the verb choice does not detract from the actual effect of the provisions. It is axiomatic that the court

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[1] The court recognizes that, in this particular case, the state legislation existed before the passage of the federal act and, thus, its signalling function is negated. This circumstance does not alter the court's overall reasoning.

should "not construe statutory phrases in isolation; [but should] read statutes as a whole." United Station v. Norton, 467 U.S. 822, 828 (1984). Under § 252(e)(5), if the state elects not to take part in the creation and consummation of the interconnection agreement, the FCC assumes the responsibility with no further involvement of the state. While Congress may have inserted the words "shall" and "fail" in order to underscore their preference for state participation, there are no repercussions or avenues of recourse against the state for failure to participate.

In contrast, the statutory scheme struck down in Seminole Tribe, the Indian Gaming Regulation Act ("IGRA"), varied significantly from the Telecommunications Act and § 252.[2] In 25 U.S.C. § 2710(d)(3)(A) of the IGRA, the State was ordered to negotiate with the Indian tribe in good faith to enter into a Tribal-State compact. Federal district courts were afforded jurisdiction over "any cause of action by an Indian tribe arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Id. § 2710(d)(7)(A). If a tribe produced evidence that the State had not complied with a request to negotiate, the State was encumbered with the burden of showing in federal court that it had, in fact, negotiated in good faith. Id. § 2710(d)(7)(B)(ii). If the federal district court found that the State had failed to negotiate in good faith, it was

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[2] The court recognizes that, in Seminole Tribe, Florida refused to participate at all and the court struck down the statutory scheme because Congress lacked constitutional authority to abrogate sovereign immunity. A comparison is nonetheless instructive in demonstrating the optional nature of § 252.

expressly authorized to order the tribe and the State to conclude such a compact within a sixty-day period. Id. § 2710(d)(7)(B)(iii). Finally, if the State continued to evade its duties under the IGRA even after judicial intervention, the Secretary of the Interior was directed to prescribe procedures under which designated gaming could occur on the Indian lands. Id. § 2710(d)(7)(B)(vii).

On the surface, the IGRA provisions do not appear that different than the Telecommunications Act provisions. In fact, the ultimate remedy under both is essentially the assumption of the state's obligations by the relevant federal authority. However, significant differences exist. First, the State's prescribed role under the IGRA is an adversarial one or, at the least, as a negotiating party to the compact whereas, under the Telecommunications Act, the State is merely requested to serve as a regulator or overseer of negotiations between private parties.

Most importantly for purposes of the Eleventh Amendment discussion, under the terms of the IGRA, a state could be hauled into federal court for not participating at all; under the Telecommunications Act, a state can only be hauled into court if they do in fact participate. This distinction is crucial. In Seminole Tribe, the Supreme Court dismissed any notion of waiver with the succinct comment that "it is undisputed that Florida has not consented to the suit." 116 S. Ct. at 1121. This statement follows from Florida's refusal to negotiate with the tribe or submit to the mandate of § 2710. Nevertheless, according to the IGRA, a state was subject to federal court jurisdiction even if

and in fact because, they refused to take part in the negotiations. Thus, pursuant to § 2710, election by a state to forego participation in a Tribal-State compact obligated it to defend its position in a federal court if sought by the tribe.

In contrast, assumption by the FCC of a state's regulatory function is the exclusive remedy for a state's refusal to participate in the telecommunications plan. In other words, the only way a state could subject itself to any type of federal judicial proceeding is if it willingly concedes to accept the role offered by Congress. This distinction insulates the Telecommunications Act from constitutional infirmity because, despite the strong language employed in § 252, states are afforded a true choice regarding whether they consent to federal jurisdiction.

Overall, unlike the situation in Atascadero, the Telecommunications Act by no means "falls . . . short of manifesting a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity." 473 U.S. at 247. The conclusion is inescapable that any state accepting the Congressional invitation to immerse itself in the intricacies of the Telecommunications Act also recognizes and acknowledges that review of its action in federal district court is a distinct possibility. See TCG Seattle, 971 F. Supp. at 1370 ("The implication that Congress conditioned state participation in the interconnection agreement process on waiver could hardly be clearer.") Accordingly, NCUC, by its voluntary involvement in the

statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex Parte Young." Id. at 1132. In this case, the Telecommunications Act in no way incorporates a "detailed remedial scheme" so as to preclude the customary operation of Ex Parte Young. See Thoms, slip op. at 4.

NCUC further argues that Seminole Tribe and Coeur d'Alene require Congress to indicate explicitly that Ex Parte Young suits are to be part of a statutory scheme before such suits can proceed. This contention misreads the import of these cases. As noted above, in Seminole Tribe, the Court reaffirmed traditional principles of Ex Parte Young and merely explained that Congress could supersede the doctrine by offering its own exhaustive remedial scheme. NCUC's efforts to transform this narrow holding into a requirement that Congress affirmatively state Ex Parte Young's applicability is unavailing. In essence, defendants seek to bootstrap Seminole's holding into a monumental shift of the default presumption. Under NCUC's theory, Congress must offer an affirmative intent to invoke the Ex Parte Young. Yet, Seminole Tribe indicates just the opposite: Congress must offer an affirmative intent to supplant Ex Parte Young, otherwise, the doctrine remains in full operation. As noted by MCI, "(t)he Court did not displace Ex Parte Young from all cases in which Congress authorized 'judicial review.'" (MCI's Mem. in Opp'n to Mot. to Dismiss, p. 10.)

Moreover, in Coeur d'Alene, the tribe was not permitted to invoke Ex Parte Young because the relief sought, quiet title to state land, was not the type contemplated by the doctrine. Evaluating the several opinions issued in Coeur d'Alene, however, seven of the Justices expressed their understanding that Ex Parte Young maintained its historic vitality. 117 S. Ct. at 2045-47 (O'Connor, J., concurring, joined by Scalia, J. and Thomas, J.) and at 2047-48 (Souter, J., dissenting, joined by Stevens, J., Ginsberg, J., and Breyer, J.).[3] Accordingly, the appropriate review remains "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Id. at 2047 (O'Connor, J., concurring).

In this instance, no special circumstances, either from the nature of the relief sought or the plain language of the Telecommunications Act, exist to inhibit the Ex Parte Young doctrine. Instead, it seems that this is a "garden variety" application of the doctrine and, therefore, the arguments of the individual commissioners must fail.

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[3] Even under Kennedy's and Rehnquist's balancing test, see Coeur d'Alene, 117 S. Ct. at 2038-42, the court finds a consideration of the relevant factors weighs in favor of Ex Parte Young jurisdiction. See Reinbold, slip op. at 6-7 (holding that balancing test supports the exercise of federal jurisdiction).

C. Tenth Amendment

NCUC also maintains that the structure of §§ 251-252 offends the Tenth Amendment.[4] NCUC relies on similar arguments offered in support of its Eleventh Amendment violation claim. To wit, it appears that NCUC is asserting that the Telecommunications Act compels them to enforce a federal program as well as depriving North Carolina of jurisdiction to review actions of its own administrative agencies.[5] For the same reasoning employed above, however, the compulsion/deprivation argument must fail.

It is well accepted that a state cannot be forced to administer a federal regulatory program. Printz v. United States, 117 S. Ct. 2365, 2383 (1997); New York v. United States, 505 U.S. 144, 149 (1992) ("[W]hile Congress has substantial power under the Constitution to encourage the States to [perform certain federal regulatory duties], the Constitution does not confer upon Congress the ability simply to compel the States to do so."); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981) (noting that Congress cannot "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"). At the same time, Congress can offer a state the option of participating in the

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[4] NCUC also invokes the protections of the Ninth Amendment. However, no substantive arguments are made in support of this facially invalid claim, and any reference to a Ninth Amendment violation must be dismissed as meritless.

[5] As noted by both AT&T and MCI, the claim that § 252(e)(4) improperly vests the federal courts with exclusive jurisdiction is not only subsumed within the voluntariness discussion but has no bearing upon the constitutionality of § 252(e)(6) and whether this court retains jurisdiction over NCUC.

enforcement of a federal program conditioned upon acceptance of the attendant statutory scheme. New York, 505 U.S. at 167; Hodel, 452 U.S. at 288. "This arrangement . . . has been termed 'a program of cooperative federalism.'" New York, 505 U.S. at 167 (quoting Hodel, 452 U.S. at 289).

Without any discussion, NCUC cites Printz and New York for the proposition that the § 252 violates the Tenth Amendment. On closer review, both holdings actually militate in favor of the Act's constitutionality. In Printz and New York, the Supreme Court invalidated certain federal directives for the very reason that they failed to provide states a choice about whether to participate in the regulatory scheme. Printz, 117 S. Ct. at 2383 (negating the mandatory obligation imposed by the Brady Bill on state law enforcement officers to perform certain background checks); New York, 505 U.S. at 176-77 (reversing take-title provision in federal waste disposal scheme because it impermissibly forced states to act). The Telecommunications Act eludes similar opprobrium by expressly allowing states to opt out completely from the purview of § 252. See § 252(e)(5) (explicitly denying any remedial action against a state for non-participation). Unlike in New York, states are not merely offered "a choice between two unconstitutionally coercive regulatory techniques." Id. at 176.

In a related situation, the Supreme Court has commented:

> We fail to see why the [Act] should become constitutionally suspect simply because Congress chose to allow the States a regulatory role. . . . Congress could have pre-empted the field . . . ; [the Act] should not be invalid simply because, out of

> deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the conditions that they consider the suggested federal standards.

FERC v. Mississippi, 456 U.S. 7432, 764 (1982). This language is equally applicable to the mechanics of § 252. Overall, recognizing that states can avoid exclusive federal review of state administrative actions on federal issues by not participating, it becomes clear that § 252 is not a prohibited intrusion into state autonomy. Although framed in rather strong language, § 251 does not impugn "the Constitution's division of authority between the Federal Government and the States." New York, 505 U.S. at 162. Consequently, NCUC's willing decision to act under § 252 renders its subsequent Tenth Amendment claims ineffective.

III. Conclusion

For the reasons stated above, defendants' motions to dismiss in both cases are hereby DENIED.

This 26 November 1997.

W. EARL BRITT
United States District Judge

att/mci/ncuc/sdn

A true and correct copy

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

AT&T COMMUNICATIONS OF THE
SOUTHERN STATES, INC.,

Plaintiff,

v. CASE NO. 4:97cv262-RH

BELLSOUTH TELECOMMUNICATIONS, INC.,
et al.,

Defendants.

_______________________________________/

ORDER DENYING MOTION TO DISMISS

This action arises under the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252. Defendants include the five members of the Florida Public Service Commission. They have moved to dismiss the complaint under the Eleventh Amendment of the United States Constitution, arguing that the action is, in substance, an action against the State of Florida itself. Because the longstanding doctri[illegible]

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Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), squarely authorizes this action, I deny the motion to dismiss.

Background - The Statutory Structure

The Telecommunications Act of 1996 ("the Act") requires the incumbent local exchange carrier ("LEC") in any territory to negotiate in good faith with any requesting telecommunications carrier on the terms under which the requesting carrier will be allowed to interconnect with the LEC's facilities and equipment. In effect, the interconnection agreements to be entered pursuant to the Act, together with the related duties created by the Act, would allow competition in the market for local telephone services.

In the event of any disagreement between the requesting carrier and LEC on the terms to be included in such an agreement, the Act provides for binding arbitration before the applicable state regulatory authority. In Florida the

applicable regulatory authority is the Florida Public Service Commission ("the Commission").

The Act provides further that any interconnection agreement adopted by negotiation or arbitration must be submitted to the state regulatory authority for approval. 47 U.S.C. § 252(e)(1). The Act provides standards to be applied and procedures to be followed by the state regulatory authority in determining whether to approve any such agreement. See, e.g., 47 U.S.C. § 252(e)(2) & (4). The Act specifically provides for judicial review of any such state regulatory authority decision:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

Plaintiff's Claims

In this action plaintiff AT&T Communications of the Southern States, Inc. ("AT&T") asserts that it has been aggrieved by a determination of the Florida Public Service Commission under § 252. AT&T seeks review of the Commission's action under § 252(e)(6).

As is undisputed, therefore, this is an action squarely authorized by the plain terms of § 252(e)(6). Indeed, an action such as this is precisely the method Congress provided for an aggrieved party to obtain judicial review of a state regulatory authority determination of this type.[1]

The Eleventh Amendment

The defendant commissioners assert that the Eleventh Amendment deprives Congress of the authority to do what it

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[1] The commissioners nonetheless assert that this action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283, or the Johnson Act, 28 U.S.C. § 1342. These statutes are inapplicable by their terms and, in any event, clearly do not foreclose this action as squarely authorized by Congress in a subsequent, more specific statute.

did. They are wrong.

The Eleventh Amendment bars actions in federal court against the states. This bar applies not only to actions against the states by name but extends also to actions against such state entities as the Florida Public Service Commission and to actions seeking damages against state officers in their official capacities. As has been clear at least since Ex Parte Young, 209 U.S. 123, 28 S.Ct. 442, 52 L.Ed. 714 (1908), however, the Eleventh Amendment ordinarily does not bar actions based on the federal Constitution or laws seeking prospective injunctive or declaratory relief against state officers. This is such an action.

In asserting the contrary, the commissioners rely on Seminole Tribe v. Florida, 517 U.S. 609, 116 S.Ct. 114, 134 L.Ed.2d 252 (1996). There the Supreme Court held that, when Congress adopts a specific remedial scheme as part of a federal statute, Ex Parte Young does not provide a different judicial remedy, separate and apart from the remedy Congress provided. That holding affects the case at bar not at all;

here AT&T seeks not to pursue a remedy different from the one Congress provided, but instead to pursue precisely the remedy Congress provided in clear and unmistakable language.

Telecommunications of the type at issue here are, beyond doubt, part of interstate commerce. Congress has authority to act in this area and has done so.[2] Congress has provided for jurisdiction in federal court to determine the type of controversy here at issue. Nothing in the Eleventh Amendment prevents Congress from taking this approach.

Accordingly,

IT IS ORDERED:

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[2] This case involves none of the special state sovereignty issues that precluded plaintiffs from invoking Ex Parte Young as a basis to go forward in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

The motion to dismiss (document 5) is DENIED.

SO ORDERED this 21st day of November, 1997.

Robert L. Hinkle
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GTE FLORIDA INCORPORATED,

Plaintiff,

v.

CASE NO. 4:97cv334-RH

JULIA L. JOHNSON, et al.,

Defendants.

_____/

ORDER DENYING MOTION TO DISMISS

This action arises under the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252. Defendants include the five members of the Florida Public Service Commission. They have moved to dismiss the complaint under the Eleventh Amendment of the United States Constitution, arguing that the action is, in substance, an action against the State of Florida itself. Because the longstanding doctrine of Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)

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squarely authorizes this action, I deny the motion to dismiss.

Background - The Statutory Structure

The Telecommunications Act of 1996 ("the Act") requires the incumbent local exchange carrier ("LEC") in any territory to negotiate in good faith with any requesting telecommunications carrier on the terms under which the requesting carrier will be allowed to interconnect with the LEC's facilities and equipment. In effect, the interconnection agreements to be entered pursuant to the Act, together with the related duties created by the Act, would allow competition in the market for local telephone services.

In the event of any disagreement between the requesting carrier and LEC on the terms to be included in such an agreement, the Act provides for binding arbitration before the applicable state regulatory authority. In Florida the applicable regulatory authority is the Florida Public

Service Commission ("the Commission").

The Act provides further that any interconnection agreement adopted by negotiation or arbitration must be submitted to the state regulatory authority for approval. 47 U.S.C. § 252(e)(1). The Act provides standards to be applied and procedures to be followed by the state regulatory authority in determining whether to approve any such agreement. See, e.g., 47 U.S.C. § 252(e)(2) & (4). The Act specifically provides for judicial review of any such state regulatory authority decision:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

Plaintiff's Claims

In this action plaintiff GTE Florida Incorporated ("GTE") asserts that it has been aggrieved by a determination of the Florida Public Service Commission under § 252. GTE seeks review of the Commission's action under § 252(e)(6).

As is undisputed, therefore, this is an action squarely authorized by the plain terms of § 252(e)(6). Indeed, an action such as this is precisely the method Congress provided for an aggrieved party to obtain judicial review of a state regulatory authority determination of this type.[1]

The Eleventh Amendment

The defendant commissioners assert that the Eleventh Amendment deprives Congress of the authority to do what it

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[1] The commissioners nonetheless assert that this action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283, or the Johnson Act, 28 U.S.C. § 1342. These statutes are inapplicable by their terms and, in any event, clearly do not foreclose this action as squarely authorized by Congress in a subsequent, more specific statute.

did. They are wrong.

The Eleventh Amendment bars actions in federal court against the states. This bar applies not only to actions against the states by name but extends also to actions against such state entities as the Florida Public Service Commission and to actions seeking damages against state officers in their official capacities. As has been clear at least since Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, the Eleventh Amendment ordinarily does not bar actions based on the federal Constitution or laws seeking prospective injunctive or declaratory relief against state officers. This is such an action.

In asserting the contrary, the commissioners rely on Seminole Tribe v. Florida, 517 U.S. 609, 116 S.Ct. 114, 134 L.Ed.2d 252 (1996). There the Supreme Court held that, when Congress adopts a specific remedial scheme as part of a federal statute, Ex Parte Young does not provide a different judicial remedy, separate and apart from the remedy Congress provided. That holding affects the case at bar not at all;

here GTE seeks not to pursue a remedy different from the one Congress provided, but instead to pursue precisely the remedy Congress provided in clear and unmistakable language.

Telecommunications of the type at issue here are, beyond doubt, part of interstate commerce. Congress has authority to act in this area and has done so.[2] Congress has provided for jurisdiction in federal court to determine the type of controversy here at issue. Nothing in the Eleventh Amendment prevents Congress from taking this approach.

Accordingly,

IT IS ORDERED:

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[2] This case involves none of the special state sovereignty issues that precluded plaintiffs from invoking Ex Parte Young as a basis to go forward in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

The motion to dismiss (document 10) is DENIED.

SO ORDERED this 21st day of November, 1997.

Robert L. Hinkle
Robert L. Hinkle
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

AT&T Communications of the Southern States, Inc. Plaintiff, v. BellSouth Telecommunications, Inc.; The Public Service Commission of South Carolina; and Warren D. Arthur, IV; Cecil A. Bowers; Philip T. Bradley; Guy Butler; Rudolph Mitchell; William Saunders; and C. Dukes Scott, who are the Commissioners of The Public Service Commission of South Carolina, acting in their official capacities Defendants.	C/A No.: 3:97-2164-17 C/A No.: 3:97-2385-17 ORDER

This matter comes before the court on a motion to dismiss filed by the South Carolina Public Service Commission (PSC) and its individual Commissioners. The parties submitted detailed briefs on the issues raised, and the court heard oral argument on November 20, 1997. For the reasons stated herein, the defendants' motion to dismiss is denied.

I. BRIEF HISTORY

The Telecommunications Act of 1996 provides a statutory framework for the development of competitive local telephone markets. 47 U.S.C. § 251 *et seq.* The Act requires local telephone utilities, such as BellSouth, to negotiate in good faith with long distance carriers, such as AT&T, to facilitate entry into local markets. 47 U.S.C. § 251(c)(1). Should the parties not reach an agreement, the Act allows the state regulatory body, here the PSC, to become an arbiter of the terms left in dispute. The Act also specifically limits review of the agency's decisions to the appropriate federal district court. 47 U.S.C. § 252(e)(6).

AT&T has filed an action seeking this court's review of terms of BellSouth's Statement of Generally Available Terms and Conditions (SGAT) as approved and arbitrated by the PSC. AT&T asserts that the PSC decision is not consistent with the requirements of the Telecommunications Act. AT&T seeks injunctive relief against the PSC and its Commissioners, prohibiting the enforcement of their decision. The PSC and its Commissioners have moved for dismissal of the case, arguing that the action has been brought in violation of the Ninth, Tenth, and Eleventh Amendments of the Constitution. Furthermore, the Commissioners contend that the Telecommunications Act does not provide for relief against them individually and that they are not necessary parties to the dispute.

II. DISCUSSION

A. Eleventh Amendment

The Eleventh Amendment has been interpreted as establishing that a "[s]tate is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). As a general matter, therefore, a state cannot be sued in federal court. Congress cannot abrogate a state's Eleventh Amendment immunity unless it acts pursuant to a provision of the Constitution granting Congress that power. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). A state can, however, "effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985).

A state can waive its immunity only through express language or by overwhelming implication. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In the present case, AT&T asserts that the PSC impliedly waived its immunity by conducting the arbitration between BellSouth and AT&T.

To understand AT&T's waiver argument, the court must briefly review the relevant

provisions of the Telecommunications Act. The Act provides in part, "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(a)(1). When negotiating the agreement, either party can request that the PSC arbitrate any unsettled issues. 47 U.S.C. § 252(a) & (b). The Act also states that "[n]o State court shall have jurisdiction to review any action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4).

Importantly, the Act also provides a mechanism for approval of the agreement if the state commission refuses to become involved.

> If a State Commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(6). In other words, if the PSC fails to act, the FCC will do so. Notably, the Act does not impose any penalty upon the state for failing to become involved in the arbitration.

AT&T argues that the PSC's acquiesence in arbitrating the dispute between the utilities amounts to a clear waiver of its Eleventh Amendment immunity. AT&T asserts that the State's waiver must be inferred from its actions because the State was well aware that the Act provided for an alternative FCC review and that the Act provided for appeals to the federal court only.

The PSC asserts that waiver is not truly an issue in this case. The PSC argues that it had no choice but to become involved in the matter because it was required to do so by its statutory duties under state law. Therefore, the PSC argues, any "choice" to become involved in the process is merely illusiory.

Even assuming that state law compels the PSC to participate in the arbitration, state law

cannot convert a federal opt-in program into a federal mandatory program. In fact, a state law requiring the PSC to act would simply constitute more concrete proof of a waiver or opt-in by the State. *See AT&T Communications of the United States, Inc. v. BellSouth Telecommunications*, 5:97-CV-405-BR, (E.D.N.C., November 20, 1997). Furthermore, if Congress could totally preempt the telecommunications field, as presumably it could, it can certainly allow the states a choice of either participating in the process subject to federal court review or not participating at all. The fact that the states have traditionally played a role in telecommunications is of no importance to the analysis.

Here, the State, through the Commission, opted to arbitrate and approve the Agreement between BellSouth and AT&T. The Telecommunications Act puts the Commission on clear notice that if it participated in the process it may have to defend a suit brought by aggrieved parties in federal court. Nevertheless, the State chose to participate in formulating and approving the agreement, and it now must live with the consequences. The court must again emphasize that the State faced no penalties for failing to participate in the telecommunications process.

The Commission primarily relies upon *Seminole Tribe* in support of its position. However, the statutory duties placed upon the State of Florida in *Seminole Tribe* by the Indian Gaming Act differ greatly from the relevant provision of the Telecommunications Act. In *Seminole Tribe*, Congress had imposed upon the states an affirmative "duty to negotiate in good faith with an Indian tribe." A state's failure to act would land them in federal court. In the present case, Congress has imposed no duties upon the states — it has merely allowed them to be participants in telecommunications regulation subject to federal court review.[1] Under the Telecommunications

[1] Although not briefed by the parties, the court notes that the actual language used in the Telecommunications Act does not lend itself to an interpretation of the states' duties as being (continued...)

statute, a state will not find itself in federal court for refusing to act; it is subject to federal court jurisdiction only if it takes affirmative acts.

B. Ex Parte Young

AT&T's alternate argument is that the Commissioner's may be sued in federal court under the doctrine of *Ex Parte Young*. 209 U.S. 123 (1908). *Ex Parte Young* has established that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Here, AT&T seeks the type of declaratory and injunctive relief that falls squarely within the parameters of *Ex Parte Young*. *See Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1449 (4th Cir. 1994)(federal suit against state Medicaid director to enjoin ongoing violations of federal statute is proper).

The Commissioners base their argument against *Ex Parte Young* on the Supreme Court's decision in *Seminole Tribe*. The Commissioners recognize that *Seminole Tribe* did not diminish the continued viability of *Ex Parte Young*. However, they point out that the Supreme Court did recognize that certain situations are "sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 116 S. Ct. at 1132. In *Seminole Tribe*, the Court recognized that in some circumstances Congress can preempt *Ex Parte Young* relief by crafting an "intricate remedial scheme" not including suit against individual state officials. *Id.* The Court explained that in those circumstances if suit could also be

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[1](...continued)
optional. Specifically, Section 252 instructs that a state "*shall*" participate in the process and characterizes a failure to act as a "*fail[ure]* to carry out its *responsibility*." 47 U.S.C. § 252(e)(emphasis added). While this language may seem mandatory, it must be read in the context of the statute as a whole. Taken as a whole, the statute clearly informs the states that failure to participate in the process results in no penalty. Congress may desire that the states be involved in the approval and arbitration of the agreements, but it has not commanded that they do so.

brought under *Ex Parte Young*, "it is difficult to see why [a party] would suffer through the intricate [statutory] scheme . . . when more complete and more immediate relief would be available under *Ex Parte Young*." *Id.* at 1133. In *Seminole Tribe*, the Court placed great emphasis on the limited remedy that the statute provided. The Court noted that the statute did not provide sanctions that would otherwise be available in a suit brought under *Ex Parte Young*. "In contrast with this quite modest set of sanctions, an action brought against a state official under *Ex Parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* at 1133.

The PSC argues that the Telecommunications Act is similar to the statute construed in *Seminole Tribe*. The PSC points out that the Telecommunications Act prescribes a mechanism for federal court review, which includes an appeal of the *Commission's* decision, *not* an action against *individual commissioners*.

The PSC does make a compelling argument against the applicability of *Ex Parte Young* in this case. Like the statute in *Seminole Tribe*, the Telecommunications Act prescribes a remedial scheme for the enforcement against a state of a statutorily created right. *Id.* at 1132. However, *Seminole Tribe* differs from the present case in that there is no "detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 1132. The Telecommunications Act does not contain a truly "detailed remedial scheme" similar to that under consideration in *Seminole Tribe*. The ultimate holding of Seminol Tribe is that if Congress intends to supplant *Ex Parte Young*, it can. The language of the Telecommunications Act simply does not provide a basis for the court to conclude that Congress intended to prohibit the application of *Ex Parte Young*.

The PSC next argues that the Commissioners are not necessary parties to the action. Although, it is clear that this case could proceed without them, the court finds that they are proper

defendants in the action. Therefore, the PSC's motion to dismiss the individual defendants is denied.

C. Ninth and Tenth Amendments

The Commission's final argument is that the Telecommunications Act violates the Ninth or Tenth Amendments. The court finds this argument unpersuasive.

The Tenth Amendment protects a state from being required against its will to participate in a federal program or carry out a federal directive. *See Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). However, when Congress has the authority to regulate activity under the Commerce Clause, it can offer the states a choice of either participating in a regulatory scheme or yielding preemption of the state law in that field. That is what Congress has done in the Telecommunications Act.

The PSC's Ninth Amendment argument adds nothing to the analysis. The Ninth Amendment recognizes that other unenumerated rights belong to the people, but the PSC has not alleged what Ninth Amendment rights of the people are being violated.

After careful and thorough consideration of the issues raised, the court respectfully denies defendants' motion to dismiss.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

December 11, 1997
Columbia, South Carolina

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

DEC 15 1997

AT FRANKFORT
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 97-79

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., PLAINTIFF,

V. MEMORANDUM OPINION AND ORDER

BELLSOUTH TELECOMMUNICATIONS, INC., ET AL., DEFENDANTS.

* * * * * * *

The defendants, Kentucky Public Service Commission and its Commissioners ("PSC"), have moved the Court [Record No. 8] to dismiss the plaintiff's claims. The plaintiff, AT&T Communications of the South Central States, Inc. ("AT&T"), has responded [Record No. 15], to which the defendants have replied [Record No. 16]. This matter is now ripe for decision.[1]

The following are the pertinent facts. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 151, et seq., (the "Act"), which gives rise to this case, is intended to foster competition in all telecommunications markets. The Act permits competitive local exchange carriers ("CLECs") to enter the local market through the following: (1) the purchase of unbundled network elements from the incumbent local exchange carrier ("ILEC"); (2) the

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1 It should also be noted that defendant, BellSouth Telecommunications, Inc., filed a response, stating that PSC's motion should be denied.

purchase of wholesale service from the ILEC for resale to the CLEC's customers; or (3) the construction of the CLEC's own facilities.

The Act requires the ILEC to negotiate interconnection agreements with new entrants to the local market. If the new entrant and the ILEC are unable to agree on terms, either party may petition the applicable state commission to arbitrate the dispute. 47 U.S.C. § 252(b)(1). The state commission must "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this Section." 47 U.S.C. § 252(b)(4)(C).

In the case at bar, AT&T set the 9 month statutory clock ticking on May 6, 1996, by requesting interconnection from BellSouth Telecommunications, Inc. ("BellSouth"), which is the ILEC. AT&T also petitioned the PSC for arbitration on October 11, 1996. The PSC investigated the issues raised in the petition and the response, conducted discovery, held hearings, and issued its order on the statutory deadline.

On August 13, 1997, BellSouth and AT&T filed an executed interconnection agreement. The agreement was approved by the PSC pursuant to the Act. The PSC approved the parties' negotiated change in the term of the contract. The PSC stated that the "parties may renegotiate prices prior to the end of the contract, but the Commission will not arbitrate these

prices during the term of the agreement absent a material change in circumstances." Shortly thereafter, this lawsuit was initiated.

AT&T contends that the actions of the PSC in implementing the Act violated the statute in several respects. The PSC and the Commissioners have moved to dismiss AT&T's suit primarily on the ground that it allegedly violates the Eleventh Amendment to the United States Constitution.[2]

The Eleventh Amendment states the following:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State.

Unless there is a waiver or the state consents, a suit against a state or one of its agencies brought in federal court is proscribed by the Eleventh Amendment. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). It is clear that a state may waive its Eleventh Amendment immunity when it voluntarily participates in a federal statutory scheme that expressly conditions participation on a state's willingness to be sued in federal court. See Edelman v. Jordan, 415 U.S. 651, 673 (1974).

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[2] The defendants also argue that the AT&T's suit should be dismissed because it violates the Tenth Amendment and the Guarantee Clause of the U.S. Constitution. Those arguments will be addressed later on in the Opinion.

In the case at bar, Kentucky, via the PSC, waived its Eleventh Amendment rights when it chose to arbitrate interconnection agreements that are exclusively reviewable in federal court, rather than leaving the arbitration function to the Federal Communications Commission ("FCC").[3] Kentucky's decision to participate in the arbitration and approval scheme, knowing that the statute had an express provision for exclusive federal jurisdiction, was an affirmative waiver of its Eleventh Amendment immunity.[4] See §§ 252(e)(4-6). See Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990).

It should be emphasized that the PSC could have deferred the matter to the FCC for resolution. See 47 U.S.C. § 252(e)(5). If the PSC had declined to participate and deferred to the FCC, it would have preserved its sovereign immunity. However, by deciding to take an active role in the

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[3] The Court notes that the defendants vigorously argue that Congress cannot abrogate sovereign immunity directly or indirectly. Although the Court agrees with their argument, it is a complete red herring. Congress did not directly, nor indirectly, abrogate state immunity by enacting the 1996 Act. The Act gives the states a choice as to whether to participate. If the state chooses not to participate, it cannot be sued in federal court. If, however, a state does choose to participate and subject itself to a statute that is limited to federal review, it waives and consents to being sued in federal court.

[4] The "overwhelming implications" from Kentucky's willingness to participate in the Act are that it was willing to waive its Eleventh Amendment immunity and be sued in federal court. See Edelman, 415 U.S. at 673.

approval of the agreement, the PSC, as an agency of Kentucky, affirmatively waived its Eleventh Amendment immunity and consented to federal review.

The Court's reasoning is bolstered by the Ninth Circuit's recent decision in Premo v. Martin, 119 F.3d 764 (9th Cir. 1997). In Premo, the issue was whether damages awarded by an arbitral panel under the Randolph-Sheppard Vending Standing Act could be enforced against California in federal court. The Ninth Circuit held that the arbitral awards were enforceable against California in federal court because California, by participating in the program, had waived its sovereign immunity. Id. at 770-71. The court went on to state that:

> In this case, the State of California has not expressly consented to suit. Nor has California enacted a statute that provides for waiver. The California statute establishing the state counterpart to the federal Randolph-Sheppard program does provide that the decision of an arbitration panel "shall be final and binding on the parties except as otherwise provided in the act." (citation omitted). While this statute clearly reflects California's intent to be bound by Randolph-Sheppard arbitral awards, it does not provide clear enough consent to suit in federal court to amount to an express statutory waiver of sovereign immunity. (citation omitted). However, the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming. Id. at 770.

The waiver in the case at bar is clear because it states that the action of the state commission is reviewable in federal court and nowhere else. See 47 U.S.C. § 252(e)(4)-(5); U.S.

West Communications, Inc. v. TCG Seattle, 971 F.Supp. 1365 (W.D. Wash. 1997) (holding in an almost identical case that the state of Washington had waived its Eleventh Amendment immunity by participating under the Telecommunications Act); U.S. West Communications, Inc. v. Reinbold, Civil No. A1-97-25, slip op., (D.N.D. July 28, 1997) (holding in an almost identical case that the state of North Dakota had waived its Eleventh Amendment immunity by participating under the Telecommunications Act); U.S. West Communications, Inc. v. Thoms, Civil No. 4-97-CV-70082, slip op., (S.D. Iowa Aug. 4, 1997) (holding in an almost identical case that the state of Iowa had waived its Eleventh Amendment immunity by participating under the Telecommunications Act); U.S. West Communications, Inc. v. Hix, Civil No. 97-D-152, slip op., (D.Colo. Oct. 29, 1997) (holding in an almost identical case that the state of Colorado had waived its Eleventh Amendment immunity by participating under the Telecommunications Act).

The Court also notes that suits brought against state officials in their official capacities seeking injunctive relief are not considered actions against the state for purposes of the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n. 10 (1989). The Young exception applies when there is no adequate state forum available to safeguard the federal interests at issue.

The case at bar is precisely on point with the above condition. The precise language of the Act precludes judicial review within a state forum: "No State court shall have jurisdiction to review the action of a State commission approving or rejecting an agreement under this section". 47 U.S.C. § 252(e)(4). The only logical implication from § 252(e)(4) is that federal judicial review is a party's exclusive remedy. See 47 U.S.C. § 252(e)(6) (stating that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved . . . may bring an action in an appropriate federal court"). Since a state forum is not possible, there is obviously no state forum available to preserve federal interests. Thus, the Commissioners could be sued in their individual capacities under the first Young exception.

Additionally, Young may be applied when a "case calls for the interpretation of federal law." See Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2036 (1997). "This reasoning, which is described as the interest in having federal rights vindicated in federal courts, can lead to an expansive application of the Young exception. Id.

The Supreme Court has also stated that:

> Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of

> state officials. Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar.

Coeur d'Alene, 117 S.Ct. at 2037-38. It is clear that courts must balance state and federal interests in reaching the ultimate conclusion of Young's application. Id. 2038-39.

In the case at bar, the Act's provision for federal judicial review is limited to determining whether federal law is being followed. Congress has also dictated a strong federal interest in restructuring the local telephone service industry through the implementation of the Act. Although Kentucky has an interest in regulating local utilities, the mandate of the Act is overriding. Hence, AT&T would also be able to sue the Commissioners of the PSC in their individual capacities under Young's second exception.

Along with their Eleventh Amendment arguments, the defendants assert that § 252(e) of the Act violates the Tenth Amendment and the Guarantee Clause. The Court finds that these arguments lack merit. The Act gave the states a choice as to whether they wanted to participate; none of them were compelled. Kentucky, via the PSC, chose to participate. Therefore, Kentucky's sovereign rights were not violated.[5]

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[5] It should be emphasized that the states are not being improperly coerced into enforcing the Act's provisions. In fact, they can opt out if they want too. Hence, the defendants' Tenth Amendment argument is meritless. As to the defendants' Guarantee Clause argument, Kentucky has not been

IT IS ORDERED that the defendants' motion (Record No. 6) be, and the same hereby is, DENIED.

This the 15th day of December, 1997.

Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

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denied a republican form of government because of the Act.

December 15, 1997

Case Number: 3:97-cv-00079

Amy E. Dougherty

William L. Willis

Deborah Tully Eversole

Creighton E. Mershon Sr.

Dorothy J. Chambers

Sean A. Lev

Michael K. Kellogg

Bruce F. Clark

Mark R. Overstreet

William Associate General Counsel BELLSOUTH CORPORATION

R. Douglas Lackey

Thomas B. Alexander

James P. Lamoureux

Holland N. McTyeire V

David L. Lawson

Michael D. Warden

Certificate of Mailing by _____.

FILED
DEC 2 6 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MCI Telecommunications Corp., et al.

Plaintiff.

v.

Civil Action Number 3:97CV629

Bell Atlantic-Virginia Inc., et al.

Defendant.

ORDER

THIS MATTER comes before the Court as a Motion to Dismiss which Defendants the Commonwealth of Virginia State Corporation Commission ("SCC") and its Commissioners, Theodore V. Morrison, Jr., Hullihen Williams Moore, and I. Clinton Miller, sued in their official capacities, have submitted. The Defendants seek the dismissal of both Plaintiff MCI Telecommunications Corporation, Inc.'s ("MCI") complaint and Intervenor-Movant AT&T Communications of Virginia, Inc.'s complaint and cross-claim. The Court will also consider intervenor Defendant Virginia Attorney General Richard Cullen's Motion to Dismiss. For the reasons stated below, the Court shall DENY Defendants' Motion to Dismiss.

THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. To find a violation of the Tenth Amendment the following must be true: (1) the challenged statute regulates "States as States," (2) the federal

regulation addresses matters which are indisputably "attributes of state sovereignty;" and (3) the State's compliance with the federal law would directly impair its ability to "structure integral operations in the areas of traditional governmental functions." Hodel v. Virginia Surface Min. & Reclam. Ass'n., 452 U.S. 264, 287-88 (1981).

A literal, if not substantive, conflict exists between the Telecommunications Act of 1996, ("the 1996 Act") and the Virginia State Constitution as it pertains to judicial review of State commission decisions. The 1996 Act provides: "In any case in which a State Commission makes a determination under this section, any party aggrieved . . . may bring an action in the appropriate Federal district court." The 1996 Act, 47 U.S.C. § 252 (e)(6). The Virginia Constitution requires, "All appeals from the Commission shall be to the Supreme Court only." Va. Const. Article IX, §4. Herein lies the heart of the Tenth Amendment conflict.

1. Regulation of the Commonwealth of Virginia

The Federal government does not have the authority to compel a State to administer a federal regulatory program. Printz v. U.S., 117 S.Ct. 2365, 2383 (1997); New York v. U.S., 505 U.S. 144, 188 (1992). Congress may not conscript the state governments as its agents. New York, 505 U.S. at 178. Congress may, however, offer States a choice. When Congress regulates a private activity which falls under the Commerce Clause, a State may regulate that activity pursuant to federal standards. Id. at 173. In the alternative, a State may forgo federally mandated regulation and have its state laws pre-empted by federal regulation. Id. at 173-74 (citing Hodel, *supra*, at 288; FERC v. Mississippi, 456 U.S. 742, 764-765 (1982)).

Contrary to Defendant Commissioners' argument, the 1996 Act does not force regulation on the Commission or the State. Instead, the 1996 Act offers aggrieved parties two forums in which they may secure approval of their agreement or resolution of any disputes. The first forum is the State

commission which shall approve or reject submitted agreements. See The 1996 Act, *supra*, § 252(e)(1). In the event the State commission abdicates its authority under the 1996 Act, a second forum is available. The Federal Communications Commission ("FCC") shall issue a notice of preemption and assume responsibility for the matter. See id. §252(e)(5). Therefore, the 1996 Act does not compel the Commission to act because any burden which results from their refusal would fall on the FCC. Cf. New York, *supra*, at 174 (holding that States were not compelled to act on regulating the disposal of radioactive waste because the burden would fall on those producing the waste and not the State as a sovereign). The Commissioners may decline to administer the federal program.

Congress passed the 1996 Act pursuant to its authority under the Commerce Clause. The Court FINDS that the 1996 Act offers States a choice; therefore, the 1996 Act does not violate the Tenth Amendment. Having concluded the 1996 Act does not regulate "States as States," the Court does not reach issues relating to State sovereignty or the 1996 Act's impact on integral state operations.

THE ELEVENTH AMENDMENT

The Eleventh Amendment to the United States Constitution reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. In effect, the Eleventh Amendment affords immunity to States from certain suits. However, a state and its officers are not entitled to Eleventh Amendment protection where the plaintiff seeks only prospective, injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 664-68 (1974) (interpreting Ex Parte Young, 209 U.S. 123 (1908)). An Ex Parte Young action entitles an individual to bring suit against a state officer in federal court to ensure the officer's conduct is in compliance with federal law. See Seminole Tribe of Florida v. Florida, 116 S.Ct 1114, 1131 n. 14 (1996)(internal citations omitted). Moreover, where a state has waived its immunity, a case against

it may go forward. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). In considering the facts of this case, the Court must resolve (1) whether Ex Parte Young applies and (2) whether the Commissioners waived their sovereign immunity.

1. Application of Ex Parte Young

Ex Parte Young applies to the case at bar. Plaintiff MCI has sued the Commonwealth of Virginia State Corporation Commission. MCI seeks prospective injunctive relief from the Commissioners who have been named in their official capacity.[1] The doctrine of Young permits "a federal court, consistent with the Eleventh Amendment, [to] enjoin state officials to conform their future conduct to the requirements of federal law." Quern v. Jordan, 440 U.S. 332, 337 (1979). However, the Defendant Commissioners' view of Young would serve as a complete evisceration.

The Court categorically rejects the Commissioners' arguments. They are proper Defendants in this case because Young authorizes suits against state officers in their official capacity. The 1996 Act's reference to review of "Commission" actions as opposed to the individual Commissioners is immaterial. See Pugh v. Alabama , 438 U.S. 781 (1978)(permitting suit against state officers although suit could not be brought against the state agency). Section 252(e)(6) does not interfere with the public administration because it also falls within the Ex Parte Young exception. See Ex Parte Young, 465 U.S. at 102.

2. Waiver of Immunity

A state may waive its immunity in the context of a particular federal regulatory program. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n. 1 (1985). The Supreme Court requires an

[1] "A Young suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2043, 2046 (1997)(O'Connor, J., concurring in part).

"unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Id. Again, the Commission voluntarily undertook review pursuant to the 1996 Act which plainly indicates that review of any State commission decision would occur in Federal district court. See, The 1996 Act, *supra*, §252(e)(4-6). Such voluntary review amounts to constructive waiver of any Eleventh Amendment immunity the Commissioners may have enjoyed. See Atascadero, 473 U.S. at 246-47; Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997)(a state may waive Eleventh Amendment Immunity by agreeing to participate in a federal program).

While not controlling, other district courts have similarly held that voluntary participation in the federal telecommunications regulatory program amounts to a waiver of Eleventh Amendment immunity. See, GTE Midwest, Inc. v. Thoms, Civil No. 4-97-CV-70118, slip op. at 4-5; U.S. West Communications, Inc. v. Reinbold, Civil No. A1-97-25, slip op. at 7-8; U.S West Communications, Inc. v. TCG Seattle, 971 F.Supp. 1365, 1369 (W.D.Wash. 1997)("The statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court."). Having waived its Eleventh Amendment immunity, granting the Defendants' Motions to Dismiss on this issue would not be appropriate.

For the reasons hereinbefore stated, the Court shall DENY Defendants' Motion to Dismiss.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

UNITED STATES DISTRICT JUDGE

December 24, 1997
DATE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.

Plaintiff

v.

TENNESSEE REGULATORY AUTHORITY, et al.

Defendants

and

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,

Counterclaim and Cross-Claim Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

Counterclaim Defendant, and

TENNESSEE REGULATORY AUTHORITY, et al.

Cross-Claim Defendants.

No. 3:97-0523
Chief Judge Nixon

MEMORANDUM

Pending before the Court is the Defendants Tennessee Regulatory Authority, H. Lynn Greer, Melvin J. Malone, and Sara Kyle's Motion to Dismiss (No. 3:97-0616 Doc. No. 10; No. 3:97-0523 Doc. No. 11), to which the Plaintiff BellSouth Telecommunications, Inc. (Doc. No. 16), the Cross-Claim Plaintiff AT&T Communications of the South Central States, Inc. (Doc. No. 17), and the Plaintiff in member case No. 3:97-0616, MCI

Telecommunications Corp. (Doc. No. 15) have filed Responses. The Defendants have in turn filed a Reply (No. 3:97-0616 Doc. No. 20; No. 3:97-0523 Doc. No. 21). In addition, the Court has before it a Motion to Intervene by the United States and the Federal Communications Commission (No. 3:97-0616 Doc. No. 23; No. 3:97-0523 Doc. No. 24), to which the Defendant BellSouth in member case No. 3:97-016 has filed a Response (Doc. No. 27) . The proposed intervenors have also filed a Response to the Motion to Dismiss (No. 3:97-0616 Doc. No. 27).

For the reasons expressed below, the Court grants the Motion to Dismiss, and grants the United States' Motion to Intervene, but denies the Federal Communications Commission's Motion to Intervene.

I. BACKGROUND

This is an action under § 252(e)(6) of the Telecommunications Act of 1996 ("Act"), seeking review of two interconnection agreements. The first is between AT&T Communications of the South Centeral States ("AT&T") and BellSouth Telecommunications ("BellSouth"). The second is between BellSouth and the collective entity of MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. (collectively "MCI"). The Act was enacted to promote competition in local telephone markets. It ends the prior regulated-monopoly era, in which incumbent local exchange carriers ("ILECs") such as BellSouth, exercised exclusive control over the facilities through which consumers place and receive all local and long distance telephone calls. It replaces this with a more competitive system which requires the ILECs to give other carriers access to the facilities they need to

enter the market. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791-92 (8th Cir. 1997). The Act requires ILECs to negotiate in good faith with potential competitors; to provide requesting carriers with "interconnection" to the ILECs' networks, 47 U.S.C. § 251(c)(2) (West Supp. 1997); to provide "unbundled access" to elements of those networks, 47 U.S.C § 251(c)(3); and to "offer for resale at wholesale rates any telecommunications service the carrier provides at retail to subscribers who are not telecommunications carriers," 47 U.S.C. § 251(c)(4).

The Act requires ILECs to negotiate "interconnection agreements" with new entrants, such as AT&T and MCI, and authorizes either party to petition the appropriate state public utility commission, in this case the Tennessee Regulatory Authority ("TRA"), to arbitrate or mediate open issues if those negotiations are unsuccessful. 47 U.S.C. § 252(a)-(b). In addition, all interconnection agreements must be presented to the state agency for approval. 47 U.S.C. § 252(e)(1). The scope of the state agency review is limited to the question of whether the agreement complies with the requirements of the Act and with state law. 47 U.S.C. § 252(e)(2). If the state commission fails to act on an arbitration request, the Federal Communications Commission ("FCC") can remove jurisdiction from the state agency and take over its responsibility. 47 U.S.C. § 252(e)(5).

After a period of unsuccessful negotiations pursuant to the Act between AT&T and BellSouth, AT&T filed a petition for arbitration with the TRA on July 17, 1996. The TRA consolidated this arbitration with a subsequently-filed request for arbitration between BellSouth and MCI. An arbitration hearing was held from October 21 to October 23, 1996, after which the TRA approved arbitration agreements for these parties. BellSouth thereafter instituted an action against the TRA, the TRA directors, and AT&T, claiming that the agreement approved

by the TRA violated the Act. In that action, AT&T has filed a cross-claim against the TRA and a counterclaim against BellSouth, also claiming that the agreement violates the Act. In the member action, MCI filed a claim against BellSouth, TRA, the TRA directors. BellSouth in turn filed a counterclaim against TRA, the TRA directors, and AT&T. The Court consolidated these two cases by Order dated November 10, 1997, finding that the cases presented sufficiently similar questions of law and fact to support consolidation (Doc. No. 36).

This Court has jurisdiction over this matter under 47 U.S.C § 252(e)(6), which provides that review of a state commission's determination under the Act may be brought in a federal district court.

II. DISCUSSION

The TRA and its directors have asked this Court to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1), (6) and (7), claiming that they are immune from suit under the Eleventh Amendment, and that as an indispensable party, the action may not proceed without them. The parties opposing this motion submit that the TRA is amenable to suit because it has waived its immunity, and that the individual directors are subject to suit under the doctrine of Ex parte Young.

A. Eleventh Amendment

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

U.S. Const. amend XI. This language has been interpreted to extend immunity for suits against a State by its own citizens. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). The rationale underlying the existence of the amendment is that inherent in the concept of state sovereignty is the recognition that the State should have a right to not be sued without its consent. Seminole Tribe of Florida v. Florida, -- U.S.--, 116 S. Ct. 1114, 1131 (1996). Here, the TRA and its directors have been made unwilling parties to a suit. The statute which created the TRA explicitly directs that "directors of the authority shall be state officers," and requires that these officers be appointed jointly by the governor, the speaker of the senate, and the speaker of the house of representatives. Tenn. Code Ann. § 65-1-101 (1997). Thus, the TRA and its directors are State entities, and they have properly invoked the Eleventh Amendment as a potential bar to suit. Cf. Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (Eleventh Amendment immunity extends to state entities); Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 463-64 (1945) (State Department of Treasury considered to be an arm of the State for purposes of immunity).

However, Eleventh Amendment protections are not absolute. Specifically, a State may be subject to suit notwithstanding the Eleventh Amendment under two well-recognized principles: waiver and the doctrine of Ex parte Young.[1]

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[1] AT&T's Memorandum in Opposition to the Motion to Dismiss also presents the argument that an action under 47 U.S.C. § 252(e)(6) is not a "suit in law or equity" against the State, such that the dictates of the Eleventh Amendment are not applicable. However, the cases cited by AT&T to support this proposition relate specifically to the review of state court proceedings: "[W]hen a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case 'whoever may be the parties to the original suit, whether private persons, or the state itself.' . . . The Eleventh Amendment does not

1. Waiver

Waiver can be realized in two ways. First, Congress can abrogate a State's immunity without the State's consent. Atascadero, 473 U.S. at 240; see also Tennessee Dep't of Human Serv. v. U.S. Dep't of Educ., 979 F.2d 1162, 1167 (6th Cir. 1996); Seminole Tribe, 116 S. Ct. at 1125. In order to determine whether a waiver has been effectuated in this manner, a court must first consider whether Congress has "unequivocally expressed its intent to abrogate the immunity," Seminole Tribe, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985), and second, whether "Congress has acted 'pursuant to a valid exercise of power.'" Id. In Seminole Tribe, the Supreme Court, overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), determined that Congress may not waive immunity when it is acting pursuant to its powers under Article I, but it may do so when exercising its Fourteenth Amendment powers. 116 S. Ct. at 1128.

With respect to the 1996 Act, it appears Congress may have intended to exercise its power under the Fourteenth Amendment in promulgating it. As specified in Section 151, one of the primary purposes of the 1996 Act was to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race color, religion, national*

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constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." McKesson v. Division of Alcoholic Beverages, 496 U.S. 18, 32 (1990). This doctrine clearly does not directly apply to the facts of the present case, which relates to the review of a state arbitration proceeding where the State was the decision-maker, not a party. Furthermore, the backdrop of the Court's statement was concern that by invoking immunity for the first time at the federal level, the Supreme Court would lose jurisdiction over state decisions. Id. at 28-29. This same concern is not as prominent under the present facts, where the State's first opportunity to exert immunity comes at the federal level.

origin, or sex, a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . ." (emphasis added). While this language does not state in express terms that it was enacted under Congress' Fourteenth Amendment powers, such an explicit declaration is not necessary. Wilson-Jones v. Caviness, 99 F.3d 203, 208, 210 (6th Cir. 1996). It is enough that other language in the statute connects it to the Fourteenth Amendment. Id. at 210. Generally, statutes which have been held to be valid under the Fourteenth Amendment's enforcement clause "concerned discrimination by state actors on the basis of race or gender." Id. The 1996 Act explicitly refers to the desire to prevent discrimination against protected classes in the telecommunications industry. Thus, a valid argument could be made that it was promulgated in part under Congress' Fourteenth Amendment powers. Nevertheless, the Court will refrain from deciding the issue of whether Congress unilaterally abrogated immunity in enacting the Act because the parties have not thoroughly briefed it. Most notably, the parties have failed to specify how the discrimination alleged here is due to state rather than private actors. In any event, it is not necessary for the Court to resolve this issue because it has concluded, as discussed below, that the State has waived its immunity voluntarily by participating in the Act.

The second method under which a State can waive its immunity is by voluntarily taking part in a federal program which conditions such participation on the waiver of immunity. Tennessee Dep't of Human Serv., 979 F.2d at 1166; see also Edelman v. Jordan, 415 U.S. 651, 673-74 (1974). Again, it is necessary that Congress express in clear and unambiguous terms that by participating in the program, States subject themselves to suit. Atascadero, 473 U.S. at 239-240. As noted in Atascadero, "[t]he test for determining whether a State has

waived its immunity from federal-court jurisdiction is a stringent one." Id. at 241. The mere fact that a State participates in a federal program is not sufficient to effectuate a waiver of immunity. Edelman, 415 U.S. at 673. In other words, a State may not "constructively consent" to suit: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." Id. A State's waiver will only be effected "where stated by the most express language or by such overwhelming implication from the text as [to] leave no room for any other reasonable construction." Atascadero, 473 U.S. at 239-240; accord Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990); Edelman, 415 U.S. at 673. The intent to abrogate immunity must be "unmistakably clear." Seminole Tribe, 116 S. Ct. at 1123-24. Furthermore, a State must specifically agree to be subject to suit in *federal court*: a general waiver of immunity is not sufficient. Atascadero, 473 U.S. at 241.

Although a statute must express unequivocally that a State's participation is contingent on waiver of immunity, the necessary intent can be *implied* from the statutory language. In other words, a statute need not expressly incorporate the word "waiver" in order to effectively abrogate immunity. In Seminole Tribe, for example, the Supreme Court concluded that Congress had "clearly intended to abrogate the States' sovereign immunity" in the Indian Gambling Regulatory Act ("IGRA"), through the provisions of § 710(d)(7) of the Act. 116 S. Ct. at 1124. That section only provided for jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Id. It did not declare abrogation of immunity in express terms. However, the Court noted that any ambiguity over the State's amenability to suit was clarified by other provisions in Section 2710(d)(7)(A)(i), which described the State's

responsibilities as a defendant in an action pursuant to the statute. Id. For example, the statute described the circumstances under which the burden of proof would be on the State, and remedial measures that a court could take if the State failed to negotiate in good faith. Id.

In contrast, a statute that only gives general authority to pursue a claim in federal court cannot be construed to operate as a waiver. For example, in Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), the Court determined that 28 U.S.C. § 1362, which provides that "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States," did not express an intent to abrogate immunity. Id. at 786. Rather, this provision was not more specific than the general grant of federal question jurisdiction of Section 1331. Id. Without any additional language connecting the jurisdictional provision with the authority to sue the States, the Court concluded that waiver could not be implied.

Applying these principles to the case at hand, the Court is satisfied that Congress expressed a clear and unequivocal intent to abrogate immunity for those States that chose to arbitrate interconnection agreements between telecommunications carriers pursuant to the 1996 Act. Under a Section entitled "Review of commission actions," the Act provides:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a commission makes a determination under this section, any party aggrieved by such a determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). This Section clearly authorizes federal courts to review a State

agency's actions regarding an interconnection agreement, as well as the FCC's determination if the state agency fails to act. Thus, this enforcement provision also permits suits to be brought against the state commission and the FCC, who would be necessary parties in an action seeking to review the interconnection agreements approved by these agencies. Accord U.S. West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc. (AT&T I) Nos. 3:97-2164-17, 3:97-2388-17, slip op. at 4-5 (D.S.C. Dec. 11, 1997); U.S. West Communications, Inc., v. Hix, No. 97-D-152, slip op. at 2 (D. Co. Oct. 29, 1997); U.S. West Communications, Inc. v. Reinbold, No. A1-97-25, slip op. at 8 (D.N.D. July 28, 1997); U.S. West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 5 (S.D. Iowa Aug. 4, 1997). Unlike the enforcement provision in Blatchford, Section 252(e)(6) is more than a provision granting federal courts jurisdiction over causes of action arising from the 1996 Act. Rather, Section 252(e)(6) specifically permits federal courts to review the actions of state agencies taken under the authority of the 1996 Act.

The text of the 1996 Act permits no other reasonable construction. It is possible to construe Section 252(e)(6) as permitting only the parties to the interconnection agreement to bring an action against each other in federal court to determine whether the agreement complied with the Act -- without also joining the state commission. However, such a reading would not be reasonable. Rule 15(a) of the Federal Rules of Appellate Procedure requires that in a "[r]eview of an order of an administrative agency, board, commission or officer . . . the agency must be named respondent." Thus, in order for the parties to the interconnection agreement to receive appellate review, the state commission *must* be made a party. Cf. Ingalls

Shipbuilding v. Director, Office of Workers' Comp. Prog., – U.S. –, 117 S. Ct. 796, 806 (1997) (affirming that Rule 15(a) gives an agency the right to appear as a respondent before courts of appeals reviewing their orders). Moreover, it is well-established that Congress is presumed to know the state of the law "pertinent to the legislation it enacts." Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988); accord, United States v. Sanders, 99 F.3d 449, 456 n.3 (6th Cir. 1996). If Congress is credited with the knowledge that appellate federal judicial review of an agency's order requires the agency to be named as a party, the Court must assume that Congress intended to waive state immunity in enacting the 1996 Act. Otherwise, the enforcement section of the Act, § 252(e)(6) would be rendered ineffective. See TGI Seattle, 971 F. Supp. at 1370 (granting joinder of the state agency under Rule 19(a) in order to facilitate appellate review).

The TRA submits, however, that it could not have waived its sovereign immunity because it was not empowered to do so under the Tennessee state constitution, which provides that "[s]uits may be brought against the State in such manner and in such courts as the legislature may by law direct." Tenn. Const. art. I, § 17. The TRA asserts that under this constitutional provision, only the legislature may waive the state's immunity. The TRA cites as support the case of Ford Motor Co., where the Supreme Court upheld state immunity even though the state attorney general had defended the suit through the Circuit Court of Appeals, and the state only asserted immunity for the first time before the Supreme Court. 323 U.S. at 466-67. In doing so, the Court explained that under the state constitution, the state could waive immunity only by general law. Id. at 468. Thus the state attorney general did not have the authority to waive immunity in that particular instance. Id.

The TRA's reliance on Ford Motor, however, is misguided. Ford Motor related to a claim for immunity where the plaintiffs were invoking a state law procedure for obtaining refunds of illegally collected taxes. Id. at 460-61. However, it is *federal*, not state law which determines waiver under federal causes of action. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278-79 (1959). The rationale behind this rule is evident – under the Supremacy Clause, states cannot be allowed to circumvent federal law which calls for a waiver of immunity by invoking state law barriers. See AT&T I, Nos. 5:97-CV-405-BR, 5:97-CV-425-BR, slip op. at 6 (State law cannot be used to negate "any legislative scheme, carefully drafted by Congress to be voluntary and to elicit waiver of Eleventh Amendment immunity if the state elects to participate.").

2. *Ex parte Young*

The doctrine of Ex parte Young permits individuals to bring an action against officers of the State to perform a duty which they have neglected or refused to do. Ex parte Young, 209 U.S. 123, 158 (1907). In order to invoke the Ex parte Young exception to sovereign immunity, the action must be brought "against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" Seminole Tribe, 116 S. Ct. at 1132; see also 13 CHARLES A. WRIGHT, ET AL., Federal Practice and Procedure § 3524, at 158 (1984) ("[T]he Eleventh Amendment is no bar to suits seeking prospective relief against state officers who allegedly have violated either federal statutes or the Constitution of the United States, or have acted against the authority of state law."). Furthermore, as explained by Justice Kennedy's opinion (joined by Chief Justice Rehnquist) in

Idaho v. Coeur d'Alene Tribe of Idaho, -- U.S. --, 117 S. Ct. 2028 (1997), courts have also extended jurisdiction when "there is no state forum available to vindicate federal interests," and when "the case calls for the interpretation of federal law." Id. at 2035-36.

With respect to the 1996 Telecommunications Act, the Court is convinced that the principles of Ex parte Young permit an action against the TRA directors. First, the Complaints filed in these actions seek to end continuing violations of federal law. The Plaintiffs maintain that the Interconnection Agreements as approved by the TRA do not comply with the mandates of the Act. Since the Interconnection Agreements regulate the ongoing conduct of the affected parties, the Plaintiffs allege that enforcement of the Interconnection Agreements would be a continuing violation of federal law.

Second, the parties seek prospective relief to the extent that they seek to enjoin future enforcement of the Act and a declaration that the TRA's actions were invalid. Injunctions and declaratory judgments are both types of prospective relief. Kroll v. Board of Trustees, 934 F.2d 904, 908 (7th Cir. 1991). Monetary damages against the State are not at issue and have not been requested by the parties. See Thomson v. Harmony, 65 F.3d 1314, 1320 (6th Cir. 1995) (Actions may only proceed on the basis of Ex parte Young when the relief requested does not "impose a liability which must be paid from public funds in the state treasury.") (citation omitted).[2]

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[2]MCI's Complaint at ¶ 81(b) does request "[t]hat the Court reform the Agreement or direct reformation of the Agreement and the inclusion of provisions consistent with the Act, the FCC's regulations, and the decision of this Court." In addition, AT&T also requests "direct reformation of the Agreement" in its Prayer for Relief. (AT&T's Ans. to BellSouth's Compl. and Counterel. and Cross-Cl. for Decl. and Inj. Relief at 29.) Reformation of the Act would constitute retroactive relief, and would thus be inconsistent with Ex parte Young.

Finally, the present action also contains the two characteristics noted by Justice Kennedy in Coeur d'Alene to be relevant to the application of Ex parte Young. Federal court is the exclusive forum to litigate actions pursuant to the 1996 Act, 47 U.S.C. § 252(e)(4)-(6), and the issues at hand concern federal law. See Coeur d'Alene, 117 S. Ct. at 2035-36.

The TRA claims that nevertheless, under the Court's pronouncement in Seminole Tribe, the doctrine of Ex parte Young is inapplicable to an action brought under the 1996 Telecommunications Act. In Seminole Tribe, the Court made it clear that a suit may not be brought against state officers under Ex parte Young when Congress has, in enacting a particular statute, created its own remedial scheme for the enforcement of a federal right. 116 S.Ct. at 1132. As explained by the Court, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Id.

Seminole Tribe involved a statute, the IGRA, which required States to negotiate in good faith with Indian Tribes for the formation of a compact regulating gambling activities. Id. at 1120. If a State failed to perform its duties under the Act, the Act set forth detailed, albeit modest, procedures under which a tribe could seek to enforce its rights. Id. at 1132. First, the tribe and the State were required to negotiate a compact within sixty days. Id. If the parties failed to conclude a compact within this prescribed time, they were required to submit

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However, since the Court has also found that the TRA is also subject to suit under the doctrine of waiver, Ex parte Young does not prevent the Court from ordering retroactive relief in this action.

to mediation. Id. Finally, if the State failed to accept the compact adopted by the mediator, the mediator was required to notify the Secretary of the Interior, who was then obliged to prescribe regulations. Id. at 1132-33. The Court concluded that by enacting such a specific remedial scheme, Congress intended to limit significantly the remedies available to the tribes against the State. Id. at 1133. Thus, the Court concluded that permitting an action to go forth on the basis of Ex parte Young would subject a State to the full enforcement powers of a federal court, and contravene congressional intent. Id.

The 1996 Telecommunications Act, on the other hand, has no comparable specified remedial scheme. Although a State's failure to act on an interconnection agreement permits the FCC to step in and preempt the State's authority, this was not intended as a "sanction," but only as a provision permitting the State to "opt out." This kind of provision is distinct from the one at issue in the IGRA, which required the State itself to be a party to a compact with an Indian tribe, and to submit to arbitration if it failed to comply. The 1996 Act does not force the State to act affirmatively, nor does it punish the State for refusing to do so. Quite to the contrary, the Act gives States the *option* of arbitrating interconnection agreements, but also gives the parties to such an agreement an alternative forum for arbitration if the State chooses not to become involved.

Accordingly, the Court finds that the TRA directors are also subject to suit for their actions associated with the interconnection agreements at issue in this case, under the doctrine of Ex parte Young. It appears that all courts which have decided this limited issue are in agreement. See, e.g., AT&T I, Nos. 3:97-216 -17, 3:97-2338-17, slip op. at 6; Hix, No. 97-D-152, slip op. at 2; Reinbold, No. A1-97-25, slip op. at 7; Thoms, No. 4-97-CV-70082, slip

op. at 4; AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 4-97cv262-RH, slip op. at 5 (N.D. Fla. Nov. 21, 1997). Moreover, both the TRA and the TRA directors are also subject to suit due to their waiver of Eleventh Amendment immunity.

B. Motion to Intervene by the United States and the FCC

The United States and the FCC have petitioned the Court for leave to intervene. The right of the United States to intervene is undisputed by the parties, and clearly permitted under 28 U.S.C. § 2403(a): "In any action, suit or proceeding in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall . . . permit the United States to intervene . . .." Thus, the United States may intervene as of right pursuant to Fed. R. Civ. P. 24(a), which permits intervention when "a statute of the United States confers an unconditional right to intervene."

However, the Court denies the FCC's motion to intervene. The FCC is clearly not entitled to intervene as of right. Intervention as of right requires entitlement to intervene pursuant to a statute, or "an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). The FCC has not presented the Court with any statutory entitlement to intervene, nor has sufficiently proved to the Court that its interests will not be adequately represented by the United States. Thus, it may not intervene in this action as of right.

Furthermore, the FCC cannot intervene in this action under the provisions of permissive intervention. Rule 24(b) states that:

> Upon timely application anyone may be permitted to intervene . . . (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Again, the FCC has not presented the Court with a statute conferring it a conditional right to intervene. Nor can the FCC assert that it has a claim or defense in common with the main action, since the FCC was not actually a party to the interconnection agreements at issue. Furthemore, the FCC's general administrative powers with respect to the 1996 Act appear to be fairly limited. The FCC's authority in relation to the state agencies and the telecommunications carriers are generally prescribed by two statuory sections, 47 U.S.C. §§ 208 and 252(e)(5). Section 208(a) gives the FCC general powers to hear complaints against common carriers. It does not give the FCC specific authority over interconnection agreements. In addition, Section 252(e)(5) only grants the FCC power over interconnection agreements when the state agencies fail to act. Thus, it appears that the FCC's interest over the issues involved in this action is relatively removed. It did not participate in the formation or approval of the agreements at issue, and its authority over these agreements appears to be subrogated to that of the state agencies. Accordingly, the Court will deny the FCC's motion to intervene. Accord TCG Seattle, 971 F. Supp. at 1368.

III. CONCLUSION

In conclusion, the Court finds that although the TRA and its directors are protected from suit under the doctrine of sovereign immunity, these parties voluntarily waived their immunity and are thus proper parties in this action. Moreover, the TRA's directors are also subject to suit under the doctrine of Ex parte Young. The Motion to Dismiss is thus denied. Furthermore, the Court grants the United States' motion to intervene, as it has shown that it has a right to do so and none of the parties object. The FCC, however, has not shown that it is entitled to intervene either as of right, or permissively. Accordingly, the FCC's motion to intervene is denied.

An Order consistent with this Memorandum is filed contemporaneously.

Entered this the 27th day of January, 1998.

JOHN T. NIXON, CHIEF JUDGE
UNITED S DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.

Plaintiff

v.

TENNESSEE REGULATORY AUTHORITY, et al.

Defendants

and

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,

Counterclaim and Cross-Claim Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

Counterclaim Defendant, and

TENNESSEE REGULATORY AUTHORITY, et al.

Cross-Claim Defendants.

No. 3:97-0523
Chief Judge Nixon

ORDER

Pending before the Court is the Defendants Tennessee Regulatory Authority, H. Lynn Greer, Melvin J. Malone, and Sara Kyle's Motion to Dismiss (No. 3:97-0616 Doc. No. 10; No. 3:97-0523 Doc. No. 11), to which the Plaintiff BellSouth Telecommunications, Inc. (Doc. No. 16); the Cross-Claim Plaintiff AT&T Communications of the South Central States, Inc. (Doc. No. 17); and the Plaintiff in member case No. 3:97-0616, MCI

This document was entered on the docket in compliance with Rule 58 and/or 79(a) FRCP on 1-29-98 GS

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Telecommunications Corp. (Doc. No. 15) have filed a Response. The Defendants' have in turn filed a Reply (No. 3:97-0616 Doc. No. 20; No. 3:97-0523 Doc. No. 21). In addition, the Court has before it a Motion to Intervene by the United States and the Federal Communications Commission (No. 3:97-0616 Doc. No. 23; No. 3:97-0523 Doc. No. 24), to which the Defendant BellSouth in member case No. 3:97-016 has filed a Response (Doc. No. 27). The proposed intervenors have also filed a Response to the Motion to Dismiss (No. 3:97-0616 Doc. No. 27).

For the reasons expressed in the contemporaneously-filed Memorandum, the Court grants the Motion to Dismiss, and also grants the United States' Motion to Intervene, but denies the Federal Communication Commission's Motion to Intervene.

Entered this the 27th day of January, 1998.

JOHN T. NIXON, CHIEF JUDGE
UNITED S DISTRICT COURT

FILED
JAN 30 [illegible]
[illegible], Clerk
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

U.S. WEST,

Plaintiff,

vs.

BOB ANDERSON, DAVE FISHER, NANCY McCAFFREE, DANNY OBERG, BOB ROWE, Commissioners of the Montana Public Service Commission, and WESTERN WIRELESS CORPORATION, a Washington Corp.,

Defendants.

CV 97-9-H-CCL

ORDER

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Before the court is a motion to dismiss by Defendants Anderson, Fisher, McCaffree, Oberg, and Rowe for lack of jurisdiction. Plaintiff U.S. West opposes the motion, and Defendant Western Wireless has not filed a response to the motion.

Background

Plaintiff U.S. West brings this action against Defendants in their official capacity as members of the Montana Public Service Commission and challenges their decision regarding an

EXHIBIT
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interconnection agreement ordered by Defendants. Plaintiff seeks declaratory and injunctive relief pursuant to the Telecommunications Act of 1996. 47 U.S.C. § 153 et seq. The Act was designed to promote competition within the local telephone market and requires local area exchange carriers (LEC), such as US West, to allow other carriers to interconnect with existing networks to compete for local service. See 42 U.S.C. § 251. The Act also permits renegotiation of existing agreements between LECs and Commercial Mobile Radio Services providers, such as Western Wireless, when compensation for terminating calls is paid by only one party to the agreement. The agreement between US West and Western provides that Western pays US West for calls from cellular customers to US West's customers, but US West does not compensate Western for terminating calls on Western's network. Section 251(b)(5) of the Act requires US West to establish a reciprocal compensation agreement with Western. Under the Act, if the parties are unable to reach such an agreement, either party may seek arbitration from the state commission in charge of the regulation of the intrastate operations of local exchange telephone companies. 47 U.S.C. § 252(b). If the state commission opts not to participate in the program, the Federal Communication Commission resolves any

disputes. 47 U.S.C. § 252(e)(5).[1]

On September 6, 1996, Western filed a petition with the Montana Public Service Commission to arbitrate unresolved issues in its reciprocal compensation contract with US West. 47 U.S.C. § 252(b)(1). The PSC accepted the request for arbitration, and on December 27, 1996, it issued an Arbitration Order finding that Western is entitled to compensation at the existing contract rate from March 29, 1996 to February 7, 1997. In reaching its conclusions, the PSC had to interpret portions of the Act and the FCC rules implementing the law. Subsequently, US West filed this action alleging that the PSC's decision is unconstitutional and violates federal law.

Discussion

This is an action under the Telecommunications Act, which states in pertinent part:

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[1] The sections states:
Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal District Court to determine whether the agreement or statement meets the requirements of § 252 in this section.

47 U.S.C. § 252(e)(6). Further, "no State court shall have jurisdiction to review the determination of a State commission approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4).

Defendants have moved to dismiss the complaint, arguing that they are shielded from suit by the doctrine of sovereign immunity under the Eleventh Amendment, which bars suits "against one of the United States by Citizens of another State, or by citizens or subjects of any Foreign State." U.S. Const. amend. XI. Generally, the Eleventh Amendment protects states, their agencies and their officers from suit absent a waiver of their sovereign immunity. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). The U.S. Supreme Court, however, has carved an exception to the rule when suits seeking declaratory and injunctive relief against state officers in their individual capacities are filed to protect federal or Constitutional rights. Ex parte Young, 209 U.S. 123 (1908). Ex parte Young applies to violations of federal statutory law as well as federal

constitutional violations. Natural Resources Defense Counsel v. California Dep't of Transportation, 96 F.3d 420, 421 (9th Cir. 1996). Additionally, suits seeking prospective, injunctive relief are not treated as suits against the state. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Here, US West seeks a declaration from the court that the agreement approved by the Defendants violates federal law and the Constitution and also seeks an injunction against its enforcement. US West does not seek monetary damages, which acts as a bar to such Ex parte Young actions. Edelman v. Johnson, 415 U.S. 651 (1974).

It is plain from the complaint that this case falls squarely within the Ex parte Young doctrine as Plaintiff seeks prospective, injunctive relief from the Defendants' decision, which Plaintiffs allege violates federal law and the Constitution. The fact that Plaintiff requests that the court determine whether the interconnection agreement comports with federal law does not, as Defendants argue, make the request one for retrospective relief. See § 252(e)(6)(authorizing the federal courts to determine whether the interconnection agreement meets the requirements of federal law). Further, the fact that the court is asked to interpret federal law supports application

of the Ex parte Young. See Idaho v. Coeur d' Alene Tribe of Idaho, -- U.S. --, 117 S.Ct. 2028 (1997). While not binding authority, the court finds persuasive the reasoning of other U.S. District Courts which have rejected the Eleventh Amendment immunity defense in similar Telecommunications Act litigation involving the same issues. See US West Communications, Inc. v. Allan I. Thoms, et al., No 4-97-70082 (S.D. Iowa, Aug. 4, 1997)(denying individual commission members' motion to dismiss after finding Ex parte Young allowed suit under the Act); and US West Communications, Inc. v. Leo M. Reinbold, et al., No A1-97-25 (D.N.D. July 28, 1997)(same).

Even if the court were to find that Ex parte Young did not apply, the court finds that Defendants waived their claim to sovereign immunity when the board members decided to arbitrate the disputed issues in the interconnection agreement instead of having the dispute to the FCC for resolution. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). There, the court explained that "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one" and can be accomplished two ways. A state may waive its immunity in a state statute or constitutional provision, or a state may constructively waive its immunity by

voluntarily participating in federal statutory schemes that condition state participation on a willingness to be sued in federal court. Id. at 247.

The Act clearly states that a commission's decision is reviewable exclusively in the U.S. District Courts. 47 U.S.C. § 252(e)(4),(6). It also allows state commissions to opt out of the federal regulatory process if they choose not to participate in the interconnection agreement disputes. 47 U.S.C. § 252(e)(5). While it is true that Congress did not, and indeed cannot, compel the state to participate in the federal statutory scheme, in passing the Act, Congress gave the state officers a choice -- whether to participate in the scheme by arbitrating disputes and consenting to the federal review in a § 252(e)(6) action or to refer any disputes to the FCC for decision, thereby protecting their Eleventh Amendment immunity. As the commissioners opted to involve themselves in the arbitration of the interconnection agreement in light of the Act's clear statement of exclusive federal review, they waived their sovereign immunity claim. See US West Communications, Inc. v. TCG Seattle, et al., 971 F.Supp 1365 (W.D. Wash. 1997)(finding that state commission members waived their immunity by arbitrating interconnection agreement under the Act); US West Communications,

Inc. v. Allan T Thoms, et al., supra. (same); US West Communications, Inc. v. Leo M. Reinbold, et al., supra. (same).

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion to dismiss is DENIED.

The clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 30th day of January, 1998.

CHARLES C. LOVELL
United States District Judge

FILED

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

U S WEST COMMUNICATIONS, INC. Plaintiff, v. TCG OREGON, a limited PARTNERSHIP; ROGER HAMILTON, SON ELCHUS, Commissioner, and JOAN H. SMITH, Commissioner, in their official capacities as Commissioners of the Oregon Public Utility Commissioner; and OREGON PUBLIC UTILITY COMMISSION, Defendants.	Civil No. 97-858-JE OPINION AND ORDER

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JELDERKS, Magistrate Judge:

Plaintiff U S West Communications, Inc. (US WEST) brings this action against defendants TCG Oregon (TCG), the Oregon Public Utility Commission (PUC), and PUC Commissioners Roger Hamilton, Ron Eachus, and Joan Smith (the Commissioners). The Commission defendants move to dismiss based upon lack of subject matter jurisdiction, and TCG moves to dismiss for lack of jurisdiction and failure to state claims upon which relief may be granted. The United States of America and the Federal Communications Commission (FCC) move to intervene. I grant the FCC's motion to intervene, deny the Commissioners' motion to dismiss, and grant in part and deny in part TCG's motion to dismiss.

BACKGROUND

1) Telecommunications Act of 1996

U S West has provided local telephone and exchange access service to Oregon customers for more than one hundred years.

Through most of this time, U S West has had no competition in its service territories.

In February 1996, Congress enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56; 47 U.S.C. § 151 et seq. The Act, which amends the Telecommunications Act of 1934, is designed to promote competition in local and long distance telephone markets. The Act sets out a comprehensive scheme for removing barriers to entry into these markets, and reflects a Congressional intent to promote the rapid development of competition by encouraging new entrants to build their own local telephone networks. See 47 U.S.C. §§ 251-253.

The Act provides for the entry of competitors through two distinct mechanisms. Under the first of these, competitors can purchase individual, "unbundled" network elements that can be combined with their own network facilities to provide services. "Loops" are an example of such unbundled elements. These are the wires and other equipment needed to connect individual telephone customers to a provider's central offices, its trunk lines, communications databases, and support systems. The second mechanism allows new competitors to purchase, at wholesale prices, an incumbent local exchange carrier's (LEC's) assembled finished services, such as residential or business telephone service, for resale. These two mechanisms allow new competitors to begin competing with existing LECs before their new completed, competing networks are in place.

The Act sets out obligations for various kinds of telecommunications service providers. Under Section 25 of the Act, incumbent LECs such as U S West are required to:

(1) negotiate in good faith to reach Agreements with new competitors under the Act;

(2) offer interconnection to competing providers at "any technically feasible point" within their network. This interconnection must be at least equal in quality to that provided by the LEC to itself, and must be provided on rates and terms that are "just, reasonable, and nondiscriminatory;"

(3) provide access to unbundled network elements at "any technically feasible point" on rates and terms that are "just, reasonable, and nondiscriminatory." "Network elements" are facilities or equipment used to provide telecommunications services. "Unbundling" refers to selling individual network elements, as opposed to aggregations of network elements;

(4) offer at wholesale rates any telecommunications service that the LEC provides at retail prices to customers who are not telecommunications carriers;

(5) provide notice of changes in the information necessary for the transmission and routing of services on the LEC's network; and

(6) provide for "collocation" of the equipment necessary for interconnection or access to unbundled elements on rates and terms that are "just reasonable, and nondiscriminatory." "Physical collocation" requires an incumbent LEC to provide the office space that its competitors need to install and operate their own equipment. "Virtual collocation" requires an incumbent LEC to dedicate to its competitors the equipment they request and to permit the competitors to interconnect with the equipment in the LEC's offices.

Under the Act, incumbent LECs are entitled to recover the costs of providing interconnection, unbundled network elements, transportation and termination of traffic, resale and collocation, and may also recover a reasonable profit. 47 U.S.C. § 252(d)(1).

Section 252 of the Act sets out a comprehensive framework for reaching Agreements between LECs and competitors. If these parties are unable to reach an Agreement resolving all of the issues covered by the Act, a party can seek mediation under § 252(a)(2). If that mediation does not produce an Agreement, a party may seek compulsory arbitration under § 252(b). State Commissions like defendant PUC are responsible for conducting arbitration, subject to certain limitations. A Commission may reject an Agreement, or a portion of an Agreement, that has been reached through arbitration if it finds that the agreement does not comply with the requirements of § 251 and any FCC regulations in effect under that section, or with the standards set out in § 252(d).

The Act provides for federal district court review of interconnection agreements concluded pursuant to § 252. Section 252(e)(6) provides that, if a state commission "makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate federal district court to determine whether the Agreement...meets the requirements of the Act."

The Act also allows states to decline to carry out the regulatory roles set out above. Section 252(e)(5) provides that

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission [FCC] shall issue an order preempting the State Commission's jurisdiction of that proceeding or matter within 90 days

> after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this Section with respect to the proceeding or matter and act for the commission

47 U.S.C. § 252(e)(5). If a state does not act, FCC proceedings and any judicial review of the FCC's action provide the exclusive remedies. 47 U.S.C. § 252(e)(6). The Act precludes state court review of interconnection agreements arbitrated under the Act. 47 U.S.C. § 252(e)(4). Section 252(e)(3) provides that

> "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an [interconnection] Agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

2) Arbitration Giving Rise to this Action

TCG requested interconnection and related network elements from U S West in February 1996. U S West and TCG were unable to resolve all of the issues related to that request, and TCG filed a petition with the PUC for arbitration pursuant to § 252(b). Arbitration was conducted in October 1996.

In a decision issued on November 8, 1996, the arbitrator resolved certain issues, and required the parties to submit a contract in accordance with the decision. U S West filed its Exceptions to the arbitrator's decision, objecting to the provisions complained of in the present action, on November 18, 1996. TCG also filed its comments on the Arbitrator's decision and requested the Commissioners' approval of the arbitration order. The Commissioners and the

PUC approved and adopted the arbitration order on December 9, 1996.

U S West petitioned for reconsideration of the Commission decision approving the arbitration decision on February 7, 1997. The Commissioners and the PUC denied that petition in an Order dated April 7, 1997.

The parties filed a copy of the interconnection agreement executed pursuant to the arbitration on May 1, 1997. The Commissioners and the PUC issued an Order on May 19, 1997, approving the executed interconnection agreement.

3) Claims and Relief Sought.

U S West alleges that it will suffer irreparable harm, and lose millions of dollars, if it is required to provide services at the prices set out in the Agreement ordered by the PUC. U S West's first claim for relief alleges that the Agreement imposes below-cost pricing in violation of 47 U.S.C. §§ 251(c) and 252(d). In this claim, U S West challenges the price assigned for unbundled network elements, the price allotted for physical collocation, and the wholesale discount rates and application of that discount to already discounted volume, wholesale rates. It also challenges provisions of the Agreement requiring it to offer residential service for resale at a wholesale discount, provisions requiring application of a wholesale discount to the nonrecurring charge assessed to retail customers when TCG purchases services for resale to retail customers, and provisions requiring it to provide

transport and termination services on a "bill-and-keep" basis. Finally, this count alleges that the Agreement unlawfully requires U S West to provide network interconnection without "just and reasonable compensation," and fails to adequately compensate U S West for sharing space in its conduits.

U S West's second claim alleges that the "sham unbundling" provision in the Agreement violates 47 U.S.C. §§ 251(c), 252(d), and 271(e)(1) by requiring it to provide "reaggregated unbundled elements far below cost...." U S West alleges that the Agreement allows TCG to engage in "rate arbitrage" by allowing it to purchase separate network elements needed to form a network below the wholesale rate for the identical services sold in a "finished state."

U S West's third claim alleges that the Agreement violates 47 U.S.C. § 251(c)(2)(C) by requiring it to meet specific performance standards that exceed the quality of service that U S West provides to itself.

U S West's fourth claim alleges that the Agreement violates 47 U.S.C. §§ 251(b)(4) and 252(c) by requiring it to make available deregulated or unregulated services, by imposing resale of deregulated services and application of wholesale discounts to nonrecurring charges, and by imposing liquidated damages provisions in connection with the Agreement. U S West alleges that, in imposing these requirements, the Commission defendants exceeded their authority under the Act.

U S West's fifth claim alleges that the Agreement violates 47 U.S.C. §§ 251(b)(2) and 251(c)(2) by requiring it to absorb costs it cannot recover from TCG or other telecommunications providers for providing number portability.

U S West's sixth claim alleges that the Agreement violates 47 U.S.C. §§ 251(c)(6) by requiring it to offer collocation at points that are not reasonably necessary for interconnection or for access to unbundled elements.

U S West's seventh claim alleges that the Agreement violates the Fourteenth Amendment to the United States Constitution by depriving it of property without due process of law.

U S West's eighth claim alleges that the Agreement violates the Fifth and Fourteenth Amendments to the United States Constitution by taking private property for a public use without just compensation.

U S West asks this court to enter an order declaring that the various provisions of the Agreement challenged in its claims violate the Act. In the alternative, if the court finds that the Agreement does not violate the Act, U S West seeks a declaration that the arbitration proceedings and related orders denied it of due process in violation of the 14th Amendment, and constituted a taking of property without just compensation in violation of the 5th and 14th Amendments.

U S West also seeks a judgment declaring that it is not required to interconnect with TCG "unless and until it is fully compensated for the costs of interconnecting...." It

seeks further injunctive relief prohibiting defendants from taking any action to put the Agreement into effect or to enforce the Agreement, and seeks an order remanding this action to the Commissioners and the PUC for further proceedings consistent with the declarations that it seeks.

4) Motions Before the Court

The United States and the FCC move to intervene, and have filed a memorandum in opposition to the PUC's and the Commissioners' motion to dismiss. The PUC and the Commissioners move to dismiss on the grounds that this court lacks subject matter jurisdiction because this action cannot be brought against them in federal court. TCG moves to dismiss all but the third claim for lack of subject matter jurisdiction and failure to state claims upon which relief may be granted.

STANDARDS

1) Failure to State a Claim

In evaluating a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept the allegations of material fact as true, and must construe those allegations in the light most favorable to the non-moving party. Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). A claim should be dismissed only if it appears beyond doubt that the plaintiff can establish no set of facts under which relief could be granted. Zachman v.

Hughes Aircraft Co., 105 F.3d 1288, 1292 (1997) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

2) Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of actions over which the district court lacks subject matter jurisdiction. The party attempting to invoke the court's jurisdiction has the burden of establishing that the court has subject matter jurisdiction.

DISCUSSION

1) Motion to Intervene by FCC and United States

The United States and the FCC contend that they are entitled to intervene under Fed. R. Civ. P. 24(a), 28 U.S.C. § 2403, and 28 U.S.C. § 517. Alternatively, they assert that leave to intervene should be granted under Rule 24(b). Rule 24(a) provides that intervention shall be permitted when a United States statute confers a right of intervention, or when the party seeking to intervene claims an interest "relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." In actions in which "the constitutionality of any Act of congress affecting the public interest is drawn in question," 28 U.S.C. § 2403(a) requires federal courts to

allow the United States to intervene "for argument on the question of constitutionality." Under 28 U.S.C. § 517,

> [t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States...or to attend to any other interest of the United States.

Rule 24(b)(2) provides that intervention may be permitted "when an applicant's claim or defense and the main action have a question of law or fact in common."

In the present action, the Commission defendants have challenged the constitutionality of the judicial review provided for under the Act. The United States and the FCC have an obvious interest in the interpretation and enforcement of the Act, and have timely sought to intervene in this action. The interests of these intervenors are not necessarily the same as those of any other parties, and it appears that none of the original parties will necessarily represent their interests adequately. I therefore grant the motion to intervene.

2) PUC's and Commissioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction

The PUC and the Commissioners contend that this court lacks subject matter jurisdiction for several reasons. I will address these issues in the order presented in these parties' opening memorandum.

a) Contention that the action is barred by the Eleventh Amendment

i) Action against PUC

The Commission defendants contend that the Eleventh Amendment to the United States Constitution bars the prosecution of this action against them in federal court. That amendment provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

State immunity under the Eleventh Amendment extends to state agencies such as the PUC, and to state officials such as the defendant commissioners who act on the state's behalf and who can assert a state's sovereign immunity. See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 142-46 (1993).

Though the Eleventh Amendment generally bars federal jurisdiction over actions brought against states, a state may waive that immunity by a statutory or constitutional provision. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.1 (1985). Participation in a federal program may also constitute a waiver of Eleventh Amendment immunity. Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997).

As noted above, the Act allows state commissions such as the PUC to participate in the arbitration of interconnection agreements, or to decline participation. If a state commission does not conduct arbitrations and assume other responsibilities under Section 252 of the Act, the FCC

preempts the state commission's jurisdiction. If a state commission chooses to exercise its regulatory authority, the Act clearly provides for judicial review of the relevant interconnection agreements resulting from the process.

Though Congress cannot compel states to participate in federal programs or require states to govern according to Congressional instructions, it can encourage states to regulate in a particular manner by offering states the choice of regulating according to federal standards or having state law preempted by federal regulation. New York v. United States, 505 U.S. 144, 162, 167 (1992). The United States Supreme Court has concluded that a state's waiver of Eleventh Amendment immunity may be evidenced "'by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

U S West, the United States, and the FCC contend that, by voluntarily participating in the regulatory process, Oregon has waived its immunity from the jurisdiction of this district court. Like several other federal district courts that have recently addressed this issue, I agree. See U S West Communications, Inc. v. Thoms, No. 4:97-CV-70082 (S. D. Iowa, Aug. 4, 1997); U S West Communications, Inc. v. Reinhold, No. A1-97-25 (D. N.D. July 28, 1997); U S West Communications, Inc. v. TCG Seattle, 1997 WL 426278 (W.D. Wash. July 24, 1997); GTE South, Inc. v. Morrison, No. 3:97CV493, slip op.

(E.D. Va. Nov. 7, 1997). The clear implication to be drawn from the statutory scheme at issue here is that Congress conditioned state participation in the negotiation, arbitration, and approval process on consent to federal judicial review of the resulting agreements. States are not required to participate, but if they choose to, the Act makes clear that their regulatory decisions will ultimately be subject to review by federal courts. In the absence of any other reasonable construction of the statute, I can only conclude that, acting through the Commission defendants, Oregon waived the immunity from federal jurisdiction otherwise provided by the Eleventh Amendment.

ii) Action against individual commissioners

Even if I concluded that Oregon had not otherwise waived its Eleventh Amendment immunity, based on my understanding of Ex Parte Young, 209 U.S. 123 (1908), I would deny the motion to dismiss as to the individual defendant commissioners. In Young, the United States Supreme Court held that, though the Eleventh Amendment barred actions in federal courts against the states themselves, it did not bar such actions seeking injunctive relief against state officers who are alleged to have acted in violation of rights secured under the United States Constitution. This principle applies to federal statutes as well as to the federal Constitution, see, e.g., Natural Resources Defense Council v. California Dep't of Transp., 96 F.3d 420, 422 (9th Cir. 1996), and is based on

the premise that federal court authority to enjoin "continuing violation of federal law [is] necessary to vindicate the federal interest in assuring the supremacy of that law." Green v. Mansour, 474 U.S. 64, 68 (1985). Under this principle, federal courts "may enjoin state officials to conform their future conduct to the requirements of federal law...." Quern v. Jordan, 440 U.S. 332, 337 (1979).

The Commission defendants contend that the Young doctrine does not apply to the present action because the PUC has been named as a defendant, because the individual commissioners are not authorized to act individually, because the relief sought is not strictly limited to "prospective injunctive relief," and because the action does not raise issues that are "reasonably free from doubt." I have reviewed these arguments and the responses of U S West and the intervenors carefully. I will not set out my analysis of those arguments here, but simply note that I find them unpersuasive. First, U S West brings this action against the PUC on the grounds that the State has waived its Eleventh Amendment immunity, not on the basis of the Young doctrine which applies to the individual commissioners. Second, that the individual commissioners cannot act individually does not make an action against them an action against the state that is beyond the scope of the Young doctrine; numerous courts have permitted actions against individual officials to go forward under that doctrine even though an action could not be brought directly against the state agency by whom the officials were employed. See, e.g.,

Alabama v. Pugh, 438 U.S. 781 (1978); Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, 1120 (9th Cir.), cert. denied, 455 U.S. 943 (1982); W. Birkenfeld Trust v. Bailey, 827 F. Supp. 651, 657 (E.D. Wash. 1993). Third, that U S West seeks review of the PUC's "past actions" does not render this an action seeking more than prospective relief. In actions to which the Young doctrine applies, plaintiffs typically seek injunctive relief against application of decisions that state officials have already made. Finally, though the Young Court did state that the doctrine set out in that action should apply where the issue is "reasonably free from doubt," neither that decision or the many subsequent decisions applying the doctrine held that federal jurisdiction is appropriate only when it is reasonably certain that the plaintiff will prevail.

I conclude that the Young doctrine does not bar the prosecution of the present action against the individual commissioners. U S West alleges that the commissioners have violated federal law in the manner in which they have set the rates and terms of the telephone service interconnection, seek only prospective relief, and do not seek monetary relief from the State of Oregon through the PUC or the individual commissioners. The action appears to be clearly within the scope of the Young doctrine.

b) Contention that the action is barred by the Johnson Act, 28 U.S.C. § 1342

The Commission defendants contend that the Johnson Act, 28 U.S.C. § 1342, renders U S West's "42 U.S.C. § 1983 and

constitutional claims" outside the scope of this court's jurisdiction. That Act provides that

> The district court shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and
>
> (3) The order has been made after reasonable notice and hearing; and
>
> (4) A plain, speedy, and efficient remedy may be had in the courts of such State.

The Johnson Act precludes federal jurisdiction only when all of the conditions set out in 28 U.S.C. § 1342 are satisfied. Hawaiian Tel. Co. v. Public Util. Comm'n, 827 F.2d 1264, 1273 (9th Cir. 1987), cert. denied, 487 U.S. 1210 (1988).

Here, U S West's action is neither based exclusively on diversity jurisdiction or alleged "repugnance" to the Federal Constitution, nor are all of the other conditions required for application of the Johnson Act met. For example, U S West is not seeking to enjoin or restrain the operation of any PUC rate order, but instead challenges the terms and conditions of a private interconnection agreement approved pursuant to a federal Act. Even if the conditions were otherwise satisfied, I would conclude that the Johnson Act is inapplicable here because the Telecommunications Act, which provides a specific statutory statement of jurisdiction, is not displaced by the

more general terms of the earlier Johnson Act. See Brown v. General Serv. Admin., 425 U.S. 820, 834 (1976).

c) Contention that the Act violates Tenth Amendment and Guarantee Clause

The Commission defendants contend that this action is barred by the 10th Amendment and the Guarantee Clause, Article IV, § 4 of the United States Constitution. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government..."

The Commission defendants argue that these provisions are violated by Section 252(e)(6) of the Act, which provides for federal court review of state commission determinations concerning interconnection agreements, and Section 252(e)(4) of the Act, which prohibits state court review of these determinations. They assert that, in enacting the Telecommunications Act of 1996, Congress did not have the authority to "compel" states to choose between exercising their rights under the Tenth Amendment to regulate intrastate telecommunications matters (and risking loss of their Eleventh Amendment Immunity) or retaining their Eleventh Amendment immunity and abandoning their "sovereign rights to regulate intrastate telecommunications matters to the FCC by operation of 47 U.S.C. § 252(e)(5)." The Commission defendants contend

that the Act unlawfully compels states to administer a federal regulatory program, and argue that the Act's prohibition on state court review of PUC determinations concerning interconnections is inconsistent with the division between state and federal authority set out in the Constitution. They also assert that, because Congress has no authority to abrogate state sovereign authority under the Commerce Clause of Article I, it lacked the lawful authority to "make the waiver of state sovereign immunity a condition to the state's action...."

Based upon my review of the relevant cases cited by the parties, I conclude that the statutory scheme at issue here does not violate the Tenth Amendment, the Guarantee Clause, or the dual sovereignty of federal and state government established by the Constitution. Before turning to the Tenth Amendment issue, I note that the Commission defendants do not identify how the Act purports to deny states the republican form of government specified under the Guarantee Clause. Claims brought under that clause are generally considered to be nonjusticiable. State of California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997). Even assuming that the issue is justiciable here, the United States Supreme Court has noted that, if the legislation in question offers states a legitimate choice rather than subjects states to an "unavoidable command," states are able to set their own legislative agendas and state officials remain accountable to a local electorate. New York, 505 U.S. at 185-186.

Under the Commerce Clause, Congress has the authority to regulate activity that, though "purely intrastate in character...combined with like conduct by others similarly situated, affects commerce among the States...." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (quoting Fry v. United States, 421 U.S. 542, 547 (1975). The Tenth Amendment prohibits Congress from requiring states to administer federal programs against their will. Printz v. United States, 117 S. Ct. 2365, 2383 (1997); New York, 505 U.S. at 178. However, when Congress has the authority to regulate private activity pursuant to the Commerce Clause, the Tenth Amendment does not prohibit it from offering states the choice of either regulating that activity according to the standards it establishes, "or having state law pre-empted by federal legislation." New York, 505 U.S. at 167. Though Congress may not compel a state to enact any particular legislation, it may induce a state to participate in a regulatory scheme by conditioning the state's receipt of federal funds on taking prescribed action. Id.

In New York, the Court considered a challenge to three provisions of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985, which offered states incentives to address waste disposal issues. The Court found that two of the provisions, which left the states free to choose whether or not to participate, were constitutional. New York, 505 U.S. at 171-174. It held that a third provision requiring states to either regulate in conformance with federal

regulation or to assume title to and liability for radioactive waste generated within their borders constituted an unlawful coercion. Id. at 175.

In Printz, the Court struck a section of the Brady Handgun Violence Prevention Act requiring local officials to conduct background checks before allowing the purchase of handguns. Printz, 117 S. Ct. at 2383.

In Hodel, the Court considered a challenge to legislation that offered states the opportunity to develop a regulatory program consistent with federal standards, and provided for federal regulation if a state chose not to participate. Hodel, 452 U.S. at 288-89. Though it noted that the legislation limited the states' legislative choices concerning important issues, the Court concluded that the statute was not constitutionally infirm. Id. at 290.

In FERC v. Mississippi, 456 U.S. 742 (1982), the Court rejected a challenge to federal legislation requiring state PUCs to consider certain federal standards concerning energy rates and regulation, but not requiring the states to adopt or enforce federal standards. The Court found that this legislation did not violate the Tenth Amendment. Id. at 764.

In the present action, the Commission defendants challenge federal legislation that allows states to choose whether or not to participate in the federal regulatory scheme. Under the guidance of the above decisions, I conclude that this legislation does not violate the Tenth Amendment. It appears that Congress can confer the authority to review

these complex agreements upon federal courts without offending the Constitutional or statutory provisions upon which the Commission defendants rely. I therefore deny the motion to dismiss for lack of subject matter jurisdiction.

d) Contention that U S West seeks relief that is beyond the scope of judicial review authorized under the Act

The Act provides that an aggrieved party may bring an action in federal court "to determine whether the Agreement...meets the requirements" of Sections 251 and 252. 47 U.S.C. § 252(e)(6). The Commission defendants contend that the court lacks jurisdiction to provide these remedies because U S West "seeks, among other things, declaratory and injunctive relief under statutes besides 47 U.S.C. § 252(e)(6)."

At this stage in the proceedings, it is not necessary to determine what particular remedies might be available if U S West ultimately establishes that the Agreement in question does not comply with the requirements of the Act. Regardless of what other remedies U S West is seeking, it clearly seeks review of the Agreement as provided under the Act. This court has subject matter jurisdiction.

3) TCG's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim

a) Motion to Dismiss Claim I

As noted above, U S West's first claim alleges that the interim rates set out in the Agreement violate the Act because

they will not fully compensate it for the related costs. TCG contends that the court lacks subject matter jurisdiction over the first claim because it is not ripe for review. TCG argues that the rates at issue are not reviewable because they are only "interim rates," and the PUC has made no reviewable "final determination" as to what compensation U S West will ultimately receive.

In determining whether a particular agency decision is "ripe" for review, courts generally consider whether the challenged action constitutes a "final agency action," whether the issues presented are of a legal or factual nature, whether the challenged action has or will directly and immediately affect the party seeking review, and whether resolution of the issue will foster effective administration. Abbot Labs v. Gardner, 387 U.S. 136, 149-154 (1967). In the present action, U S West has alleged facts that satisfy this test. U S West has alleged that it has executed a final binding agreement setting out the terms of interconnection with TCG based upon the PUC orders at issue, and that these orders require it to provide certain services and facilities at prices that will not allow it to recover its costs. In opposing TCG's motion to dismiss, U S West contends that the Commission defendants have heard the issues and arguments the parties have raised regarding the arbitrator's decision, have resolved those issues in a manner that is to U S West's detriment, and that these defendants "will not revisit these issues...." I am satisfied that, though identified as "interim," the rates at

issue here are sufficiently "final" to warrant judicial review. I therefore deny the motion to dismiss the first claim.

In its challange to the first claim, TCG also contends that U S West can attack the rates only if the overall impact of the rates is confiscatory, and that U S West cannot challenge individual elements of the overall rate structure. In support of that contention, TCG cites Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). Though a superficial reading of that decision offers some support for TCG's contention that a review must consider the "total effect" of the rates at issue, it is not clear the decision is truly relevant to the present action. U S West correctly notes that the Act itself specifies that costs for interconnection and network elements must be determined "without reference to a rate-of-return or other rate-based proceedings." 47 U.S.C. § 252(d)(1)(A)(i). In addition, as U S West also observes, Duquesne Light and related decisions addressed rate setting in the context of regulated monopolies, not the kind of "regulated-competition paradigm imposed by the Act." Under these circumstances, I will not dismiss U S West's challenge to the rates imposed under the Agreement on the grounds that it fails to address the overall impact of the rates.

b) Motion to dismiss claim VIII

The eighth claim alleges that the Agreement violates the Fifth and Fourteenth Amendments to the United States

Constitution by taking private property for a public use without just compensation. TCG contends that this claim is not ripe for review because U S West has not sought compensation from the state for the alleged failure to justly compensate it for the services and facilities it must provide under the Agreement.

In support of this contention, TCG relies primarily upon decisions concerning takings related to condemnations and land use issues. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616 (9th Cir. 1992), cert. denied, 510 U.S. 813 (1993); Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995). Based upon my review of these decisions, I conclude that U S West is not required to seek compensation from the State before asserting this "failure to compensate" claim. The Williamson Court concluded that a takings claim concerning land use was not ripe until the government entity charged with implementing zoning regulations had reached a final decision regarding a developer's application, and that a takings claim was not ripe because the developer did not seek compensation through procedures the state had established for that purpose. Williamson County, 473 U.S. at 190, 194. In the present action, unlike the situation at issue in Williamson County, there appears to be no other state entity or agency like a Zoning Board of Appeals to which U S West can appeal for relief from the provisions of the Agreement of which it complains.

The Dodd decision is more helpful in analyzing the current motions. In Dodd, the court held that a plaintiff was not required to present taking claims to the state court system before seeking relief in federal court. Dodd, 59 F.3d at 860. The court interpreted the principal concern of Williamson County as being whether future, uncertain or contingent events might alter the anticipated outcome. Id. The court added that "to hold that a taking plaintiff must first present a Fifth Amendment claim to a state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every taking claim." Id.

In the present action, it appears that U S West cannot appeal the provisions of the Agreement of which it complains to any state agency or board. TCG's contention that U S West may seek relief from the PUC by requesting a rate increase pursuant to certain Oregon statutes is not convincing, given that the Act explicitly precludes state court review of challenges to agreements such as the one at issue here, and confers review upon federal district courts. Under these circumstances, I am satisfied the conclusion that U S West must pursue further relief in state proceedings before asserting its taking claim in this court is not inevitable.

Therefore, U S West's eighth claim should not be dismissed at this time.[9]

c) Motion to dismiss second claim

U S West's second claim alleges that a "sham Unbundling" provision in the Agreement allows TCG to purchase the separate network elements needed to form a network at a price that is lower than the wholesale rate for the same services purchased as a unit. U S West alleges that the Agreement allows TCG to purchase "unbundled" elements at cost and then "pretend" to recombine the elements into a "finished service."

TCG contends that the Eighth Circuit's decision Iowa Utilities Board v. Federal Communications Comm'n, 120 F.3d 753 (8th Cir. 1997) "removes all doubt that (this claim) is legally invalid." In that decision, the court concluded that the Act permitted competing carriers to obtain the ability to provide "finished telecommunications services" entirely through access to unbundled elements on an incumbent LEC's network. Id. at 815.

U S West agrees that the Eighth Circuit held that a requesting carrier may gain access to all of the unbundled elements needed to provide a finished service. It argues, however, that it is not complaining of this, but of provisions

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[9] I note that the Honorable William Dwyer has recently granted motions for summary judgment on US West's takings claim in similar actions brought in Washington. U.S. West Communications, Inc. v. TCG Seattle, C97-354WD, Order at 10 (W.D. Wash. Jan. 22, 1998); U.S. West Communications, Inc. v. MFS Intelenet, Inc., C97-211WD, Order at 10 (W.D. Wash. Jan. 22, 1998). I will revisit this issue in the present action if motions for summary judgment are filed.

in the Agreement allowing TCG to require U S West to both "disaggregate" its network elements, and then to "reaggregate" these elements into a finished service for TCG. U S West cites the Eighth Circuit's conclusion that the Act does not require incumbent LECs to actually combine the unbundled elements, but instead provides that "the requesting carriers will combine the unbundled elements themselves...." Id. at 813.

In its reply memorandum, TCG contends that U S West has recharacterized its allegations in an attempt to conform to the holding in Iowa Utilities Board, and that this recharacterization is futile because the Agreement does not require U S West to perform the recombination of which it now purportedly complains. At this stage in the proceedings, I have not attempted to fully comprehend the various provisions of the Agreement, and to understand the ramifications of each particular portion on the agreement as a whole. Accepting U S West's allegations as true, and construing those allegations in its favor as I must, I cannot now conclude that U S West cannot establish any set of facts entitling it to relief on this claim. I therefore deny the motion to dismiss this claim.

d) Motion to dismiss fourth claim

U S West's fourth claim alleges that the Commission exceeded its authority by requiring U S West to make deregulated telecommunications services available for resale.

by applying wholesale discounts to nonrecurring charges, and by including a liquidated damages provision in the agreement.

1) Requirement to make deregulated services available

U S West contends that the Act did not delegate to the Commission defendants the authority to require it to offer for resale any services other than those included in retail tariffs already in existence. U S West argues the PUC could not require it to make its deregulated services available to TCG, and that Oregon has not granted the PUC authority over such services.

These contentions appear to conflict with the plain language of the Act. Section 251(c)(4)(A) provides that LECs like U S West must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." This provision neither states, nor appears to imply, any exception as to deregulated services. I therefore grant the motion to dismiss this portion of U S West's action.

2) Requirement that wholesale discounts be applied to nonrecurring charges

Nonrecurring charges are one-time fees imposed for establishing particular services, such as the charge a customer pays to have telephone service established. U S West contends that the Commission defendants lacked the authority to impose wholesale discounts on nonrecurring charges because these charges are not "telecommunications services" within the

meaning of the Act. It also contends that imposing wholesale discounts on these services is improper because nonrecurring charges "are typically set at cost to begin with, and typically do not include costs that can be avoided."

I find no distinction in the Act between recurring and nonrecurring charges, and no implication that Congress intended that these charges be treated differently. U S West's observation that "a nonrecurring charge is not a telecommunications service" is both undoubtedly correct, and unavailing. Recurrent charges likewise do not constitute "telecommunications service," but there is no doubt that these charges must be provided at a discount pursuant to the Act. I therefore grant the motion to dismiss this portion of the fourth claim.

3) Commission's authority to include a liquidated damages provision in the Agreement

U S West alleges that the Commission defendants exceeded their authority by including provisions in the Agreement requiring it to comply with performance standards "that exceed its own internal practices and the requirements of Oregon law, and impos[ing] liquidated damages for failure to meet those standards, in violation of the law."

Section 251(c)(2)(C) of the Act requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself." In Iowa Utilities Board, the Eighth Circuit concluded that this provision does not require incumbent LECs like U S West

to provide competitors with interconnection at levels of quality that are superior to those at which the incumbent LECs provide these services to themselves. Iowa Utilities Bd., 120 F.3d at 813. Under the plain language of the Act itself, and the Iowa Utilities Board decision, I am satisfied that this portion of U S West's fourth claim should not be dismissed.

e) Motion to dismiss fifth claim

U S West's fifth claim challenges the mechanism for cost recovery related to interim number portability set out in the Agreement. "Number portability" is defined in the Act as "the ability of users of telecommunication services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). The Act accords the FCC the authority to prescribe rules and regulations concerning number portability.

TCG contends that U S West cannot prevail on its fifth claim because it agreed to the provision of which it now complains, and because the provision in question tracks a binding FCC Number Portability Order that is subject to review only by a United States Court of Appeals. As to the former of these contentions, I note that U S West has alleged that the Commission and the arbitrator rejected its argument that interim number portability should be fixed according to a "cost-based rate." As to the latter contention, I am

satisfied that U S West is entitled to challenge the application of the FCC Order to the Agreement, even if that Order permitted application of the method used by the Commission in establishing the challenged provision. Section 252(e)(6) of the Act grants aggrieved parties the right to obtain judicial review to determine whether an agreement complies with the Act. Certainly, appellate courts are granted exclusive jurisdiction to review FCC orders. 28 U.S.C. § 2342(1). Here, however, U S West has neither named the FCC as a defendant nor sought review of an FCC order. Instead, it seeks the judicial review explicitly provided under Section 252(e)(6). Under these circumstances, the motion to dismiss the fifth claim should be denied.

f) Motion to dismiss sixth claim

The Act requires an incumbent LEC to allow requesting telecommunications carriers to place certain equipment at the LEC's premises. This requirement is referred to as "physical collocation." U S West's sixth claim alleges that the Agreement requires it to permit collocation of TCG's facilities at any technically feasible point, "including its central offices, service wire centers and tandem offices, as well as all buildings or similar structures owned or leased by U S West that house its network facilities, whether or not collocation at that point is necessary to permit TCG to interconnect or to obtain access to unbundled elements."

This claim alleges that Section 251(c)(6) of the Act does not require such broad collocation.

Section 251(c)(6) specifies that incumbent LECs shall provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier...." TCG contends that this section must be interpreted in conjunction with Sections 251(c)(2) and (3). Section 251(c)(2) provides in part that LECs must provide interconnection "at any technically feasible point within the carrier's network," and Section 251(c)(3) provides in part that LECs must provide for "access to network elements on an unbundled basis at any technically feasible point...." TCG contends that these latter sections set out the requirement relating to where interconnection and access must be provided (that is, "at any technically feasible point,") while Section 251(c)(6) describes the equipment that the LECs must collocate, that is "equipment necessary for interconnection or access to unbundled network elements." It argues that the phrase "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6) modifies the term "equipment," and "does not purport to describe where collocation is to occur."

I am not persuaded that TCG's reading of these sections is the only reasonable, logical, or plausible interpretation of these provisions. At this point, I do not know whether the "interconnection" and "access" specified under Sections 251(c)(2) and (3) would necessarily require the collocation of

a competitor's equipment, or whether U S West could effect the interconnection through some other mechanism. TCG's contention that Section 251(c)(6) does not describe where collocation is to occur is also unpersuasive. This section provides for physical collocation of equipment "at the premises of the local exchange carrier...." Though "premises" is not further defined, it appears that the term may well mean something different than the reference to "any technically feasible point" in the other potentially relevant sections.

Under these circumstances, U S West's inability to establish a right to recover under its sixth claim is not beyond doubt. I therefore deny the motion to dismiss this claim.

g) Motion to dismiss seventh claim

U S West's seventh claim alleges that the Agreement unlawfully deprived it of property without due process of law. This claim alleges that the Commission defendants "improperly adopted or relied on the FCC Order and the rules promulgated therein, failed to take into account the overriding provisions of the Act, and acted arbitrarily." The claim further alleges that the Commission defendants lacked the authority to impose provisions that were not supported by the record, and that they "unlawfully adopted the Agreement with provisions that are inconsistent with the record evidence."

TCG contends that this claim must fail because the complaint and attached documents establish that U S West was accorded the notice and right to be heard that due process

requires. However, notice and a right to be heard are not the focus of U S West's due process claim. Instead, at the core of U S West's due process claim are allegations that the Commission defendants acted arbitrarily and imposed provisions that were unsupported by evidence in the record. In addition to requiring that one threatened with a loss of property be provided notice and an opportunity to be heard, due process requires that the decision be made by a reasonable decision maker who does not act arbitrarily or capriciously, and who bases the decision upon the evidence presented. See, e.g., Jordan v. City of Lake Oswego, 734 F.2d 1374, 1376 (9th Cir. 1984). U S West's allegation that the Commission defendants arbitrarily deprived it of property without the support of evidence in the record at least states a due process violation claim. Accepting these allegations as I must in analyzing a motion to dismiss for failure to state a claim, I deny the motion to dismiss this claim.

CONCLUSION

The United States' and the FCC's motion to intervene (#29) is GRANTED. The Oregon PUC's and PUC Commissioners' motion to dismiss (#12) is DENIED. TCG's motion to dismiss (#13) is GRANTED as to subparts 1 and 2 of the fourth claim, and is DENIED as to the balance of the claims against which TCG has moved.

DATED this 30th day of January, 1998.

John Jelderks
United States Magistrate Judge

FILED

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

MFS INTELENET, INC.; and ROGER HAMILTON, Chairman, RON EACHUS, Commissioner, and JOAN H. SMITH, Commissioner, in their official capacities as Commissioners of the Oregon Public Utility Commission; and OREGON PUBLIC UTILITY COMMISSION,

Defendants.

Civil No. 97-857-JE

OPINION AND ORDER

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JELDERKS, Magistrate Judge:

Plaintiff U S West Communications, Inc. (US WEST) brings this action against defendants MFS Intelenet, Inc. (MFS), the Oregon Public Utility Commission (PUC), and PUC Commissioners Roger Hamilton, Ron Eachus, and Joan Smith (the Commissioners). The Commission defendants move to dismiss based upon lack of subject matter jurisdiction, and MFS moves to dismiss for failure to state claims upon which relief may be granted. The United States of America and the Federal Communications Commission (FCC) move to intervene. I grant the FCC's motion to intervene, deny the Commissioner's motion to dismiss, and grant in part and deny in part MFS's motion to dismiss.

BACKGROUND

1) Telecommunications Act of 1996

U S West has provided local telephone and exchange access service to Oregon customers for more than one hundred years. Through most of this time, U S West has had no competition in its service territories.

In February 1996, Congress enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56;

47 U.S.C. § 153 et seq. The act, which amends the Telecommunications Act of 1934, is designed to promote competition in local and long distance telephone markets. The Act sets out a comprehensive scheme for removing barriers to entry into these markets, and reflects a Congressional intent to promote the rapid development of competition by encouraging new entrants to build their own local telephone networks. See 47 U.S.C. §§ 251-253.

The Act provides for the entry of competitors through two distinct mechanisms. Under the first of these, competitors can purchase individual, "unbundled" network elements that can be combined with their own network facilities to provide services. "Loops" are an example of such unbundled elements. These are the wires and other equipment needed to connect individual telephone customers to a provider's central offices, its trunk lines, communications databases, and support systems. The second mechanism allows new competitors to purchase, at wholesale prices, an incumbent local exchange carrier's (LEC's) assembled finished services, such as residential or business telephone service, for resale. These two mechanisms allow new competitors to begin competing with existing LECs before their new completed, competing networks are in place.

The Act sets out obligations for various kinds of telecommunications service providers. Under Section 25 of the Act, incumbent LECs such as U S West are required to:

(1) negotiate in good faith to reach Agreements with new competitors under the Act;

(2) offer interconnection to competing providers at "any technically feasible point" within their network. This interconnection must be at least equal in quality to that provided by the LEC to itself, and must be provided on rates and terms that are "just, reasonable, and nondiscriminatory;"

(3) provide access to unbundled network elements at "any technically feasible point" on rates and terms that are "just, reasonable, and nondiscriminatory." "Network elements" are facilities or equipment used to provide telecommunications services. "Unbundling" refers to selling individual network elements, as opposed to aggregations of network elements;

(4) offer at wholesale rates any telecommunications service that the LEC provides at retail prices to customers who are not telecommunications carriers;

(5) provide notice of changes in the information necessary for the transmission and routing of services on the LEC's network; and

(6) provide for "collocation" of the equipment necessary for interconnection or access to unbundled elements on rates and terms that are "just, reasonable, and nondiscriminatory." "Physical collocation" requires an incumbent LEC to provide the office space that its competitors need to install and operate their own equipment. "Virtual collocation" requires an incumbent LEC to dedicate to its competitors the equipment they request and to permit the competitors to interconnect with the equipment in the LEC's offices.

Under the Act, incumbent LECs are entitled to recover the costs of providing interconnection, unbundled network elements, transportation and termination of traffic, resale and collocation, and may also recover a reasonable profit. 47 U.S.C. § 252(d)(1).

Section 252 of the Act sets out a comprehensive framework for reaching Agreements between LECs and competitors. If these parties are unable to reach an Agreement resolving all of the issues covered by the Act, a party can seek mediation

under § 252(a)(2). If that mediation does not produce an Agreement, a party may seek compulsory arbitration under § 252(b). State Commissions like defendant PUC are responsible for conducting arbitration, subject to certain limitations. A Commission may reject an Agreement, or a portion of an Agreement, that has been reached through arbitration if it finds that the agreement does not comply with the requirements of § 251 and any FCC regulations in effect under that section, or with the standards set out in § 252(d).

The Act provides for federal district court review of interconnection agreements concluded pursuant to § 252. Section 252(e)(6) provides that, if a state commission "makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the Agreement...meets the requirements of the Act."

The Act also allows states to decline to carry out the regulatory roles set out above. Section 252(e)(5) provides that

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission [FCC] shall issue an order preempting the State Commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this Section with respect to the proceeding or matter and act for the state commission

47 U.S.C. § 252(e)(5). If a state does not act, FCC proceedings and any judicial review of the FCC's action

provide the exclusive remedies. 47 U.S.C. § 252(e)(6). The Act precludes state court review of interconnection agreements arbitrated under the Act. 47 U.S.C. § 252(e)(4).

Section 252(e)(3) provides that

> "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an [interconnection] Agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

2) Arbitration Giving Rise to this Action

MFS requested interconnection and related network elements from U S West shortly after the Act was passed. U S West and MFS were unable to resolve all of the issues related to that request, and MFS filed a petition with the PUC for arbitration pursuant to § 252(b). Arbitration was conducted in late September 1996, and the parties filed final briefs on October 8, 1996.

In a decision issued on November 8, 1996, the arbitrator resolved certain issues, and required the parties to submit a contract in accordance with the decision. U S West filed its Exceptions to the arbitrator's decision, objecting to the provisions complained of in the present action, on November 18, 1996. MFS filed its comments on the Arbitrator's decision and requested the Commissioners' approval of the arbitration order on November 21, 1996. The Commissioners and the PUC approved and adopted the arbitration order on December 9, 1996.

U S West petitioned for reconsideration of the Commission decision approving the arbitration decision on February 6,

1997. The Commissioners and the PUC denied that petition in an Order dated April 7, 1997.

At the time that the complaint in this action was filed, MFS had yet to comply with the arbitrator's order requiring it to submit an executed contract to U S West "incorporating terms that reflect the Commission's final decision" in the underlying proceedings. In their opening memorandum in support of their motion to dismiss, the PUC and Commissioners contended that the absence of an approved interconnection agreement deprived this court of subject matter jurisdiction. However, on August 25, 1997, U S West executed an interconnection agreement that MFS had tendered on August 21, 1997. The PUC approved the interconnection agreement before the PUC and the Commissioners filed their reply brief in support of the motion to dismiss, and withdrew their contention that the action was not ripe for review in that reply memorandum.

3) Claims and Relief Sought[1]

U S West's first claim for relief alleges that the Agreement imposes below-cost pricing in violation of 47 U.S.C. §§ 251(c) and 252(d). In this claim, U S West challenges the price assigned for unbundled network elements, the price allotted for physical collocation, the wholesale discount rates and application of that discount to already discounted,

[1]This summation of the claims reflects U S West's agreement to dismiss counts 1(D), (E), and (G), and count III(B).

volume, wholesale rates, and the pricing applicable to "traffic originated or terminated by enhanced service providers," such as Internet traffic.

U S West's second claim alleges that the "sham unbundling" provision in the Agreement violates 47 U.S.C. §§ 251(c), 252(d), and 271(e)(1) by requiring it to provide "reaggregated unbundled elements far below cost...."

U S West's third claim alleges that the Commission defendants exceeded their delegated authority by requiring it to offer deregulated services that are not subject to the Act, and by requiring it to provide discounted services for resale to enhanced service providers.

U S West's fourth claim alleges that the Agreement violates 47 U.S.C. §§ 251(b)(2) and 251(e)(2) by preventing it from recovering a significant portion of the costs of interim number portability, and by requiring it to subsidize MFS in the manner in which the parties share switched access charges.

U S West's fifth claim alleges that the Agreement violates the Fourteenth Amendment to the United States Constitution by depriving it of property without due process of law.

U S West's sixth claim alleges that the Agreement violates the Fifth and Fourteenth Amendments to the United States Constitution by taking private property for a public use without just compensation.

U S West asks this court to enter an order declaring that the various provisions of the Agreement challenged in its

claims violate the Act. It further seeks a declaration that it is not required to interconnect with MFS until it is "fully compensated for the costs of interconnecting." U S West seeks an order enjoining performance of the Agreement in its entirety and remanding the dispute to the PUC. In the alternative, if the court finds that the Agreement complies with the Act, U S West seeks a declaration that the PUC Orders it challenges and the Agreement violate the Fifth and Fourteenth Amendments to the United States Constitution.

4) Motions Before the Court

The United States and the FCC move to intervene, and have filed a memorandum in opposition to the Commissioners' and the PUC's motion to dismiss. The PUC and the Commissioners move to dismiss on the grounds that this court lacks subject matter jurisdiction because this action cannot be brought against them in federal court. MFS moves to dismiss on the grounds that the complaint does not state claims upon which relief may be granted. It also contends that the court lacks jurisdiction over certain claims.

STANDARDS

1) Failure to State a Claim

In evaluating a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept the allegations of material fact as true, and must construe those allegations in the light most favorable to the

non-moving party. Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). A claim should be dismissed only if it appears beyond doubt that the plaintiff can establish no set of facts under which relief could be granted. Jacobsen v. Hughes Aircraft Co., 105 F.3d 1288, 1292 (1997) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

2) Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of actions over which the district court lacks subject matter jurisdiction. The party attempting to invoke the court's jurisdiction has the burden of establishing that the court has subject matter jurisdiction.

DISCUSSION

1) Motion to Intervene by FCC and United States

The United States and the FCC contend that they are entitled to intervene under Fed. R. Civ. P. 24(a), 28 U.S.C. § 2403, and 28 U.S.C. § 517. Alternatively, they assert that leave to intervene should be granted under Rule 24(b). Rule 24(a) provides that intervention shall be permitted when a United States statute confers a right of intervention, or when the party seeking to intervene claims an interest "relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the

applicant's interest is adequately represented by an existing party." In actions in which "the constitutionality of any Act of congress affecting the public interest is drawn in question," 28 U.S.C. § 2403(a) requires federal courts to allow the United States to intervene "for argument on the question of constitutionality." Under 28 U.S.C. § 517,

> [t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States...or to attend to any other interest of the United States.

Rule 24(b)(2) provides that intervention may be permitted "when an applicant's claim or defense and the main action have a question of law or fact in common."

In the present action, the Commission defendants have challenged the constitutionality of the judicial review provided for under the Act. The United States and the FCC have an obvious interest in the interpretation and enforcement of the Act, and have timely sought to intervene in this action. The interests of these intervenors are not necessarily the same as those of any other parties, and it appears that none of the original parties will necessarily represent their interests adequately. I therefore grant the motion to intervene.

2) PUC's and Commissioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction

The PUC and the Commissioners contend that this court lacks subject matter jurisdiction for several reasons. I will

address these issues in the order presented in these parties' opening memorandum.

a) Contention that the action is barred by the Eleventh Amendment

i) Action against PUC

The Commission defendants contend that the Eleventh Amendment to the United States Constitution bars the prosecution of this action against them in federal court. That amendment provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

State immunity under the Eleventh Amendment extends to state agencies such as the PUC, and to state officials such as the defendant commissioners who act on the state's behalf and who can assert a state's sovereign immunity. San Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 142-46 (1993).

Though the Eleventh Amendment generally bars federal jurisdiction over actions brought against states, a state may waive that immunity by a statutory or constitutional provision. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.1 (1985). Participation in a federal program may also constitute a waiver of Eleventh Amendment immunity. Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997).

As noted above, the Act allows state commissions such as the PUC to participate in the arbitration of interconnection

agreements, or to decline participation. If a state commission does not conduct arbitrations and assume other responsibilities under Section 252 of the Act, the FCC preempts the state commission's jurisdiction. If a state commission chooses to exercise its regulatory authority, the Act clearly provides for judicial review of the relevant interconnection agreements resulting from the process.

Though Congress cannot compel states to participate in federal programs or require states to govern according to Congressional instructions, it can encourage states to regulate in a particular manner by offering states the choice of regulating according to federal standards or having state law preempted by federal regulation. New York v. United States, 505 U.S. 144, 162, 167 (1992). The United States Supreme Court has concluded that a state's waiver of Eleventh Amendment-immunity may be evidenced "'by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

U S West, the United States, and the FCC contend that, by voluntarily participating in the regulatory process, Oregon has waived its immunity from the jurisdiction of this district court. Like several other federal district courts that have recently addressed this issue, I agree. See U S West Communications, Inc. v. Thoms, No. 4:97-CV-70042 (S. D. Iowa, Aug. 4, 1997); U S West Communications, Inc. v. Reinhold,

No. A1-97-25 (D. N.D. July 28, 1997); U S West Communications, Inc. v. TCG Seattle, 1997 WL 426278 (W.D. Wash. July 24, 1997); GTE South, Inc. v. Morrison, No. 3:97CV493, slip op. (E.D. Va. Nov. 7, 1997). The clear implication to be drawn from the statutory scheme at issue here is that Congress conditioned state participation in the negotiation, arbitration, and approval process on consent to federal judicial review of the resulting agreements. States are not required to participate, but if they choose to, the Act makes clear that their regulatory decisions will ultimately be subject to review by federal courts. In the absence of any other reasonable construction of the statute, I can only conclude that, acting through the Commission defendants, Oregon waived the immunity from federal jurisdiction otherwise provided by the Eleventh Amendment.

ii) Action against individual commissioners

Even if I concluded that Oregon had not otherwise waived its Eleventh Amendment immunity, based on my understanding of Ex Parte Young, 209 U.S. 123 (1908), I would deny the motion to dismiss as to the individual defendant commissioners. In Young, the United States Supreme Court held that, though the Eleventh Amendment barred actions in federal courts against the states themselves, it did not bar such actions seeking injunctive relief against state officers who are alleged to have acted in violation of rights secured under the United States Constitution. This principle applies to federal

statutes as well as to the federal Constitution, see, e.g., Natural Resources Defense Council v. California Dep't of Transp., 96 F.3d 420, 422 (9th Cir. 1996), and is based on the premise that federal court authority to enjoin "continuing violation of federal law [is] necessary to vindicate the federal interest in assuring the supremacy of that law." Green v. Mansour, 474 U.S. 64, 68 (1985). Under this principle, federal courts "may enjoin state officials to conform their future conduct to the requirements of federal law...." Quern v. Jordan, 440 U.S. 332, 337 (1979).

The Commission defendants contend that the Young doctrine does not apply to the present action because the PUC has been named as a defendant, because the individual commissioners are not authorized to act individually, because the relief sought is not strictly limited to "prospective injunctive relief," and because the action does not raise issues that are "reasonably free from doubt." I have reviewed these arguments and the responses of U S West and the intervenors carefully. I will not set out my analysis of those arguments here, but simply note that I find them unpersuasive. First, U S West brings this action against the PUC on the grounds that the State has waived its Eleventh Amendment immunity, not on the basis of the Young doctrine which applies to the individual commissioners. Second, that the individual commissioners cannot act individually does not make an action against them an action against the state that is beyond the scope of the Young doctrine; numerous courts have permitted actions against

individual officials to go forward under that doctrine even though an action could not be brought directly against the state agency by whom the officials were employed. See, e.g., Alabama v. Pugh, 438 U.S. 781 (1978); Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, 1120 (9th Cir.), cert. denied, 455 U.S. 943 (1982); W. Birkenfeld Trust v. Bailey, 827 F. Supp 651, 657 (E.D. Wash. 1993). Third, that U S West seeks review of the PUC's "past actions" does not render this an action seeking more than prospective relief. In actions to which the Young doctrine applies, plaintiffs typically seek injunctive relief against application of decisions that state officials have already made. Finally, though the Young Court did state that the doctrine set out in that action should apply where the issue is "reasonably free from doubt," neither that decision or the many subsequent decisions applying the doctrine held that federal jurisdiction is appropriate only when it is reasonably certain that the plaintiff will prevail.

I conclude that the Young doctrine does not bar the prosecution of the present action against the individual commissioners. U S West alleges that the commissioners have violated federal law in the manner in which they have set the rates and terms of the telephone service interconnection, seek only prospective relief, and do not seek monetary relief from the State of Oregon through the PUC or the individual commissioners. The action appears to be clearly within the scope of the Young doctrine.

b) Contention that the action is barred by the Johnson Act, 28 U.S.C. § 1342

The Commission defendants contend that the Johnson Act, 28 U.S.C. § 1342, renders U S West's "42 U.S.C. § 1983 and constitutional claims" outside the scope of this court's jurisdiction. That Act provides that

> The district court shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and
>
> (3) The order has been made after reasonable notice and hearing; and
>
> (4) A plain, speedy, and efficient remedy may be had in the courts of such State.

The Johnson Act precludes federal jurisdiction only when all of the conditions set out in 28 U.S.C. § 1342 are satisfied. Hawaiian Tel. Co. v. Public Util. Comm'n, 827 F.2d 1264, 1273 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988).

Here, U S West's action is neither based exclusively on diversity jurisdiction or alleged "repugnance" to the Federal Constitution, nor are all of the other conditions required for application of the Johnson Act met. For example, U S West is not seeking to enjoin or restrain the operation of any PUC rate order, but instead challenges the terms and conditions of a private interconnection agreement approved pursuant to a

federal Act. Even if the conditions were otherwise satisfied, I would conclude that the Johnson Act is inapplicable here because the Telecommunications Act, which provides a specific statutory statement of jurisdiction, is not displaced by the general terms of the earlier Johnson Act. See Brown v. General Serv. Admin., 425 U.S. 820, 834 (1976).

c) Contention that the Act violates Tenth Amendment and Guarantee Clause

The Commission defendants contend that this action is barred by the 10th Amendment and the Guarantee Clause, Article IV, § 4 of the United States Constitution. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government..."

The Commission defendants argue that these provisions are violated by Section 252(e)(6) of the Act, which provides for federal court review of state commission determinations concerning interconnection agreements, and Section 252(e)(4) of the Act, which prohibits state court review of these determinations. They assert that, in enacting the Telecommunications Act of 1996, Congress did not have the authority to "compel" states to choose between exercising their rights under the Tenth Amendment to regulate intrastate telecommunications matters (and risking loss of their Eleventh

Amendment Immunity) or retaining their Eleventh Amendment immunity and abandoning their "sovereign rights to regulate intrastate telecommunications matters to the FCC by operation of 47 U.S.C. § 252(e)(5)." The Commission defendants contend that the Act unlawfully compels states to administer a federal regulatory program, and argue that the Act's prohibition on state court review of PUC determinations concerning interconnections is inconsistent with the division between state and federal authority set out in the Constitution. They also assert that, because Congress has no authority to abrogate state sovereign authority under the Commerce Clause of Article I, it lacked the lawful authority to "make the waiver of state sovereign immunity a condition to the state's action...."

Based upon my review of the relevant cases cited by the parties, I conclude that the statutory scheme at issue here does not violate the Tenth Amendment, the Guarantee Clause, or the dual sovereignty of federal and state government established by the Constitution. Before turning to the Tenth Amendment issue, I note that the Commission defendants do not identify how the Act purports to deny states the republican form of government specified under the Guarantee Clause. Claims brought under that clause are generally considered nonjusticiable. State of California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997). Even assuming that the issue is justiciable here, the United States Supreme Court has noted that, if the legislation in question

offers states a legitimate choice rather than subjects states to an "unavoidable command," states are able to set their own legislative agendas and state officials remain accountable to a local electorate. New York, 505 U.S. at 185-186.

Under the Commerce Clause, Congress has the authority to regulate activity that, though "purely intrastate in character...combined with like conduct by others similarly situated, affects commerce among the states...." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (quoting Fry v. United States, 421 U.S. 542, 547 (1975). The Tenth Amendment prohibits Congress from requiring states to administer federal programs against their will. Printz v. United States, 117 S. Ct. 2365, 2383 (1997); New York, 505 U.S. at 178. However, when Congress has the authority to regulate private activity pursuant to the Commerce Clause, the Tenth Amendment does not prohibit it from offering states the choice of either regulating that activity according to the standards it establishes "or having state law pre-empted by federal legislation." New York, 505 U.S. at 167. Though Congress may not compel a state to enact any particular legislation, it may induce a state to participate in a regulatory scheme by conditioning the state's receipt of federal funds on taking prescribed action. Id.

In New York, the Court considered a challenge to three provisions of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985, which offered states incentives to address waste disposal issues. The Court found that two of

the provisions, which left the states free to choose whether or not to participate, were constitutional. New York, 505 U.S. at 173-174. It held that a third provision requiring states to either regulate in conformance with federal regulation or to assume title to and liability for radioactive waste generated within their borders constituted an unlawful coercion. Id. at 175.

In Printz, the Court struck a section of the Brady Handgun Violence Prevention Act requiring local officials to conduct background checks before allowing the purchase of handguns. Printz, 117 S. Ct. at 2383.

In Hodel, the Court considered a challenge to legislation that offered states the opportunity to develop a regulatory program consistent with federal standards, and provided for federal regulation if a state chose not to participate. Hodel, 452 U.S. at 288-89. Though it noted that the legislation limited the states' legislative choices concerning important issues, the Court concluded that the statute was not constitutionally infirm. Id. at 290.

In FERC v. Mississippi, 456 U.S. 742 (1982), the Court rejected a challenge to federal legislation requiring state PUCs to consider certain federal standards concerning energy rates and regulation, but not requiring the states to adopt or enforce federal standards. The Court found that this legislation did not violate the Tenth Amendment. Id. at 764.

In the present action, the Commission defendants challenge federal legislation that allows states to choose

whether or not to participate in the federal regulatory scheme. Under the guidance of the above decisions, I conclude that this legislation does not violate the Tenth Amendment. It appears that Congress can confer the authority to review these complex agreements upon federal courts without offending the Constitutional or statutory provisions upon which the Commission defendants rely. I therefore deny the motion to dismiss for lack of subject matter jurisdiction.

c) Contention that U S West seeks relief that is beyond the scope of judicial review authorized under the Act

The Act provides that an aggrieved party may bring an action in federal court "to determine whether the Agreement...meets the requirements" of Sections 251 and 252. 47 U.S.C. § 252(e)(6). The Commission defendants contend that the court lacks jurisdiction to provide these remedies because U S West "seeks, among other things, declaratory and injunctive relief under statutes besides 47 U.S.C. § 252(e)(6)."

At this stage in the proceedings, it is not necessary to determine what particular remedies might be available if U S West ultimately establishes that the Agreement in question does not comply with the requirements of the Act. Regardless of what other remedies U S West is seeking, it clearly seeks review of the Agreement as provided under the Act. This court has subject matter jurisdiction, and the Commission defendants' motion to dismiss should be denied.

3) MFS' Motion to Dismiss

a) Motion to dismiss 1st claim

U S West's first claim challenges the price assigned for unbundled network elements in the Agreement, as well as the price set for physical collocation, wholesale discount rates and their application, and pricing applicable to "enhanced service providers."

(1) Unbundled loop price

MFS contends that U S West is collaterally estopped from challenging the unbundled loop rate set by the PUC because U S West stipulated to the cost methodology at issue in another proceeding before the PUC. In the alternative, MFS contends that the claim "constitutes an impermissible collateral attack on that other PUC order."

For the purposes of analyzing this motion, it is sufficient to note that U S West has alleged that the prices in question do not allow it to recover its costs, and that this requirement that it provide services below cost constitutes a violation of the Act. These allegations are sufficient to state a claim. As to the contention that U S West is collaterally estopped because it stipulated to a particular cost methodology, I simply note that one can stipulate to a methodology without stipulating to the correctness of calculations purportedly made pursuant to that methodology. I also note my doubts as to whether the state agency findings which MFS cites are "entitled to preclusive effect" as MFS argues, given that the Act specifically

provides for judicial review. I deny the motion to dismiss this portion of U S West's first claim.

(2) Collocation

The Act provides that an LEC like U S West must recover just and reasonable compensation if it is forced to "collocate" by providing competitors like MFS space to install and operate their own equipment. U S West has alleged that the PUC set physical collocation rates that do not allow it to recover its costs. These allegations state a claim, regardless of any opportunity U S West may have had to "be heard" concerning these rates in other proceedings before the PUC. I deny the motion to dismiss this part of U S West's first claim.

(3) Wholesale discounts

Under the Act, U S West is required to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). The Act further provides that state commissions like the PUC "shall determine wholesale rates on the basis of retail rates charged...excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). U S West alleges that the wholesale discounts set out in the Agreement is not based on the costs it will avoid,

and that MFS failed to present necessary evidence in support of the discount rate that it proposed.

MFS contends that these allegations fail to state a claim because U S West failed to submit evidence that would allow the arbitrator to determine its avoided costs. It also asserts that this court cannot provide a remedy for this aspect of the first claim because U S West's real complaint is not with the Agreement, but with the Act's requirement that "resold services be priced taking the retail rate structure as a starting-point."

Accepting U S West's allegations as true as I must in evaluating this motion, I am satisfied that this claim should not be dismissed. Examination of the evidence submitted in the proceedings below, and analysis of whether the arbitrator applied the correct standards, are well beyond the scope of the present proceedings. U S West's allegations concerning the wholesale discount state a claim, and I deny the motion to dismiss this portion of the first claim.

(4) Enhanced service providers

The Agreement provides that U S West and MFS will compensate each other on a reciprocal basis for terminating local calls originating from each other's network. U S West alleges that the Agreement fails to adequately compensate it for transporting and terminating "enhanced services," such as Internet traffic, for MFS. U S West contends that it is unfair to provide the same compensation for this traffic as

for other calls because "holding times" for Internet connections are generally much longer than for non-Internet traffic.

MFS contends that U S West cannot obtain review of this issue now because it did not raise this argument during arbitration, and because the FCC has subsequently concluded that inclusion of enhanced service provider traffic does not violate the Act. U S West contends that it did object to the inclusion of enhanced service provider traffic in the reciprocal compensation provisions of the Agreement, noting that MFS itself cited in its memorandum U S West's statement of its position in the parties' Joint Position Statement submitted in the arbitration proceedings. In that document, U S West opined that it was "appropriate to exempt traffic originated to and terminated by enhanced service providers from the reciprocal compensation arrangement of this Agreement" until the FCC had reformed the access charge system.

Under these circumstances, I am satisfied that this aspect of U S West's first claim should not be dismissed. Though it may not have argued that the provision in question violated a particular section of the Act, U S West objected to inclusion of enhanced service provider traffic in the reciprocal compensation provisions in the underlying proceedings. It is also not clear that the FCC Order MFS cites specifically addresses this issue.

b) Motion to dismiss second claim

U S West's second claim alleges that a "sham unbundling" provision in the Agreement allows MFS to purchase the separate network elements needed to form a network at a price that is lower than the wholesale rate for the same services purchased as a unit. U S West alleges that the Agreement allows MFS to purchase "unbundled" elements at cost and then "pretend" to recombine the elements into a "finished service."

MFS contends that the Eighth Circuit rejected U S West's "sham unbundling" theory in Iowa Utilities Board v. Federal Communications Comm'n, 120 F.3d 753 (8th Cir. 1997). In that decision, the court concluded that the Act permitted competing carriers to obtain the ability to provide "finished telecommunications services" entirely through access to unbundled elements of an incumbent LEC's network. Id. at 813.

U S West does not dispute that the Eighth Circuit held that a requesting carrier may gain access to all of the unbundled elements needed to provide a finished service. It argues, however, that it is complaining of something else--of provisions in the Agreement allowing MFS to require U S West to both "disaggregate" its network elements, and then to "reaggregate" these elements into a finished service for MFS. U S West cites the Eighth Circuit's conclusion that the Act does not require incumbent LECs to actually combine the unbundled elements, but instead provides that "the requesting carriers will combine the unbundled elements themselves...." Id. at 813.

In its reply memorandum, MFS contends that the Agreement does not require U S West to perform the recombination of which it now purportedly complains. At this stage in the proceedings, I have not attempted to fully comprehend the various provisions of the Agreement, and to understand the ramifications of each particular portion to the agreement as a whole. I do note that the parties' joint proposal, which MFS cites, states that U S West will not restrict MFS "from combining elements with any technically compatible equipment" that MFS owns. Though the proposal also recites the parties' agreement that U S West will perform "the functions necessary to combine requested elements in any technically feasible manner," it is not clear whether this agreement would require U S West to perform the total "reaggregation" of unbundled elements of which it now complains. Accepting U S West's allegations as true, and construing those allegations in its favor as I must, I cannot now conclude that U S West cannot any set of facts entitling it to relief on this claim. I therefore deny the motion to dismiss this claim.

c) Motion to dismiss third claim

U S West's third claim alleges that the Commission defendants exceeded their delegated authority by requiring it to offer deregulated services that are not subject to the Act.

expand by requiring it to provide discounted services for resale to enhanced service providers.[2]

(1) Requirement that U S West make deregulated services available

U S West contends that the Act did not delegate to the Commission defendants the authority to require it to offer for resale any services other than those included in retail tariffs already in existence. U S West argues the PUC could not require it to make its deregulated services available to MFS, and that Oregon has not granted the PUC authority over such services.

These contentions appear to conflict with the plain language of the Act. Section 251(c)(4)(A) provides that LECs like U S West must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Telecommunications services can be sold at retail without a tariff, and, as MFS notes, some states do not require tariffs for telecommunications services. The Act defines these services as including "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." These provisions neither state, nor appear to imply, any exception as to deregulated services.

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[2]As noted above, U S West has agreed to dismiss its allegation that the Commission defendants exceeded their authority by requiring it to apply wholesale discounts to nonrecurring charges for unbundled network elements.

I therefore grant the motion to dismiss this portion of U S West's action.

(2) Requirement that U S West provide discounted services for resale to enhanced service providers

U S West contends that the Commission defendants lacked the authority under the Act to provide discounted services for resale to "enhanced service providers" such as Internet service providers, because Internet traffic is not a "telecommunications service." Because I find no basis for concluding that the local call portion of Internet traffic does not qualify as "a telecommunications service," I disagree, and grant the motion to dismiss this part of U S West's third claim as well.[3]

d) Motion to dismiss fourth claim

This claim alleges that the Agreement violates the Act by preventing U S West from recovering much of the costs of interim number portability, and by requiring it to subsidize MFS in the division of switched access charges. MFS contends that these allegations do not state a claim upon which relief may be granted because the methods of cost recovery were approved in an FCC Order addressing number portability that is

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[3]The FCC has concluded that Internet access consists of both the local connection of Internet service providers through public switched telecommunications networks, and the unregulated services provided by the Internet service providers themselves. See Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 1997 WL 236168, ¶ 83, 788-89 (F.C.C. May 8, 1997).

subject to review only by the United States Courts of Appeals. U S West contends that the FCC Order in question has been challenged, and that, in any event, the Commission defendants did not fully comply with the Order in setting out the provisions related to the cost recovery portion of this claim. U S West contends that the Order did not dictate the distribution of access charges that is addressed in the second part of the fourth claim.

I am satisfied that the fourth claim should not be dismissed at this point. U S West has alleged that the provisions complained of violate the Act, and it is not readily apparent that these provisions were required by or fully comport with a binding FCC Order. The viability of this claim requires a scrutiny of the underlying record that is simply inapplicable at this stage in the proceedings.

e) Motion to dismiss fifth claim

U S West's fifth claim alleges that the Agreement unlawfully deprived it of property without due process of law. This claim alleges that the Commission defendants "improperly adopted or relied on the FCC Order and the rules promulgated therein, failed to take into account the overriding provisions of the Act, and acted arbitrarily." The claim further alleges that the Commission defendants lacked the authority to impose provisions that were not supported by the record, and that they "unlawfully adopted the Agreement with provisions that are inconsistent with the record evidence."

In addition to requiring that one whose property might be taken be provided notice and an opportunity to be heard, due process requires that the decision be made by a reasonable decision maker who does not act arbitrarily or capriciously, and that the decision be based upon the evidence presented. See, e.g., Jordan v. City of Lake Oswego, 734 F.2d 1374, 1376 (9th Cir. 1984). U S West's allegations that the Commission defendants arbitrarily deprived it of property without the support of evidence in the record states a due process violation claim. Accepting these allegations as I must in analyzing a motion to dismiss for failure to state a claim, I therefore deny the motion to dismiss this claim.

f) Motion to dismiss sixth claim

U S West's sixth claim alleges that the Agreement violates the Fifth and Fourteenth Amendments to the United States Constitution by taking private property for a public use without just compensation. MFS contends that this claim must fail because an unlawful taking occurs only if the "total effect" of the rates in question is confiscatory. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989). MFS asserts that U S West has not alleged that the Agreement will impair its financial integrity, but has only alleged that "discrete policies of the OPUC will lead to service-or element-specific losses...."

This argument is not persuasive. Duquesne Light and related decisions requiring reference to the "total effect" of rates imposed in the context of regulated monopolies, in which

losses in one area might be offset by altering the rates in another. Here, as U S West correctly notes, the Act itself specifically provides that costs for interconnection and network elements must be determined "without reference to a rate-of-return or other rate-based proceedings." 47 U.S.C. § 252(d)(1)(A) (i).

MFS also contends that this claim is not ripe for review because the rates at issue are "merely interim rates." I disagree. In determining whether a particular agency decision is "ripe" for review, courts generally consider whether the challenged action constitutes a "final agency action," whether the issues presented are of a legal or factual nature, whether the challenged action has or will directly and immediately affect the party seeking review, and whether resolution of the issue will foster effective administration. Abbot Labs v. Gardner, 387 U.S. 136, 149 (1967). Here, U S West has alleged facts that satisfy this test. U S West has alleged that it has executed a final binding agreement setting out the terms of interconnection with MFS based upon the PUC orders at issue, and that it is required under these orders to provide certain services and facilities at prices that will not allow it to recover its costs. U S West contends that the Commission defendants have heard the issues and arguments the parties have raised regarding the arbitrator's decision, have resolved those issues in a manner that is to U S West's detriment, and "will not revisit these issues...." I am satisfied that, though identified as "interim," the rates at

DATED this 30th day of January, 1998.

John Jelderks
United States Magistrate Judge

issue here are sufficiently fixed and find them to warrant judicial review. I therefore deny the motion to dismiss this claim.

CONCLUSION

The motion to intervene brought by the United States and the FCC (#28) is GRANTED. The motion to dismiss brought by the Oregon PUC and the Commissioners (#10) is DENIED. MCI's motion to dismiss (#12) is GRANTED as to claims 1(D), (E), and (G), and as to claim III, and DENIED as to the balance

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta
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LUTHER D. THOMAS, Clerk
By: Deputy Clerk

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

vs.

BELLSOUTH TELECOMMUNICATIONS, INC. and GEORGIA PUBLIC SERVICE COMMISSIONERS, in their official capacities

1:97-cv-884-RCF

MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.; GEORGIA PUBLIC SERVICE COMMISSION; DAVID N. BAKER; ROBERT B. BAKER; MAC BARBER; BOB DURDEN; and STAN WISE, in their official capacities

1:97-cv-1318-RCF

ORDER

These related actions are before the court on motions to dismiss by defendants Georgia Public Service Commission [GPSC], Georgia Public Service Commissioners, David N. Baker, Robert B. Baker, Mac Barber, Bob Durden, and Stan Wise [collectively, the State Defendants]. These actions are also before the court on motions to intervene by the United States and the Federal

Communications Commission [the FCC]. Because the motions in both cases are, for all intents and purposes, identical, the court addresses them together in this consolidated Order.[1]

Background

In February 1996, President Clinton signed into law the Telecommunications Act of 1996 [the Act], 47 U.S.C. § 251 et seq., which provides a statutory framework for the development of competitive local telephone markets. Pursuant to the Act, local telephone utilities, such as defendant BellSouth Communications, Inc. [BellSouth], must negotiate with requesting competitors, such as plaintiffs AT&T Communications of the Southern States, Inc. [AT&T], MCI Telecommunications Corporation, and MCIMetro Access Transmission Services, Inc. [collectively, MCI], to facilitate those competitors' entry into the local market. See 47 U.S.C. § 252(a). If the parties are unable to negotiate an "Interconnection Agreement" [the Agreement], they may petition the state public utility commission--in Georgia, GPSC--to arbitrate any unresolved issues. See id. § 252(b)(1). The parties must then incorporate the negotiated and arbitrated terms into the Agreement, which is subsequently submitted to the state commission for approval. Id. § 252(e)(1). After the Agreement is either approved or rejected, the parties may seek judicial review of the state commission's decision in federal district court. Id. § 252(e)(6).[2] If, however, the state commission does not act when petitioned for arbitration, the FCC becomes responsible for arbitrating and approving the Agreement. Id. § 252(e)(5).

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[1]The court sees no need to hear argument on these motions and thus denies AT&T's request for oral argument.

[2]The state courts are prohibited from reviewing the commission's decision. Id. § 252(e)(4).

In the actions at bar, AT&T and MCI seek the court's review of the terms of their respective Agreements, both of which were arbitrated and approved by GPSC. In connection therewith, plaintiffs have sued BellSouth and the State Defendants. Against the State Defendants, plaintiffs seek prospective injunctive relief.[3] In response to the complaints, the State Defendants have moved for dismissal under the Tenth and Eleventh Amendments to the United States Constitution.[4] The United States and the FCC seek to intervene.

Motions to Intervene

Seeking to defend the constitutionality of the Act, the United States and the FCC move to intervene in both actions pursuant to 28 U.S.C. § 2403(a) and Fed. R. Civ. P. 24. BellSouth, the only party to have responded to the motions for intervention, opposes only the FCC's ability to intervene. This opposition implicitly recognizes the undeniable right of the United States to intervene. See 28 U.S.C. § 2403(a) ("In any action in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United

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[3]The court rejects the argument that plaintiffs are, in reality, seeking retroactive relief.

[4]The State Defendants have also questioned the constitutionality of the Act under the Guarantee Clause. Claims raised under the Guarantee Clause are, however, generally thought to be nonjusticiable. See, e.g., Deer Park Independent School District v. Harris County Appraisal District, — F.3d —, 1998 WL 3336, *4 (5th Cir. Jan. 22, 1998) ("challenges to Congressional action under the Guarantee Clause are not justiciable"); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) ("The Supreme Court traditionally has held that claims brought under the Guarantee Clause are nonjusticiable political questions."). To the extent this claim may be justiciable, the State Defendants do not adequately explain the merits of their claim, "silence which warrants rejection." Deer Park, 1998 WL 3336 at *4.

States to intervene."). Although the FCC does not enjoy the same right under § 2403(a), it argues that it may intervene pursuant to Fed. R. Civ. P. 24(b)(2),[5] which provides as follows:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute . . . administered by a federal . . . governmental officer or agency . . . , the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

BellSouth does not argue either that the FCC's motion is untimely or that undue delay or prejudice would result were the FCC permitted to intervene. Rather, BellSouth relies on the fact that the United States can adequately speak for the FCC. This fact is not, however, relevant to a discussion of permissive intervention. The relevant issues are: (1) whether the FCC has a claim or defense in common with a question of law or fact in the main action; and (2) whether the parties to the action rely on a statute administered by the FCC. Because the FCC has substantial regulatory responsibility over the administration of the Telecommunications Act of 1996 and because intervention will neither delay the action nor prejudice the parties, the court will allow the FCC to intervene. Accord AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, Inc., File No. 97-CV-901 (ADM/JGL), slip op. at 3-4 (D. Minn. Sept. 26, 1997) (allowing the FCC to intervene under Fed. R. Civ. P. 24(b)). But see US West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1368 (W.D. Wash. 1997) (denying the FCC's motion to intervene under Fed. R. Civ. P. 24(b)).

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[5]Because the United States will undoubtedly represent the FCC's interests in this action adequately, the court does not find that the FCC has a right to intervene pursuant to Fed. R. Civ. P. 24(a).

Motions to Dismiss

The arguments raised by the State Defendants in support of their motions to dismiss are not new. Over the course of the last year, these same arguments have been made throughout the nation by various state public utility commissions and rejected every time. See, e.g., TCG Seattle, 971 F. Supp. 1365; AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2164-17 (D.S.C. Dec. 11, 1997); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-cv-405-BR (E.D.N.C. Nov. 20, 1997); US West Communications, Inc. v. Thoms, Civil No. 4-97-cv-70082 (S.D. Iowa Aug. 4, 1997); US West Communications, Inc. v. Reinbold, Civil No. A1-97-25 (D.N.D. July 28, 1997).

Under the reasoning expressed in these earlier decisions, the court holds that the Tenth and Eleventh Amendments do not bar the actions brought by AT&T and MCI against the State Defendants pursuant to § 252(e)(6) of the Act. More specifically, the court holds that suit may proceed against GPSC on the grounds that, "by participating in the interconnection agreement process," the State of Georgia "has waived its Eleventh Amendment immunity from federal judicial review of its actions." TCG Seattle, 971 F. Supp. at 1370. See also Reinbold, Civil No. A1-97-25, slip op. at 8-9 ("By deciding to take an active role in the approval of the agreement, [the state commission] has affirmatively waived its Eleventh Amendment immunity and consented to federal review, as provided for by the Telecommunications Act of 1996."). The court also holds that, regardless of whether GPSC may be sued in the actions at bar, suit may proceed against the individual commissioners in their official capacities pursuant to the doctrine enunciated in Ex Parte Young, 28 S. Ct. 441 (1908), whereby suit against state officials in their official capacities seeking prospective injunctive relief is excepted from Eleventh Amendment immunity. Accord Reinbold, Civil No. A1-

97-25, slip op. at 7 (holding that plaintiff's claim against the individual commissioners "rests squarely within the Ex parte Young exception"); AT&T, No. 5:97-cv-405-BR, slip op. at 13 (same). Lastly, the court holds that the State Defendants are not protected by the Tenth Amendment because they are not being compelled to act on behalf of the federal government. Accord AT&T, No. 1:97-2164-17, slip op. at 7 (holding that Tenth Amendment does not protect state commission from suit brought under the Act); AT&T, No. 5:97-cv-405-BR, slip op. at 14-15 (same).[6]

One last argument deserves the court's attention. In the action brought by AT&T, the individual commissioners argue that GPSC should be joined as a necessary party because AT&T is, in reality, petitioning for review of GPSC's actions.[7] The court suspects that this argument was made in an attempt to escape the result compelled by Ex parte Young with respect to GPSC's individual members. In fact, the argument that GPSC is a necessary party appears to be incidental to the argument that the State has not waived its Eleventh Amendment immunity. In light of its finding that the State of Georgia has waived its immunity with respect to federal judicial review of its actions in connection with the AT&T/BellSouth Agreement, the court doubts that the commissioners wish to pursue their argument that GPSC is a necessary party. The court thus declines to address the necessity of joining GPSC as a party to the AT&T action at this time. If, however, the parties to the AT&T action believe GPSC must be joined, they may so move the court within 10 days of the filing of this Order.

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[6]By so holding, the court rejects GPSC's arguments under Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), New York v. United States, 112 S. Ct. 2408 (1992), and Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997).

[7]This issue is not relevant to MCI's action because MCI brought suit against both GPSC and the individual commissioners responsible for approving the Agreement.

Conclusion

Accordingly, for the reasons explained in the body of this Order, defendant Georgia Public Service Commissioners' motion to dismiss [#4-1 in Case No. 1:97-cv-884-RCF] is DENIED. Defendants Georgia Public Service Commission, David N. Baker, Robert B. Baker, Mac Barber, Bob Durden, and Stan Wise's motion to dismiss [#6-1 in Case No. 1:97-cv-1318-RCF] is also DENIED. The United States and the FCC's motions to intervene [#17-1 in Case No. 1:97-cv-884-RCF and #20-1 in Case No. 1:97-cv-1318-RCF] are GRANTED. The Clerk is thus DIRECTED to add the United States and the Federal Communications Commission as parties to these actions. Defendant BellSouth's motion for enlargement of time [#27-1 in Case No. 1:97-cv-884-RCF] is GRANTED nunc pro tunc. The parties' joint motion for enlargement of page limit [#13-1 in Case No. 1:97-cv-1318-RCF] is also GRANTED nunc pro tunc.

If the parties to the AT&T action believe GPSC to be a necessary party, they are DIRECTED to file a motion requesting joinder within 30 days of the filing of this Order.

SO ORDERED, this 11 day of February, 1998.

RICHARD C. FREEMAN
SENIOR UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

U S WEST COMMUNICATIONS, INC.,
a Colorado Corporation,

Plaintiff,

-vs-

No. CIV 97-0539 JC/WWD

ERIC SERNA, JEROME BLOCK, and
GLORIA TRISTANI, Commissioners of the
New Mexico State Corporation Commission; and
AT&T COMMUNICATIONS OF THE MOUNTAIN
STATES, INC., a New York Corporation,

Defendants,

-and-

UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION,

Intervenors.

MEMORANDUM OPINION

THIS MATTER came on for consideration of several pending motions. In addition to reviewing the relevant authorities, the Court has examined the entire case file and all of the motions and memoranda submitted by the parties and intervenors. The Court finds that at this time it lacks jurisdiction over the claims brought pursuant to the Telecommunications Act of 1996, and those claims will be dismissed without prejudice. As to the constitutional claims brought in Counts 11, 14 and 15, the Court has federal question jurisdiction as to that portion of the arbitration order mandating that Plaintiff disclose information regarding its data files even in the absence of an

approved interconnection agreement. With the exception of the § 1983 claim regarding the dark fiber disclosure requirement, all other constitutional claims (including those asserting First Amendment violations) are not yet ripe for review and will be dismissed without prejudice. The Court further finds that it will exercise its federal question jurisdiction over the only ripe constitutional claim and will grant Plaintiff's Motion to Stay that portion of the commission's order requiring U S West to precisely disclose the locations and quantity of its dark fiber even in the absence of approval or rejection of an interconnection agreement.

Background

In an effort to foster competition in the telecommunications industry, Congress passed the Telecommunications Act of 1996 ("the Act")[1] which became effective February 8, 1996. GTE South, Inc. v. Morrison, 957 F. Supp. 800 (E.D. Va.1997). New competitors are permitted under the Act to enter local service markets by purchasing services and connecting to facilities owned by "incumbent" telephone companies, such as Plaintiff U S WEST within the State of New Mexico. The Act requires that present telecommunication providers negotiate agreements to allow any competing carrier: to interconnect to its facilities, § 251(c)(2); to obtain "unbundled" elements of its telecommunications network, § 251(c)(3); and to purchase retail telecommunications services at wholesale prices, § 251(c)(4). 47 U.S.C. § 252.

If the new competitor and incumbent provider fail to voluntarily reach an agreement for the provision of such services within 135 to 160 days, either party may petition a State commission to arbitrate any open issues. 47 U.S.C. § 252(b)(1). The procedures associated with this arbitration

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[1] Pub. L. No. 104, 110 Stat. 56 (1996), codified in scattered sections of Title 47 of the United States Code. The specific provisions of the Act presently at issue include 47 U.S.C. § 251 and § 252.

process are outlined in § 252 of the Act. If the State commission "fails to act to carry out its responsibility in any proceeding or other matter" under this section, the FCC is to issue an order preempting the State commission's jurisdiction and is to assume the responsibility. 47 U.S.C. § 252(e)(5). In such a case, "the proceeding before the Commission . . . and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. § 252(e)(6).

Here, however, the New Mexico State Corporation Commission accepted the arbitration responsibility and received written and live testimony from twenty-six witnesses during February 10 through February 21, 1997. The following month, the commission issued Findings of Fact, Conclusions of Law and Order ("the March 20, 1997 Order")[1] detailing the terms to be incorporated into an interconnection agreement between Plaintiff U S WEST and Defendant AT&T. The March 20, 1997 order further imposed on U S WEST a duty to disclose to AT&T within forty-five days specific information regarding a type of unused fiber optic cable.

To date, a final interconnection agreement between these telecommunication companies has not been filed for the commission's final approval or rejection as required by § 252(e). Instead, the commission has before it a joint request by the companies for the commission to resolve certain contract issues for inclusion in the final interconnection agreement to be submitted for commission approval.

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[1] The document was 72 single-spaced pages in length and set forth over four hundred individual findings of fact. Errata notices were issued by the commission on April 1 and 4, 1997.

Analysis

Jurisdiction under the Telecommunication Act of 1996

U S WEST filed this action for declaratory and injunctive relief from the commission's March 20, 1997 arbitration order. Plaintiff contends that jurisdiction lies in this Court to review the entire commission's order pursuant to § 252(e)(6), which provides as follows:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the *agreement* or statement[3] meets the requirements of section 251 of this title and this section.

Although it concedes that no final interconnection agreement has been approved or rejected by the commission, U S WEST maintains that it is aggrieved by the commission's determinations in the March 20, 1997 order and by the form of interconnection agreement that the order directs the companies to submit for its approval. In short, Plaintiff contends that "the formal act of approval is not a requirement of jurisdiction, ripeness, or declaratory relief in a case such as this one . . . ." Plaintiff's Response to AT&T's Motion to Dismiss at 7.

I have been unable to locate any court decision that has accepted such a proposition. Rather, it appears that every court addressing this issue has found that the Act limits the federal court's jurisdiction to reviewing an approved or rejected interconnection agreement to determine if it complies with the requirements of § 251. See GTE Southwest Inc. v. Graves, No. CIV-97-0078-C (W.D. Okla. June 5, 1997); GTE North, Inc. v. Strand, No. 5:97-0073-C (W.D. Mich. June 2, 1997); Contel of Minn., Inc. d/b/a GTE of Minn. v. Jacobs, Nos. 97-160, 97-346 (D. Minn. May 30, 1997); GTE Midwest Inc. v. Zobrist, No. 96-1313-CV-C-5 (W.D.Mo. May 22, 1997); GTE North v.

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[3] The term "statement" refers to a "statement of generally available terms" that a "Bell operating company may prepare." § 252(f)(1). No such "statement" is at issue in this litigation.

Glazer, No. 5:97-CV-137 (N.D. Ohio May 12, 1997); GTE Florida Inc. v. Johnson, 964 F. Supp. 333 (N.D. Fla. May 11, 1997); GTE South, Inc. v. Breathitt, 963 F. Supp. 610 (E.D. Ky. Apr. 25, 1997); GTE Northwest v. Hamilton, No. 97-6021 (D. Ore. Apr. 16, 1997); GTE Northwest v. Nelson, No. 96-1991 (W.D. Wash. Mar. 31, 1997); GTE Southwest v. Wood, No. M-97-003 (E.D. Tex. Mar. 27, 1997); GTE South Inc. v. Morrison, 957 F. Supp. 800 (E.D. Va. Feb 24, 1997).

The Morrison opinion cited above presents a thoughtful and careful analysis which persuades this Court that the structure of the statute supports the view that judicial review of the commission's order is premature prior to the approval process.

> Section 252 sets out a four-stage approach to developing an interconnection agreement:
>
> *First*, voluntary negotiations for the first 135 days, § 252(a);
>
> *Second*, arbitration of the unresolved issues commencing during the 135th to 160th day and concluded by the State commission within nine months of the first interconnection agreement request, § 252(b);
>
> *Third*, approval or rejection by the State commission, § 252(e)(1)-(4); and
>
> *Fourth*, review of State commission actions, § 252(e)(6).
>
> The SCC has not completed the third step in the statutory procedures because the parties have not submitted an agreement. The section-and-subsection and paragraph structure within § 252 require the completion of SCC action prior to district court review so as not to 'disrupt[ ] the review scheme Congress intended.'

Morrison, 957 F. Supp. at 804-05 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 206 (1994)).

As AT&T points out, even after the commission makes a determination on an arbitrated issue, the Act requires the commission to evaluate the negotiated interconnection agreement and "approve or reject the agreement, with written findings as to any deficiencies." § 252(e)(1). Prior to judicial

review, the commission must be given the opportunity to review the telecommunications company's interpretation of the commission's rulings as incorporated into the agreement, to assure itself that the arbitrated determinations are functional within the context of a complete interconnection agreement, and to make a final determination that the submitted agreement conforms to the requirements of the Act and to the dictates of State law as well.

Thus, I find that the Act does not permit federal review over the claims which allege only violations of the Act until such time as the interconnection agreement has been approved or rejected. "A finding that Congress intended to preclude review 'prevents a district court from exercising subject-matter jurisdiction.'" Morrison , 957 F. Supp. at 804 (E.D.Va. 1997) (quoting Thunder Basin, 510 U.S. at 202 (1994)). Therefore, Counts 1 through 10, 12 and 15 will be dismissed without prejudice.

Asserted Alternative Grounds for Jurisdiction

Plaintiff argues that the three remaining claims provide this Court with alternative grounds for federal question jurisdiction. Brought pursuant to 42 U.S.C. § 1983, Counts 11, 14 and 13 include allegations that the commission's actions violate U S WEST's constitutional guarantees to due process and unauthorized takings. Yet, U S WEST is under no duty to perform the terms of the arbitrated interconnection agreement until such time that the commission finally approves such an agreement. Thus, alleged constitutional violations will ripen only at completion of the interconnection agreement approval process when Plaintiff would be obligated to perform under such agreement. These unripe constitutional claims will be dismissed without prejudice.

A problematic exception lies in paragraph 3 on page 71 of the commission's order of March 20, 1997:

3. U S WEST shall provide to AT&T, within 45 days of the effective date of this Order, with maps and other data sufficient to indicate the precise location and currently unused extent of capacity of U S WEST's dark fiber[4] in New Mexico.

Unlike the other portions of the commission's arbitration order, this disclosure requirement is not dependent on completion of the approval process. The order to disclose represents an actual and concrete harm to Plaintiff's asserted interest in excluding potential competitors from "proprietary and competitively sensitive information" regarding its dark fiber. Because the commission denied U S WEST's motion for reconsideration, Plaintiff can now be accountable for failure to comply with this portion of the order. Thus, unlike the other alleged constitutional violations, this disclosure requirement is ripe for review.

Applicability of the Johnson Act

But in which forum is review of this "final" portion of the order to take place? Plaintiff contends that by its terms, the Telecommunication Act of 1996 precludes the State from providing judicial review of this "final" decision. Indeed, the Act provides that "no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement . . ." 47 U.S.C. § 252(e)(4). Thus, Plaintiff argues that it has no recourse other than to seek an injunction in federal court to prohibit enforcement of the disclosure requirement on constitutional grounds.

However, with its passage of the Johnson Act in 1934, Congress specifically limited federal jurisdiction over even constitutional claims affecting utility rate orders. The Johnson Act, 28 U.S.C. § 1342, provides as follows:

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[4] The term "dark fiber" refers to "the fiber installed under a cable sheath that is not currently connected to the electronics that make it functional." Because this cable has been "built," the dark fiber is still in an unused inventory for potential later use in telecommunications.

> The district courts shall not enjoin, suspend or restrain operation of, or compliance with, any order affecting the rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
> (2) The order does not interfere with interstate commerce; and,
> (3) The order has been made after reasonable notice and hearing; and
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

Defendants contend that the Johnson Act precludes this Court from addressing Plaintiff's constitutional challenges of the commission's arbitration order because it constitutes "an order affecting rates."

The Tenth Circuit has given the phrase "an order affecting rates" an expansive interpretation given the history of the Johnson Act. See Tennyson v. Gas Service Co., 506 F.2d 1135 (10th Cir. 1974). Tension had developed between state and federal systems in two areas: state rate-making and state tax matters.[5] The Tennyson court observed that the Johnson Act

> was intended to keep constitutional challenges to orders affecting rates out of the federal courts 'lock, stock and barrel,' or, as Professor Moore modestly puts it, to effect a 'general hands-off policy relative to state rate making.' The Act is not framed in terms of categories of plaintiffs, whether municipalities, state commissions, utilities or consumers, but in terms of enumerated conditions. Behind the Act were years of hostilities generated from jurisdiction in both the state and federal systems, removal of which was deemed desirable to the national policy. Thus the restriction imposed was far-reaching, going to jurisdiction itself.

Id. at 1138. Yet the Tenth Circuit specifically noted that the limitations on jurisdiction imposed by the Johnson Act were subject to Congressional modification. "Should it be thought desirable to

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[5] Similar to the Johnson Act, 28 U.S.C. § 1341 provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

resurrect the federal jurisdiction in favor of any particular class or group, *such is a matter for the Congress, not for this court.*" Id. (emphasis added).

I believe that this is precisely what Congress intended to do with its enactment of the Telecommunications Act of 1996. Undoubtedly, the arbitration process and resulting interconnection agreements will affect, directly or indirectly, state utility rate orders. Yet, the Act expressly prohibits state court review and vests such exclusive review authority in the federal courts. It would appear by the terms of the 1996 Act that technological advancements in the telecommunications industry over the past fifty years warrant a change in national policy authorizing limited federal intrusion into the arena of traditional rate-making authority.

Congress clearly knew that interconnection agreements affect rates, yet expressly authorized federal jurisdiction to review such agreements. By "resurrecting" federal jurisdiction under § 252 of the 1996 Act, Congress rejected the "hands-off" policy underlying the Johnson Act and instead adopted a "hands-on" role for federal courts in the specific area of interconnection between telecommunications providers. The Johnson Act's purpose of eliminating federal encroachment will not be served where, as here, federal court review of a state order affecting rates has been specifically authorized by Congress. Therefore, the rationale behind the Johnson Act would not require that I dismiss the ripe constitutional claim directly arising from the interconnection agreement process.

Even if the Johnson Act were deemed applicable, however, Defendants have not demonstrated that the fourth prong for abstention under § 1342 has been satisfied.

> In order to qualify as 'plain, speedy, and efficient,' the state remedy need only meet certain minimum procedural requirements. See Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 512-514, (1981) (construing the 'plain, speedy, and efficient' state remedy requirement of the Tax Injunction Act, 28 U.S.C. § 1341 which was modeled after the identical language in the Johnson Act). To be 'plain' the state remedy must not

> be uncertain or unclear. Id. at 517. To be 'speedy' it must not entail significantly greater delay than a corresponding procedure in federal court. See id. at 519-21. To be 'efficient' it must not require 'ineffectual activity or an unnecessary expenditure of time or energy.' Id. at 518.

Brooks v. Sulphur Springs Valley Elec. Coop., 951 F.2d 1050, 1055 (9th Cir. 1991), cert. denied, 503 U.S. 938 (1992). Defendants contend that U S WEST can take advantage of State procedures which permit someone aggrieved by a utility commission's decision to appeal alleged constitutional claims to State court. However, § 252(e)(4) of the Telecommunications Act strips State courts of the power to review the determinations of a State commission associated with telecommunications interconnection agreements. Because the availability of a state remedy is neither certain nor clear, I find that U S WEST lacks "a plain, speedy and efficient remedy" in a State forum to address the dark fiber disclosure requirement.

Other Asserted Bar to Federal Jurisdiction

Defendant Commissioners contend that the Eleventh Amendment prohibits a federal forum for claims related to the Telecommunications Act of 1996. Because I find that the Court lacks subject matter jurisdiction under the Act until the commission has approved or rejected an interconnection agreement, I need not address the Eleventh Amendment arguments as to these claims at this time. (other than dark fiber claim)

The Eleventh Amendment does not bar the § 1983 claim seeking to enjoin the Commissioners from enforcing the portion of the order requiring the dark fiber disclosure of information. Historically such claims for prospective injunctive relief have not been treated as actions against the state because the state actor is "stripped of his official or representative character" by his unconstitutional actions. See Ex Parte Young, 209 U.S. 123 (1908).

Plaintiff's Objection to Denial of a Stay

Having determined that this Court has jurisdiction over the specific § 1983 claim identified above, the objections to Chief Magistrate Judge Deaton's Order must be addressed. The Magistrate Judge denied a motion to stay the disclosure portion of the commission's arbitration order on the basis that there had been no ruling whether the federal district court had jurisdiction over the action. Now that this issue has been decided in the affirmative, the merits of U S WEST's motion to stay, which have been fully briefed by the parties, must be addressed.

Plaintiff seeks to restrain enforcement of the disclosure requirement portion of the arbitration order until the merits of its constitutional claim can be resolved. In order to obtain the injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, U S WEST must demonstrate that the following four elements are met:

(1) substantial likelihood that the movant will eventually prevail on the merits;

(2) a showing that the movant will suffer irreparable injury unless the injunction issues;

(3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and

(4) a showing that the injunction, if issued, would not be adverse to the public interest.

Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule. GTE Corp. v. Williams, 731 F.2d 676 (10th Cir. 1984) cert. denied, GTE Corp. v. Williams, 498 U.S. 998 (1990).

In determining whether such an injunction is warranted, a court must be guided by normal equitable principles and "must weigh the practicalities of the situation." Id. at 678. Because it

constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established. United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enterprise Mgt. Consul., Inc., 883 F.2d 886 (10th Cir. 1988).

The Court finds that Plaintiff has met its burden. U S WEST's disclosure of the confidential information to its potential competitors cannot be undone; the competitive advantage gained by AT&T from obtaining the precise location and currently unused extent of capacity of U S WEST's dark fiber would be difficult, if not impossible, to calculate in terms of monetary damages. As Plaintiff contends, "in the hands of a competitor, particularly AT&T with its competitive strengths and resources, the information is a roadmap to U S WEST's customers and marketing strategies and will enable AT&T to identify and precisely target such customers." Thus, the potential injury resulting from forced disclosure of the proprietary dark fiber information represents an irreparable, immediate harm to U S WEST. Similarly, Plaintiff has demonstrated that the threatened injury to it outweighs whatever damage, such as delays in the agreement approval process, the proposed injunction may cause defendants; and the injunction, if issued, would not be adverse to the public interest.

Where, as here, the other three requirements for a preliminary injunction are satisfied, "it will ordinarily be enough that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." City of Chanute v. Kansas Gas & Elec. Co., 754 F.2d 310, 314 (10th Cir. 1985) (quoting Otero Sav. and Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981). Again, U S WEST has shown that the questions going to the merits of its constitutional claim satisfy the test for obtaining injunctive relief at this time.

U S WEST contends that by imposing the immediate requirement to disclose proprietary information, the commissioners acted outside the scope of their authority. Under the Act, commissioners are to arbitrate and set prices for new competitors to purchase "network elements" from the incumbent provider. One of the statutorily-based claims is that the commission exceeded its authority by including dark fiber in the order on the basis that it falls outside the definition of "network element" because dark fiber is not currently being "used" in telecommunications.

The FCC has not yet advocated any position on the issue. Instead, just last year the FCC opted to

> decline at this time to address the unbundling of incumbent LECs' 'dark fiber.' Parties that address this issue do not provide us with information on whether dark fiber qualifies as a network element under sections 251(c)(3) and 251(d)(2). Therefore, we lack a sufficient record on which to decide this issue. We will continue to review and revise our rules in this area as necessary.

Federal Communications Commission's First Report and Order in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 at ¶ 450 (1997). As discussed previously, however, the merits of this solely *statutory* claim will not ripen until the interconnection agreement is approved or rejected by the commission.

Plaintiff further contends that the commission exceeded its authority under the Act by imposing on U S WEST, *independent of the finalization and approval of an interconnection agreement*, a very precise and detailed disclosure requirement. The commissioners are specifically directed by Congress to limit their consideration to the unresolved issues set forth in the arbitration petition and response. § 252(b)(4)(A). It is unclear if "dark fiber" was an issue raised in either the petition or response.

Assuming that it was raised in either of the documents as an unresolved issue, Defendants rely on that portion of the Act that permits a State commission to "require the petitioning party and the responding party to provide such information as may be reasonably necessary for the State commission to reach a decision on the unresolved issues."[6] § 252(b)(4)(B). Yet, the "request" in this instance constitutes a binding order of the commission and imposes a legal duty on Plaintiff to comply. The Act, however, provides that "[i]f any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, the State commission may proceed on the basis of the best information available to it from whatever source derived." Id. Thus, Plaintiff argues that the entry of such a binding disclosure order was outside the commission's subject matter jurisdiction.

The commission denied the stay now sought on the basis that U S WEST had waived its right to protect the disclosure requirement. However, lack of subject matter jurisdiction represents a defect which cannot be waived and can be raised at any time. Penteco Corp. v. Union Gas Sys., 929 F.2d 1519, 1521 (10th Cir. 1991). I find that Plaintiff has sufficiently raised questions going to lack of subject matter jurisdiction in the commission's order requiring specific, confidential disclosures that the stay is warranted to preserve a meaningful opportunity to litigate the issue on the merits. In an effort to minimize delays to the commission proceedings, Chief Magistrate Judge Deanell will be requested to contact all counsel and obtain an expedited discovery/briefing schedule on the very

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[6] "Incumbent LECs have a duty to make available to requesting carriers general information indicating the location and technical characteristics of incumbent LEC network facilities. Without access to such information, competing carriers would be unable to make rational network deployment decisions and could be forced to make inefficient use of their own and incumbent LEC facilities, with anticompetitive effects." Federal Communications Commission's First Report and Order in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 at ¶ 205 (1997).

narrow issue on which the stay is granted--whether the commissioners exceed their scope of authority under the Act by imposing the detailed disclosure requirement independent of the approval or rejection of an interconnection agreement.

An order in accordance with this opinion shall be entered.

CHIEF UNITED STATES DISTRICT JUDGE

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Assistant U.S. Attorney
U. S. Attorney's Office
District of New Mexico
Albuquerque, New Mexico

Becky—
I see
you are
on the list,
but I wanted
to make
sure you get
this, &
right away. SA.

FILED
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U.S. DISTRICT COURT
ANN ARBOR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AT&T COMMUNICATIONS OF MICHIGAN, INC.,

Plaintiff,

vs.

Case No. 97-CV-60018-AA
97-CV-60176-AA
HON. BARBARA K. HACKETT

MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN, INC., and THE COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION, in their Official Capacity and not as individuals,

Defendants.
_____/

ORDER DISMISSING CASE NO. 97-60018 AND DENYING DEFENDANT MPSC COMMISSIONERS' MOTION TO DISMISS CASE NO. 97-60176

The above-captioned cases arise under the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6) (the Act), which authorizes this court to determine whether the interconnection agreement between AT&T Communications of Michigan, Inc. (AT&T) and Michigan Bell Telephone Company d/b/a Ameritech Michigan, Inc. (Ameritech) arbitrated and approved by the Commissioners of the Michigan Public Service Commission (MPSC) complies with the Act. Now before the court is the Commissioners' motion to dismiss plaintiff's claims as to the Commissioners. For the following reasons, their motion shall be denied.

I. FACTS

Through the Telecommunications Act of 1996, Congress enacted a new subchapter of the Communications Act of 1934, 47 U.S.C. §§ 251-261, that is designed to foster "rapidly" the development of competition in local telephone markets. However, Congress recognized that incumbent monopolist providers of local telephone service, such as Ameritech, have strong economic incentives to delay and impede the introduction of competition in the local exchange markets. Hence, Congress imposed specific obligations on the incumbents, requiring them to give new competitors immediate access to the facilities they need to enter the market. Specifically, the Act mandates that potential competitors be allowed to "interconnect" with the incumbent's networks, id. § 251(c)(2); to purchase access to "unbundled elements" of those networks, id. § 251(c)(3); and, to resell services currently sold by incumbents such as Ameritech. Id. § 251(c)(4).

The Act further directs incumbents to negotiate "interconnection agreements" with new entrants to fulfill their duties under the Act, id. § 251(c)(1), and § 252 of the Act creates an important, yet voluntary, role for state commissions arbitrating and reviewing those interconnection agreements. If such negotiations are unsuccessful, either party may petition a state commission to arbitrate open issues. Id. § 252(b)(1)-(2). The Act does not require state commissions or their commissioners to participate in this new federal scheme.[1] Rather, if a state commission opts not to conduct the arbitration, the Federal Communications Commission (FCC) must do so. Id. § 252(e)(5). If a state commission

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[1]Cf. New York v. United States, 505 U.S. 144, 176 (1992) (invalidating legislative provision "compelling [states] to enact and enforce a federal regulatory program").

conducts the arbitration, it must ensure that the terms and conditions imposed upon the parties comply with the Act and the FCC's rules. Id. § 252(c)(1).

The Act instructs that agreements adopted through arbitration or negotiation be submitted to the state commission for review, and the commission may then approve the agreement or reject it if it is inconsistent with the Act. Id. § 252(e)(1)-(2). If the commission fails to act, the agreement will be deemed approved. Id. § 252(e)(4). Once a state commission has approved or rejected an interconnection agreement, "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section." Id. § 252(e)(6).

In the present case, plaintiff AT&T served defendant Ameritech with a request for negotiation pursuant to the Act on February 27, 1996. For either party to avail itself of the Act's arbitration process before a state commission, a petition for arbitration must be filed after the 135th day but before the 160th day after the date of the original negotiation request. AT&T complied with this provision and filed a petition for arbitration with the Michigan Public Service Commission on August 1, 1996. Ameritech also filed a petition for arbitration on August 2, 1996, and the MPSC subsequently consolidated the separate petitions into a single arbitration proceeding and appointed an arbitration panel to consider the issues raised by the parties.

On October 28, 1996, the arbitration panel issued its first decision and required the parties to submit exceptions to the MPSC by November 7, 1996. On November 26, 1996, the MPSC issued an order approving agreement adopted by arbitration. That order

directed that a complete copy of the interconnection agreement, as adopted by the arbitration panel and as modified by the MPSC, be filed within 10 days. On December 26, 1996, Ameritech filed a disputed version of the interconnection agreement with the MPSC. Because it was uncertain whether the MPSC's November 26, 1996, order constituted final approval of the parties' interconnection agreement, AT&T filed its first complaint in this court on January 24, 1997, which was assigned case number 97-60018.[2]

After the MPSC's November 26, 1996, order, AT&T and Ameritech filed five agreements, each of which contained disputed provisions.[3] Consequently, MPSC staff initiated discussions with AT&T and Ameritech regarding the unresolved issues. The MPSC staff then filed recommendations concerning resolution of the outstanding disagreements. AT&T and Ameritech filed responses to the recommendations, and on February 28, 1997, the MPSC issued an opinion and order adopting staff's recommendations and requiring the parties to submit a signed copy of the interconnection agreement. On March 7, 1997, AT&T and Ameritech jointly submitted a fully executed agreement. On the same date, Ameritech filed a motion for approval of the agreement.

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[2]Case no. 97-60018, however, must be dismissed because it was filed prior to the MPSC's April 4, 1997, order approving the parties' final agreement and seeks the court's premature review of the arbitration process. Although AT&T suggests that the court consolidate the two cases and "proceed on the basis of the second complaint, reviewing the Agreement as approved by the MPSC's April 4, 1997 Approval Order," the court finds no reason to maintain the first case on its docket when there is no agreement at issue in that complaint for the court to review.

[3]The five disputed agreements were submitted on December 6, 1996; December 26, 1996; January 14, 1997; January 16, 1997; and, January 29, 1997. Only the January 29, 1997, agreement was signed by both parties, but even it included disputed language.

On April 4, 1997, the MPSC issued an order approving the interconnection agreement between the parties, and on May 5, 1997, AT&T filed its second complaint, which was assigned case number 97-60176.

In its complaint, AT&T asserts that the interconnection agreement and the MPSC's order violate the Act and FCC regulations by not requiring Ameritech to provide a particular telecommunication service (Counts I and II). Counts III and IV allege a controversy between AT&T and Ameritech and request that the court resolve questions regarding the parties' rights and obligations under the agreement. AT&T named as defendants both Ameritech and the MPSC Commissioners, in their official capacity.

The MPSC Commissioners have filed a motion to dismiss plaintiff's claims against them, arguing that (1) the court lacks subject matter jurisdiction over an action against state officials; and, (2) the complaint fails to state a claim on which relief can be granted against state officials. The court now turns to the Commissioners' motion.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim on an issue of law. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, a court must "accept all of plaintiff's factual allegations as true and determine whether any set of facts consistent with the allegations would entitle the plaintiff to relief." G.M. Eng'r and Assoc., Inc. v. West Bloomfield Tp., 922 F.2d 328, 330 (6th Cir. 1990).

III. DISCUSSION

The Commissioners contend that they should be dismissed as defendants because the Act only authorizes the court to review the agreement between AT&T and Ameritech that the Commissioners arbitrated and approved to see if it complies with the Act, and that such limited authorization does not extend to jurisdiction over an action against the Commissioners. This argument lacks merit. The Act makes no mention about who is a proper party to suit. As long as nothing outside the statute prohibits naming the Commissioners as defendants, they are clearly proper parties to a proceeding which will examine whether an agreement they arbitrated and approved complies with the Act that they undertook to apply. For the reasons stated hereafter, the court finds that nothing outside the Act mandates the Commissioners' dismissal from suit. Furthermore, naming the Commissioners as defendants is essential to ensuring that AT&T receives all of the potential relief to which it is entitled, including that the MPSC properly apply the federal Act in Michigan.

The Commissioners maintain that the Tenth and Eleventh Amendments to the United States Constitution require their dismissal from suit. The specific arguments raised by the Commissioners in support of their motion are not novel. Over the course of the last year, these same arguments have been advanced throughout the nation by various state public utility commissions and rejected every time.[4] Pursuant to the reasoning expressed

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[4]See, e.g., US W. Communications, Inc. v. Public Serv. Comm'n of Utah, No. 2:97-CV-558, 1998 WL 28146 (D. Utah Jan. 23, 1998); US W. Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365 (W.D. Wash. 1997); Michigan Bell Tel. Co. d/b/a Ameritech Mich. v. Climax Tel. Co., No. 5:97-CV-197 (W.D. Mich. Feb. 13, 1998); AT&T

in these earlier decisions, this court determines that neither the Tenth nor the Eleventh Amendment bars the action brought by AT&T against the MPSC Commissioners under § 252(e)(6) of the Act.

More specifically, the court first holds that the Commissioners are not protected by the Tenth Amendment because the Act does not mandate their participation in the federal program. Rather, the Act offers states the option of implementing the regulatory scheme or declining to do so. Thus, the MPSC Commissioners voluntarily chose to act here, and absent coercion of a state's legislative processes, there can be no Tenth Amendment violation.

As to the Commissioners' Eleventh Amendment arguments, the court finds that an action for judicial review under § 252(e)(6) of the Act is not a "suit in law or equity" against the state, and therefore does not raise Eleventh Amendment concerns. Moreover, even if this case was a "suit" for purposes of the Eleventh Amendment, jurisdiction over the MPSC Commissioners would nonetheless be proper under Ex parte Young, in which the

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Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 1:97-cv-884-RCF (N.D. Ga. Feb. 11, 1998); BellSouth Telecommunications, Inc. v. Tennessee Regulatory Auth., No. 3:97-0523 (M.D. Tenn. Feb. 11, 1998); US W. Communications, Inc. v. MFS Intelenet, Inc., No. 97-857-JE (D. Or. Jan. 30, 1998); AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecommunications, Inc., No. 97-79 (E.D. Ky. Dec. 15, 1997); AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2164-17 (D.S.C. Dec. 11, 1997); AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 4:97cv262-RH (N.D. Fla. Nov. 21, 1997); AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-CV-425-BR (E.D.N.C. Nov. 20, 1997); GTE S., Inc. v. Morrison, No. 3:97CV493 (E.D. Va. Nov. 7, 1997); U.S. W. Communications, Inc. v. Hix, No. 97-D-152 (D. Colo. Oct. 29, 1997); US W. Communications, Inc. v. Thoms, No. 4-97-CV-70082 (S.D. Iowa Aug. 4, 1997); US W. Communications, Inc. v. Reinbold, No. A1-97-25 (D.N.D. July 28, 1997).

Supreme Court recognized that the Eleventh Amendment does not bar lawsuits that seek to enjoin state officials in their official capacity from prospective violations of federal law. 209 U.S. 123 (1908).[5] Contrary to the Commissioners' contention, the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), does not work to avoid the clear-cut application of Ex parte Young. Although the Court in Seminole Tribe held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young," id. at 74, the Act at issue here does not present such a detailed remedial scheme.

Furthermore, the applicability of Ex parte Young in this case is all the more clear in light of Justice Kennedy's Eleventh Amendment analysis in Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997). Affirming the "continuing validity of the Ex parte Young doctrine," Justice Kennedy emphasized that the Young rule has "special significance" when "there is no available state forum." Id. at 2034-35. There is "no state forum available to vindicate" a telecommunication carrier's claim that an interconnection agreement violates the Act. See 47 U.S.C. § 252(e)(4). Therefore, ensuring the MPSC Commissioners' prospective compliance with the Act in this forum is a proper invocation of Ex parte Young.

Moreover, even if the court were to conclude that this action implicates the Eleventh Amendment, and that the doctrine of Ex parte Young does not authorize the court to direct the Commissioners to abide by the requirements of the Act, there is yet a third ground for

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[5]The doctrine espoused in Ex parte Young applies to threatened violations of both constitutional and statutory law. See, e.g., Cory v. White, 457 U.S. 85, 89 (1982).

denying the Commissioners' motion to dismiss: The Commissioners waived the right to invoke any constitutional claims of sovereign immunity by voluntarily choosing to conduct the arbitration and implement the federal scheme set forth in §§ 251 and 252 of the Act. A state waives its Eleventh Amendment immunity by voluntarily participating in a federal program if the waiver arises from "'such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06 (1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985)). Here, the MPSC voluntarily injected itself into a regulatory scheme in the face of clear and unambiguous language that, upon completion of the arbitration and approval process, federal district court review would ensue. The "overwhelming implication" of the MPSC's conduct demonstrates a waiver of any Eleventh Amendment immunity.

The Commissioners' arguments in support of dismissal regarding the doctrines of exhaustion of administrative remedies and primary jurisdiction are equally unavailing. The Commissioners claim that the FCC, pursuant to its authority under 47 U.S.C. § 206(a), can grant the relief requested by AT&T, and that AT&T should thus be required to exhaust that remedy before the FCC, or alternatively, that this court should refer to the FCC's primary jurisdiction. However, the Eighth Circuit recently held that an action under § 252(e)(6) such as this one "is the exclusive means to attain review of state commission determinations under the Act," and that "Congress did not intend to allow the FCC to review the decisions of state commissions," because "nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements." Iowa Util. Bd. v.

FCC, 120 F.3d 753, 804 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (1998). Accordingly, the doctrines of exhaustion of remedies and primary jurisdiction do not apply here.

Finally, the MPSC Commissioners allege that the Johnson Act, 28 U.S.C. § 1342, provides additional support for the proposition that they are not proper parties to this action. The Johnson Act bars federal courts from asserting jurisdiction to "enjoin, suspend or restrain the operation of, or compliance with" state utility rate making orders when all four of the act's conditions are met. The first condition under the Johnson Act requires that jurisdiction be based solely on diversity of citizenship or federal constitutional grounds. However, AT&T's challenge to the MPSC's order arises under a federal statute. Second, the Johnson Act applies only if "[a] plain, speedy and efficient remedy" is available in state court. Here, the Telecommunications Act explicitly bars state courts from determining whether interconnection agreements comply with the Act. 47 U.S.C. § 252(e)(4). Because at least two of its requirements are not satisfied, the Johnson Act has no application to this case.

IV. CONCLUSION

For the reasons stated above, defendant MPSC Commissioners' motion to dismiss hereby is DENIED.

SO ORDERED.

BARBARA K. HACKETT
United States District Judge

Dated: March 19, 1998.

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
'03 MAR 30 PM 2:22
GARY D. MCFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GTE MIDWEST INCORPORATED,

Plaintiff,

vs.

ROD JOHNSON, Chairman; LOWELL C. JOHNSON, Commissioner; FRANK E. LANDIS, Commissioner; ANNE C. BOYLE, Commissioner; and DANIEL G. URWILLER, Commissioner; (In Their Official Capacities as Commissioners of the Nebraska Public Service Commission),

and

AT&T COMMUNICATIONS OF THE MIDWEST, INC.,

Defendants.

4:97CV3218

MEMORANDUM AND ORDER

AT&T COMMUNICATIONS OF THE MIDWEST, INC.,

Plaintiff,

vs.

GTE MIDWEST INCORPORATED; THE NEBRASKA PUBLIC SERVICE COMMISSION; AND ROD JOHNSON, CHAIRMAN; LOWELL JOHNSON; FRANK E. LANDIS; ANNE E. BOYLE; and DANIEL G. URWILLER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NEBRASKA PUBLIC SERVICE COMMISSION,

Defendants.

4:97CV3221

MEMORANDUM AND ORDER

GTE MIDWEST INCORPORATED, Plaintiff, vs. ROD JOHNSON, Chairman; LOWELL C. JOHNSON, Commissioner; FRANK E. LANDIS, Commissioner; ANNE C. BOYLE, Commissioner; and DANIEL G. URWILLER, Commissioner; (In Their Official Capacities as Commissioners of the Nebraska Public Service Commission), and WESTERN WIRELESS CORPORATION, Defendants.	)	4:97CV3224 MEMORANDUM AND ORDER

AT&T COMMUNICATIONS OF THE MIDWEST, INC., Plaintiff, vs. U S WEST COMMUNICATIONS, INC., THE NEBRASKA PUBLIC SERVICE COMMISSION and THE COMMISSIONERS OF THE NEBRASKA PUBLIC SERVICE COMMISSION in their Official Capacity, Defendants.	)	4:97CV3286 MEMORANDUM AND ORDER

The plaintiffs in the above-captioned cases seek review of various interconnection agreements approved by the Nebraska Public Service Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"). Specifically, the plaintiffs seek a declaration that various provisions of the agreements violate the Act and Federal Communications Commission

("FCC") regulations and request that this court enjoin the defendants from enforcing any portions of the agreements that are inconsistent with the declaratory relief sought.

Pending before the court in each of the above cases are motions to dismiss filed by the Nebraska Public Service Commission and its Commissioners ("state defendants") which challenge this court's jurisdiction over the subject matter of this action and the state defendants under the Eleventh Amendment to the United States Constitution. (Filings 18 & 20 in 4:97CV3218; Filings 15 & 16 in 4:97CV3221; Filing 13 in 4:97CV3224; Filings 12 & 27 in 4:97CV3286.) On January 26, 1998, this court allowed the United States of America and the FCC to intervene for the limited purpose of addressing the state defendants' challenge to this court's jurisdiction over these actions. (Filing 34 in 4:97CV3218; Filing 32 in 4:97CV3221; Filing 25 in 4:97CV3224; Filing 19 in 4:97CV3286.) After receipt of the intervenors' briefs and supplemental indexes regarding the pending motions to dismiss, such motions are now ripe for the court's consideration.

For the reasons articulated by Chief Judge William G. Cambridge in US West Communications, Inc. v. Boyle, et al., No. 8:97CV446, Memorandum and Order (D. Neb. Feb. 19, 1998), I shall deny the state defendants' motions to dismiss. Id. (Nebraska Public Service Commission and its members not entitled to dismissal on Eleventh Amendment grounds because by participating in the interconnection agreement arbitration and approval process under the Telecommunications Act of 1996, the Commission and its members

consented to review in federal district court; therefore, State of Nebraska waived its Eleventh Amendment immunity). See also U.S. West v. Anderson, et al., No. CV 97-9-H-CCL, Order (D. Mont. Jan. 30, 1998) (defendant members of state public service commission waived claim to sovereign immunity when board members arbitrated disputed issues in interconnection agreement instead of leaving dispute to FCC for resolution); GTE Midwest Inc. v. Thoms, et al., No. 4-97-CV-70116, Memorandum Opinion and Ruling Denying Board Members' Motion to Dismiss (S.D. Iowa Aug. 4, 1997) (court had jurisdiction over members of state utility board--and board itself if it had been sued--because state waived Eleventh Amendment immunity when it chose to arbitrate interconnection agreements that are exclusively reviewable in federal court under the Telecommunications Act of 1996); U.S. West Communications, Inc. v. Reinhold, et al., No. A1-97-25, Memorandum and Order (D.N.D. July 28, 1997) (members of state public service commission waived Eleventh Amendment immunity when its members accepted regulatory authority and approved interconnection agreement under the Telecommunications Act of 1996, which mandates exclusive federal judicial review of interconnection agreements); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., et al., No. 1:97-cv-884-RCF, Order (N.D. Ga. Feb. 11, 1998) (same); BellSouth Telecommunications, Inc. v. Tennessee Regulatory Authority, et al., No. 3:97-0523 Memorandum and subsequent Order (M.D. Tenn. Jan. 27 & Feb. 11, 1998) (same); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., et al., No. 1:97-cv-1318-RCF, Order (N.D. Ga. Feb. 11, 1998) (same); U S West

Communications, Inc. v. MFS Intelenet, Inc., et al., No. 97-357-JE, Opinion and Order (D. Ore. Jan. 30, 1998) (same); US West Communications, Inc. v. Public Service Commission of Utah, et al., 1998 WL 28146 (D. Utah Jan. 23, 1998) (same); AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., et al., Civil Action No. 97-79, Memorandum Opinion and Order (E.D. Ky. Dec. 15, 1997) (same); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., et al., Nos. 3:97-2164-17 & 3:97-2388-17 (D.S.C. Dec. 11, 1997) (same); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., et al., No. 5:97-CV-405-BR, Order (E.D.N.C. Nov. 20, 1997) (same); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., et al., No. 5:97-CV-425-BR, Order (E.D.N.C. Nov. 20, 1997) (same); GTE South, Inc. v. Morrison, et al., No. 3:97CV493, Order (E.D. Va. Nov. 7, 1997) (same); U.S. West Communications, Inc. v. Hix, et al., No. 97-D-152 (D. Colo. Oct. 29, 1997) (same); US West Communications, Inc. v. TCG Seattle, et al., 971 F. Supp. 1365 (W.D. Wash. July 24, 1997) (same).

Accordingly,

IT IS ORDERED:

1. The motions to dismiss filed by the Nebraska Public Service Commission and its commissioners based on the Eleventh Amendment (Filings 18 & 20 in 4:97CV3218; Filings 15 & 16 in 4:97CV3221; Filing 13 in 4:97CV3224; Filings 12 & 27 in 4:97CV3286) are denied;

2. In light of the amended answer, counterclaim, and cross-claim filed by U S WEST Communications, Inc., in 4:97CV3286, the

motion to dismiss (filing 11) the cross-claim contained in U S WEST's original answer, counterclaim, and cross-claim is denied as moot;

3. All motions for oral argument on the pending motions to dismiss (Filing 23 in 4:97CV3218; Filing 15 in 4:97CV3224) are denied as moot.

DATED this 30th day of March, 1998.

BY THE COURT:

Richard G. Kopf
United States District Judge

motion to dismiss (filing 11) the cross-claim contained in U S WEST's original answer, counterclaim, and cross-claim is denied as moot;

3. All motions for oral argument on the pending motions to dismiss (Filing 23 in 4:97CV3218; Filing 15 in 4:97CV3224) are denied as moot.

DATED this 30th day of March, 1998.

BY THE COURT:

Richard G. Kopf
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

AT&T Communications of the Midwest, Inc.,

Plaintiff,

vs.

Contel of Minnesota, Inc., d/b/a GTE Minnesota and MPUC Commissioners,

Defendants.

File No. 97-901 (ADM/JGL)

MEMORANDUM OPINION AND ORDER

US WEST Communications, Inc.

Plaintiff,

vs.

Gervey et al., MPUC, AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company, Inc.,

Defendants.

File No. 97-913 (ADM/JGL)

AT&T Communications of the Midwest, Inc.,

Plaintiff,

vs.

US WEST Communications, Inc., and MPUC Commissioners,

Defendants.

File No. 97-917 (ADM/JGL)

FILED MAY 01 1998
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTERED
DEPUTY CLERK'S INITIALS

MCI Telecommunications Corp., et al.,

Plaintiffs,

File No. 97-919 (ADM/JGL)

vs.

US West Communications, Inc., MPUC and Garvey et al.,

Defendants.

US WEST Communications, Inc.,

Plaintiff,

File No. 97-1921 (ADM/JGL)

vs.

Garvey et al., MPUC, OCI Communications, Inc. and KMC Telecom, Inc.,

Defendants.

US WEST Communications, Inc.,

Plaintiff,

File No. 97-1963 (ADM/JGL)

vs.

Garvey et al., MPUC, Triad Minnesota L.P., Cellular Mobil Systems of St. Cloud Minnesota, L.L.P., and Sprint Spectrum, L.P.,

Defendants.

US WEST Communications, Inc.,

Plaintiff,

File No. 97-2179 (ADM/JGL)

vs.

Garvey et al., MPUC, and Sprint Communications Company, L.P.,

Defendants.

US WEST Communications, Inc.,

Plaintiff,

File No. 98-914 (ADM/JGL)

vs.

MPUC, Garvey et al., and AT&T Wireless Services, Inc.,

Defendants.

Each of these actions brought pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), 47 U.S.C. § 252(e)(6), seeks judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). In each case, the Plaintiffs have named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC. The motions presently before the Court include: the MPUC's motions to dismiss based on sovereign immunity in 97-901, 97-913, 97-917, 97-919, 97-2179, and 98-914; US WEST's motion for preliminary injunction in 97-913; MFS' motion to dismiss in 97-913; and Sprint's motion to dismiss in 97-2179. In addition to these motions, this Order will also address

the proper standard of review for these actions.

I. Background

Congress enacted the Telecommunications Act, in part, "to erode the monopolistic nature of the local telephone industry" by making local phone service providers ("incumbent local exchange carriers" or "incumbent LECs") facilitate competing companies' entry into local phone markets. Iowa Utilities Bd. v. F.C.C., 120 F.3d 753, 791 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (U.S. Jan. 26, 1998). The Act obligates an incumbent LEC: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it; (2) to provide competing carriers with access to elements of the local networks on an unbundled basis; and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service. Id. In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiations and arbitration. 47 U.S.C. § 252. When a competing carrier seeks interconnection, services or network elements from an incumbent LEC, both parties have an obligation to negotiate in good faith the terms and conditions of an agreement. § 252(c)(1), 252 (a)(1). During the negotiations, if necessary, either party "may petition a State commission to arbitrate any open issues." § 252(b)(1). An agreement adopted pursuant to either negotiation or arbitration is then submitted to the State commission, which approves or rejects the agreement, "with written findings as to any deficiencies." § 252(e)(1). Any party aggrieved by the State commission's decision may bring an action in federal court to determine whether the agreement or statement meets the requirements of the Act. § 252(e)(6). If a State commission opts not to fulfill its role under the Act, then the Federal Communication

Commission ("F.C.C.") assumes the State commission's responsibilities. § 252(e)(5).

II. MPUC's Motion to Dismiss

The MPUC has brought a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (2) in actions 97-901, 97-913, 97-917, 97-919, 97-2179, and 98-914, arguing that the Eleventh Amendment bars these suits.[1] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against on of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The Supreme Court has determined that the Amendment applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355 (1974). State immunity extends to state agencies and state officials acting on behalf of the state. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-46, 113 S.Ct. 684, 687-89 (1993).

The Eleventh Amendment bar to suits is not, however, absolute. Hankins v. Finnel, 964 F.2d 853, 856 (8th Cir. 1992) (citing Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299,

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[1] Nearly all of the federal district courts that have addressed the issue have determined that the Eleventh Amendment does not act as a bar to suits against State commissions under the Telecommunications Act. See, e.g., US WEST Communications, Inc. v. TCG Seattle, 971 F.Supp. 1365, 1368 (W.D. Wash. 1997); US WEST Communications, Inc. v. Serna, Civ. No. 97-124 JP/WGH, slip op. at 3-7 (D.N.M. Mar. 31, 1998); US WEST Communications, Inc. v. Boyle, No. 4:97CV448, slip op. at 5 (D. Neb. Feb. 1998); GTE Florida Inc. v. Johnson, No. 4:97cv234-RH, slip op. at 5-6 (N.D. Fla. Nov. 21, 1997). The United States District Court for the District of Maryland did find that the Eleventh Amendment barred an Ex parte Young action brought to vindicate rights under the Act. MCI Telecommunications Corp. v. Frisby and Bell Atlantic-Maryland, 1998 WL 138680 (D.Md.). However, unlike the other district courts that have considered the matter, the District Court of Maryland did not address the issue of whether a suit could be brought pursuant to § 252(e)(6) of the Act. Id. at *3.

305, 110 S.Ct. 1868, 1873 (1990)). The Eleventh Amendment neither prohibits suits when a state waives its immunity and consents to suit in federal court, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985), nor when the suit seeks prospective relief from a state official allegedly acting in violation of federal law. Puerto Rico Aqueduct, 506 U.S. at 144-46, 113 S.Ct. at 683-85.

i. State Waiver

A State may consent to a suit against it in a federal court but the State's consent to the suit must "be unequivocally expressed." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907 (1984) (citation omitted). There are three methods by which a state may waive its sovereign immunity: 1) expressly in writing, in which case the waiver must be stated in the most clear language; 2) implicitly in writing, in which case the implication of waiver from the text must leave no room for any other construction; or 3) through conduct. Hankins, 964 F.2d at 856 (quoting Feeney, 495 U.S. at 305, 110 S.Ct. At 1873). Other circuits have found waiver through conduct when a state voluntarily participates in a federal statutory program for which Congress has a waiver of immunity requirement. See Premo v. Martin, 119 F.3d 764, (9th Cir. 1997), cert. denied, 118 S.Ct. 1163 (1998); Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ., 772 F.2d 1123, 1137-38 (3d Cir. 1985).

In the 1996 Telecommunications Act, Congress permits the State to opt out of the Act's regulatory process:

> (5) Commission to act if State will not act
>
> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90

days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5). By providing for this alternative method of decision making, Congress acknowledged that the State can decline involvement in the statutory scheme. Because the State can opt out, any decision on its part to participate in the process is voluntary.

In the Act, Congress placed exclusive jurisdiction for review of the State commissions' determinations in the federal courts: "No State court shall have jurisdiction to review the action of a State commission . . ." 47 U.S.C. § 252(e)(4). The Telecommunications Act provides that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). Congress thereby notified the States that the review in federal courts of State commissions' decisions under the statutory scheme requires the States to waive sovereign immunity as a condition of participation in the regulatory process.

MPUC was not required by the statute to regulate the interconnection agreement. It chose to take an active role in the process. By choosing an active role, it waived its sovereign immunity implicitly through its conduct pursuant to the clear requirement of the Act, and therefore the Eleventh Amendment does not act as a bar to these suits.

ii. Ex parte Young

Assuming arguendo a determination that the State had not waived its Eleventh Amendment immunity, these actions could still proceed under the doctrine of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908). Under Ex parte Young and its progeny, suits brought against

state officials in their official capacities that seek prospective, injunctive relief "in order to end a continuing violation of federal law" are not treated as actions against the State for purposes of the Eleventh Amendment. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73, 116 S.Ct. 114, 1132 (quoting Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985)); see Edelman v. Jordan, 415 U.S. 651, 677, 94 S.Ct. 1347, 1362 (1974). "[T]he Young doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst, 465 U.S. at 105, 104 S.Ct. at 910 (quoting Ex parte Young, 209 U.S. at 160, 285 S.Ct. at 454)). The present cases fall clearly within the classic, well-established Young doctrine. The Plaintiffs seek to vindicate federal rights guaranteed under the Telecommunications Act. The relief sought is limited to prospective, injunctive relief, the future compliance with the Act. The suits are directed at state officials, the MPUC commissioners, in their official capacities. All criteria for the Young doctrine are met.

The MPUC relies on the recent Supreme Court decisions, Seminole Tribe and Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997),[2] to support its argument that the Ex parte

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[2]The MPUC does not expressly rely upon Coeur d'Alene Tribe, except to the extent that it reaffirms Seminole Tribe. The MPUC is correct that in Coeur d'Alene Tribe, the Supreme Court reaffirmed the holding of Seminole Tribe. Coeur d'Alene Tribe, 117 S.Ct. at 2034. However, any additional effect of the Coeur d'Alene Tribe decision on the Ex parte Young doctrine is limited. A divided Court found that although "[a]n allegation of an on-going violation of federal law where requested relief is prospective is ordinarily sufficient to invoke the Young fiction," it is not sufficient in the unique case where the suit "is the functional equivalent of a quiet title action." Id. at 2040. The Court found that the possible effect of the suit, virtually eliminating the State's control of certain public land, would be at least as intrusive as "any conceivable retroactive levy upon funds." Id. at 2043. In reaching its decision, the Court took note of the strong ties between a sovereign entity and its land. Id. Notwithstanding the MPUC's assertion that the State has a long-standing tradition of regulating local telephone service, no

Young doctrine is inapplicable to the present cases. The MPUC's reliance is misplaced. In Seminole Tribe, the Court found that Congress could not abrogate the States' Eleventh Amendment immunity under the Indian Commerce Clause. Seminole Tribe, 517 U.S. at 72-73, 116 S.Ct. at 1131-32. The Court also determined that the Ex parte Young doctrine could not be applied in the case because "[t]he situation . . . [was] sufficiently different from that giving rise to the traditional Ex parte Young action so as to preclude the availability of that doctrine." Seminole Tribe, 517 U.S. at 73, 116 S.Ct. at 1132. The Court stated that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state office based upon Ex parte Young." Seminole Tribe, 517 U.S. at 74, 116 S.Ct. at 1132. The Court reasoned that if an aggrieved party could bring an action under Ex parte Young, the complex remedial scheme designed by Congress in the Indian Gaming Regulation Act ("IGRA") would be superfluous. Seminole Tribe, 517 U.S. at 75, 116 S.Ct. at 1133. The Court expressly noted that its holding did not inhibit Congress' ability to "authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme." Id. at n.17.

In the Telecommunication Act, Congress limited the remedial scheme to the passage in section 252 which provides that "[i]n any case in which a State commission makes a determination under this section any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). As the

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possible outcome of the present actions could rise to the level of intrusiveness of either a quiet title action or a retroactive levy on state funds.

Eighth Circuit noted subsection 252(e)(6) "is the exclusive means to attain review of state commission determinations under the Act." Iowa Utilities Board, 120 F.3d 753, 804 (8th Cir. 1997). This is precisely the type of limited remedial scheme by which Congress can still create federal jurisdiction under Ex parte Young following Seminole Tribe. An Ex parte Young action brought under the Telecommunications Act would not make the remedial scheme provided by the Act superfluous, but would rather fulfill it. Furthermore, throughout the Telecommunications Act, Congress references the State commission, and not the State, see, e.g., § 251(c)(3), 252(b)(1), 252 (a)(4), indicating that Congress contemplated an action being brought against the State commission under the Ex parte Young theory.[3] Seminole Tribe does not bar an Ex parte Young action brought pursuant to the Telecommunication Act. In the Act, Congress effectively authorized such a cause of action.[4]

III. Standard of Review

This Court has previously determined that the scope of its review in these cases is limited to appellate review of the record established before the MPUC. US WEST Communications,

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[3]The repeated reference to the State commission in the Telecommunications Act can be contrasted with the IGRA, the statute at issue in Seminole Tribe, "which repeatedly refers exclusively to 'the State.'" Seminole Tribe, 517 U.S. at n.17, 116 S.Ct. at n.17. IGRA's repeated reference to the State as the actor implied that an Ex parte Young action would be inappropriate under the IGRA because a suit against a state official or group of officials would not provide the necessary remedy. Id.

[4]The MPUC concedes that review provided for under the § 252(e)(6) does not violate the Johnson Act. Because the Court is limiting itself to the review provided for under § 252(e)(6), the Court will not address the parties' arguments concerning the Johnson Act.

Furthermore, because the Court finds that the Eleventh Amendment does not act as a bar to this action based on both the State's waiver of its immunity and the Ex parte Young doctrine, AT&T's argument that these actions are not "suits" against the State within the meaning of the Eleventh Amendment will also not be addressed.

Inc. v. Garvey, No. 97-913, slip op. at 3 (Feb. 11, 1998). Having decided the appropriate scope of the review, the Court must now determine the applicable standard of review.[3] The standard of review issue may be further delineated into two subparts: 1) the review appropriate for questions of law and 2) the review appropriate for factual findings and mixed questions of law and fact. The majority of the federal district courts that have addressed the question of the appropriate standard of review under § 252(e)(6) of the Act have determined that a State commission's interpretation of federal law is subject to *de novo* review while a State commission's factual determinations as well as its application of law to facts is reviewed under the arbitrary and capricious standard. See, e.g., US WEST Communications, Inc. v. MFS Intelenet, No. C97-222WD, slip op. at 3-4 (W.D. Wash. Jan. 12, 1998); GTE South, Inc. v. Morrison, No. 3:97CV493, slip. op. at 3-4 (E.D. Va. Dec. 17, 1997).

i. Questions of Law

Although the Eighth Circuit has not ruled conclusively concerning the appropriate level of review to be given state agencies' interpretations of federal law, other courts of appeal have determined that state agencies' interpretations of federal laws should be reviewed *de novo* rather than under the deferential standard given to federal agencies. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997); Ritter v. Cecil County of Hous. & Comm. Dev., 33 F.3d

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[3]The Telecommunications Act is silent as to what standard of review should be applied under § 252(e)(6). When a federal statute is silent as to the appropriate standard of review, a court would generally apply the Administrative Procedure Act when reviewing an agency determination. Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Board, 794 F.2d 1339, 1342 (8th Cir. 1986). However, as the parties acknowledge, the APA is inapplicable to the present cases, because the APA does not apply to state agencies. 5 U.S.C. § 701(b)(1).

325, 327 (4th Cir. 1994); Aminoil (PSI.) v. Colorado Dep't of Social Srvs., 879 F.2d 789, 795 (10th Cir. 1989), cert. denied, 496 U.S. 935 (1990); Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989). These four courts of appeal have all concluded that the reasons for deferring to federal agencies' interpretations of federal law are inapplicable to state agencies. For example, deference is given to federal agencies, in part, because "their activities are subject to continuous congressional supervision by virtue of Congress's powers of advice and consent, appropriation, and oversight." Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989). State agencies are not subject to the same oversight by Congress. Deference is also given to a federal agency because reliance on one centralized agency's determinations promotes uniformity of law. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83 (1984); Turner, 869 F.2d at 141. In passing the Telecommunications Act, Congress apparently sought a coherent nationwide interpretation of the Act, because it placed review of commissions' decisions exclusively within the jurisdiction of the federal courts rather than permitting the various States' courts to review the State commissions' determinations. See 47 U.S.C. § 252(e)(4), (e)(6). Granting deference to the interpretations of federal law promulgated by up to fifty state commissions would undermine a uniform construction of the Act rather than promote it. Finally, deference is given to a federal agency because of its expertise and experience with the relevant statutory provisions. See Chevron, 467 U.S. at 844, 104 S.Ct. at 2782-83; Turner, 869 F.2d at 141; Kenaitze, 860 F.2d at 316. Because the Telecommunications Act was only recently enacted, none of the State commissions have any experience with the statute itself or with the underlying purpose of the statute, the opening up of local phone markets.

Because the reasons for granting deference to federal agencies' interpretations of federal law are logically inapplicable to the MPUC, the Court concludes that the MPUC's interpretation of federal law must be subject to *de novo* review.

ii. Findings of Fact and Application of Law to Fact

Although *de novo* review is appropriate for questions of law, a state agency's determinations as to questions of fact as well as mixed questions of law and fact are entitled to greater deference. See Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519, 529 (8th Cir. 1993). In Arkansas Medical Society, the Eighth Circuit applied the arbitrary and capricious standard as enunciated by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971), when reviewing the Arkansas Department of Human Services' rate-making decision under the federal Medicaid statue. Arkansas Medical Society, 6 F.3d at 529. Principles of judicial discretion are strongest where Congress has entrusted the administrative body with primary jurisdiction over the precise matters the court is asked to decide. See Chevron, 467 U.S. at 844, 104 S.Ct. at 2782. Under the Telecommunications Act, the MPUC has original jurisdiction over negotiated and arbitrated interconnection agreements, including the power to set the prices which may be charged by an incumbent local exchange carrier. See 47 U.S.C. § 252; Iowa Utilities Bd, 120 F.3d at 794. Therefore, as was done with the Arkansas DHS, this Court will apply the arbitrary and capricious standard of review in its analysis of the MPUC's factual determinations as well as its application of law to fact.

"Review under the arbitrary and capricious standard is narrow, and a court may not substitute its judgment for that of the agency." Id. Although the standard is deferential, a court

must still engage in a "substantial inquiry," id. (quoting Overton Park, 401 U.S. at 415, 91 S.Ct. at 823), and insure that the agency articulates a "rational connection between the facts found and the choice made." Id. (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105, 103 S.Ct. 2246, 2256 (1983)). A court must determine whether the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983).

IV. Motion for Preliminary Injunction and Other Motions to Dismiss

As was previously noted in the Court's letter dated April 1, 1998, US WEST's Motion for Preliminary Injunction in 97-913, MFS' Motion to Dismiss in 97-913, and Sprint's Motion to Dismiss in 97-2179 will be denied at this juncture.

V. Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. The MPUC's Motion to Dismiss in 97-901, 97-913, 97-917, 97-919, 97-2179, and 98-914, is DENIED.
2. US WEST's Motion for Preliminary Injunction in 97-913 is DENIED.
3. MFS' Motion to Dismiss in 97-913 is DENIED.
4. Sprint's Motion to Dismiss in 97-2179 is DENIED.

DATED: April 30, 1998.

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

RECD OSBORN MALEDON P.A.

JUN - 3 1998

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JUN 1 - 1998

CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY ___DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US WEST COMMUNICATIONS, Plaintiff, vs. RENZ D. JENNINGS, MARCIA WEEKS, CARL KUNASEK, as members of the Arizona Corporation Commission, and TCG PHOENIX, Defendants,	CIV-97-0026-PHX-RGS CIV-97-0027-PHX-RGS CIV-97-0394-PHX-RGS CIV-97-1723-PHX-RGS CIV-97-1856-PHX-RGS CIV-97-1927-PHX-RGS CIV-97-2025-PHX-RGS
MCI TELECOMMUNICATIONS CORPORATION and MCI METRO ACCESS TRANSMISSION SERVICES, INC., Plaintiffs, vs. US WEST COMMUNICATIONS, INC., THE ARIZONA CORPORATION COMMISSION and CARL KUNASEK, JIM IRVIN and RENZ JENNINGS, in their official capacities as Commissions of the Arizona Corporation Commission, Defendants,	CIV-97-1856-PHX-RGS

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AT&T COMMUNICATIONS OF MOUNTAIN STATES, INC., Plaintiff, vs. US WEST COMMUNICATIONS, INC., THE ARIZONA CORPORATION COMMISSION and CARL KUNASEK, RENZ JENNINGS AND JIM IRVIN as members of the Arizona Corporation Commission, Defendants.	CIV-97-1927-PHX-RGS O R D E R

The Arizona Corporation Commission and three of its Commissioners have filed a motion to dismiss the Complaint filed by MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. (collectively, "MCI") in CIV-97-1856-PHX-RGS and AT&T Communications of Mountain States, Inc., ("AT&T") in CIV-97-1856-PHX-RGS, which have been consolidated with other cases.

The Johnson Act

The Commission contends that the complaints should be dismissed pursuant to the Johnson Act, 28 U.S.C. § 1342, which provides in relevant part:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and
(2) The order does not interfere with interstate commerce; and,
(3) The order has been made after a reasonable notice and hearing; and
(4) A plain, speedy and efficient remedy may be had in the courts of such State.

The Court finds that the Johnson Act does not operate to deprive the Court of jurisdiction. The Telecommunications Act clearly gives the Court jurisdiction over MCI's and AT&T's claims that the Commission's Order violates the Act. See 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section."). Thus, the Court's jurisdiction is not based solely on diversity of citizenship or repugnance of the order to the Federal Constitution and, therefore, the Johnson Act does not apply on its face.

Furthermore, a plain, speedy and efficient remedy may not be had in the Arizona courts because the Telecommunications Act specifically bars state courts from determining whether interconnection agreements comply with the requirements of the Act. See 47 U.S.C. § 252(e)(4).

Thus, the Johnson Act does not bar consideration of MCI's or AT&T's claims.

Eleventh Amendment Immunity

Both the Commissioners and the Commission contend that they are entitled to Eleventh Amendment immunity. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although not apparent on its face, the Eleventh Amendment also bars suits brought by a State's own citizens. Idaho v. Coeir d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2033 (1997).

Individual State Actors

AT&T and MCI contend that the Commissioners can be sued pursuant to the doctrine set forth in Ex Parte Young, 209 U.S. 123 (1908). Ex parte Young created an exception to the Eleventh Amendment. Under this doctrine, a state official sued in his or her official capacity can be sued in federal court if the suit seeks only prospective relief. See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993). The Ex Parte Young doctrine "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." Id.

The Commissioners do not dispute the contention that the present suits seek prospective relief. Rather, they contend that the Ex Parte Young doctrine does not apply because they "are not

authorized to act individually to issue final orders in arbitration proceedings under § 252 of the 1996 Act," and thus these suits are really a suit against the State of Arizona and the Commission. (Motion #66 at p. 8, lines 23-25). However, the Commissioners have failed to cite a single case that supports this proposition. In fact, Ex parte Young is routinely applied in cases brought against individual members of a collective body. See, e.g., Exxon Corp. v. Fischer, 607 F.2d 842, 845 (9th Cir.), amended on other grounds, 817 F.2d 1429 (9th Cir. 1987); Cornwall v. California Board of Barbering & Cosmetology, 962 F.Supp. 1260, 1266 (S.D. Ca. 1997) (upholding Ex parte Young action against individual members of state board).

The Commissioners cite Seminole Tribe of Florida v. Florida, 517 U.S. 609, 116 S.C.t 1114 (1996) in support of their argument that Ex parte Young does not apply. In that case, the Supreme Court held that the Ex parte Young doctrine was inapplicable to the plaintiff's suit against the Governor of Florida based upon case law holding that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aide those limitations and permitting an action against a state officer based upon Ex parte Young." 116 S.Ct. at 1132. In the Seminole Tribe case, the Indian Gaming Regulatory Act set forth a detailed remedial scheme for its enforcement. Under that scheme, if a federal court were to find that the State failed to negotiate a gaming compact in good faith, the only remedy

prescribed was an order directing the State and the tribe to conclude a compact within 60 days. If either of the parties disregarded the Order, the only sanction was that each party was required to submit a proposed compact to a mediator, who was to select the one that best embodies the Act. If the State failed to accept the compact chosen by the mediator, the only sanction was that the mediator was to notify the Secretary of the Interior, who was then required to prescribe regulations governing gaming on the land at issue. The Supreme Court explained that if the Act could be enforced pursuant to a suit brought under Ex Parte Young, the remedial provisions of the act "would be superfluous; it is difficult to see why an Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under Ex parte Young." Id.

The Court finds Seminole Tribe to be inapposite, as the Telecommunications Act does not set forth a detailed remedial scheme that could be thwarted if individual state actors could be sued. The Court finds this case to be much more akin to other cases in which Ex parte Young has been held to apply and to allow a suit for prospective injunctive relief to be brought against a state actor. In particular, at least three district courts confronted with the identical issue raised here have held that Ex Parte Young applies to suits brought against state public utility commissioners pursuant to the Telecommunications Act. See U.S. West v. Thomas, No. 4-97-CV-70082 (S.D. Iowa, Aug. 4, 1997); U.S. West v. Hix, No. 97-D-152 (D. Colo., Oct. 29, 1997); U.S. West v.

Heintzold, Civil No. A1-97-25 (D.N.D., July 28, 1997).

The Commission

AT&T and MCI contend that the Commission has waived its Eleventh Amendment immunity by participating in the arbitration scheme established by Congress and set forth in the Act. A state waives its Eleventh Amendment immunity where "it opts to participate in a federal program in which Congress clearly has conditioned participation on such waivers." Tennessee Dept. of Human Servs. v. United States Dept. of Education, 979 F.2d 1162, 1166 (6th Cir. 1992). See also Barfield v. Blackwood, 7 F.3d 1140, 1145 (4th Cir. 1993); BV Eng'g v. UCLA, 585 F.2d 1394, 1398 (9th Cir. 1988). The Supreme Court itself has recognized that a state can waive its immunity by participating in a federal program. See Atascadro State Hospital v. Scanlon, 473 U.S. 234, 238 and 246-247 n.1 (1985).

Under the Telecommunications Act, the Commission had the option[1] to not participate in the arbitration process. See 47 U.S.C. § 252(e)(5) (providing for FCC jurisdiction over interconnection proceedings "[i]f a State commission fails to act to carry out is responsibility under this section."). If a State

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[1] The Commission's contention that its choice is not voluntary because "Congress does not have the authority to compel states to choose between exercising their sovereign rights to regulate intrastate telecommunications matters . . . or retaining their Eleventh Amendment immunity," CIV-97-1927 Motion at 10, is unavailing. As AT&T notes, "the state of Arizona has no sovereign right as against the United States, to regulate intrastate telecommunications" because "[t]elecommunications is the lifeblood of commerce, and even intrastate regulation is well within Congress' Commerce power." AT&T Response at 10 (citing Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

commission decides to carry out its responsibility under the Act, the Commission is on express notice that its action will be reviewable in federal court, and federal court only. See 47 U.S.C. § 252(e)(6). As the Court in U.S. West Communications, Inc. v. TCG Seattle, 971 F.Supp. 1365 (D. Wash. 1997) explained:

> The "overwhelming implication" of this statutory structure is that Congress conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted - but not required - to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress' invitation, its actions will be reviewable in federal court. There is "no room for any other reasonable construction" of the statue. Port Authority [Tran-Hudson v. Kaeney] 495 U.S. 299, 305 (1990). By participating in the arbitration and approval process, [a State] consent[s] to review of its actions.

TCG, 971 F.Supp. at 1369.

Because the Court finds that the Commission has waived its sovereign immunity, the Court need not address the issue of whether Congress has abrogated States' immunity and whether it had the power to so do.

Furthermore, all four federal district courts to address this issue have held that a State commission waives its immunity by voluntarily participating in the arbitration process set forth in section 252.

Finally, for the reasons set forth in the responsive briefs, the Court finds that the Commission's Tenth Amendment arguments must fail.

Nominal Party Status

The Commission also contends that the Court should award it nominal party status. The Commission cites no authority for its propoulition that it is entitled to nominal party status, and the Court itself is aware of none. The Commission contends that nominal party status will prevent it from being subjected to an award of damages, costs or fees. This argument is unavailing, however, because the MCI and AT&T have stated on the record that they do not intend to pursue any monetary relief from the Commission. Thus, the Commission's request for nominal party status will be denied.

Ripeness

The Commission seeks to dismiss on ripeness grounds Counts V, VI and VII of MCI's operative complaint in CIV-97-1856-PHX-RGS.

With respect to Count V, MCI admits that the rates for unbundled loops are interim rates and that the Commission has provided for a true-up upon the establishment of permanent rates. Moreover, MCI has suggested that the Court need not address this claim until after the permanent rates: an odd position to take in conjunction with the position that this claim is ripe for review. Furthermore, MCI's reliance on Southern California Edison Co. v. FERC, 770 F.2d 779, 784 (9th Cir. 1985) is unavailing. In that case, electric companies sought review of a rule promulgated by the Federal Energy Regulatory Commission establishing procedures for

the approval of interim rates submitted by another federal agency under a federal act. The intervenors contended that the rule was not final and therefore the plaintiff's claim was not ripe for review. The Ninth Circuit disagreed, finding that the rule was final and, therefore, the claim was ripe for review. The court explained that "[c]hallenges to agency decisions are fit for judicial review when the agency action is final and the issues involved are legal ones." Id. at 785. In this case, the agency action is not final, and the agency has specifically provided a mechanism for righting any wrong that may have occurred from the interim rates. Therefore, the Court finds that this claim is not ripe for review and will dismiss this claim without prejudice.

In Count VI, MCI alleges that the Commission failed to set cost-based interconnection and unbundled network element rates. For the reasons set forth above?, the Court finds that this claim is not ripe for review.

In Count VII, MCI alleges that the Commission adopted non-cost-based rates for non-recurring charges. The Commission contends, and MCI does not dispute, that this issue is pending before the Commission. Thus, the Court finds that this claim is not ripe either.

Failure to State a Claim

Finally, the Commission moves to dismiss Count V of MCI's complaint in CIV-97-1856-PHX-RGS on the ground that it fails to state a claim. Count V alleges that the rates for unbundled loops are not cost-based because they are not geographically deaveraged.

The Commission contends that it fails to state a claim because nothing in the Act requires the Commission to deaverage rates. The Court need not reach this argument because, as discussed above, that claim is not ripe for review.

Accordingly,

IT IS ORDERED granting in part and denying in part Defendant Corporation Commission's Motion to Dismiss [the claims in CIV-97-1856], which is doc. # 65 in CIV-97-0026-PHX-RGS: Counts V, VI and VII of the operative complaint in CIV-97-1856-PHX-RGS are dismissed on ripeness grounds.

FURTHER ORDERED denying Defendant Corporation Commission's Motion to Dismiss [the claims in CIV-97-1927], which is doc. # 66 in CIV-97-0026-PHX-RGS.

DATED this 27TH day of MAY, 1998.

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

****

MICHIGAN BELL TELEPHONE CO.,
d/b/a Ameritech Michigan, Inc.,

Plaintiff,

v

File No. 5:98 CV 18

HON. RICHARD ALAN ENSLEN

MFS INTELENET OF MICHIGAN, INC., TCG DETROIT, BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC., MCI TELECOMMUNICATIONS CORP., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF MICHIGAN, INC., BRE COMMUNICATIONS, LLC, and JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, in their official capacities,

Defendants. /

ORDER

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that the Defendant Commissioners' Motion to Dismiss, filed February 26, 1998 (dkt. #24), is DENIED;

IT IS FURTHER ORDERED that Plaintiff's Motion for Early Hearing, filed May 27, 1998 (dkt. #67), is DENIED as moot.

DATED in Kalamazoo, MI:
July 20, 1998

RICHARD ALAN ENSLEN
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN BELL TELEPHONE CO., d/b/a Ameritech Michigan, Inc.,

Plaintiff,

v

File No. 5:98 CV 18

HON. RICHARD ALAN ENSLEN

MFS INTELENET OF MICHIGAN, INC., TCG DETROIT, BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC., MCI TELECOMMUNICATIONS CORP., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF MICHIGAN, INC., BRE COMMUNICATIONS, LLC, and JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, in their official capacities,

Defendants.
_____/

OPINION

This matter is before the Court on Defendant John Strand, John Shea and David Svanda's Motion to Dismiss filed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff Michigan Bell Telephone Company, d/b/a Ameritech Michigan, Inc. [hereinafter Ameritech], filed this action against the Commissioners of the Michigan Public Service Commission (MPSC) and competing local telecommunications carriers pursuant to the federal Telecommunications Act of 1996. Alleging violations of both state and federal law, Plaintiff seeks declaratory and injunctive relief to prevent enforcement of an Order issued by the Defendant Commissioners interpreting

interconnection agreements entered into by Plaintiff Ameritech and the Defendant telecommunications carriers. The Defendant Commissioners argue that: 1) the Court lacks jurisdiction to proceed; 2) the Eleventh Amendment bars suit against them as state officials; 3) whether or not jurisdiction exists, the Court must abstain from rendering judgment; and 4) the Johnson Act prohibits the Court from enjoining the agency. Both the Plaintiff and Defendant telecommunications carriers oppose the Commissioners' contentions. Upon review, the Motion to Dismiss is denied.

I. BACKGROUND

The Telecommunications Act of 1996, Pub. L. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56) 10 (codified as amended in scattered sections of Title 47 of the United States Code),[1] was designed "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies" by promoting competition and reducing regulation of the telecommunications industry. 1996 U.S.C.C.A.N. at 11. One way in which the Act seeks to accomplish these goals is by the forced deregulation of state-sanctioned local telecommunications monopolies. 47 U.S.C. ch. 5, subch. II, Pt. II (entitled "Development of Competitive Markets"). "In providing local telephone service, telephone companies have historically been protected from competition by State and local government barriers to entry." 1996 U.S.C.C.A.N. at 13. As a result, until passage of Act, the providers of local telephone service (referred to as local exchange companies or LECs) "maintain[ed] bottleneck

[1] The Telecommunications Act of 1996 amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* See the notes accompanying 47 U.S.C. § 609 for a listing of the specific sections affected.

control over the essential facilities needed for the provision of local telephone service." *Id.* The Act seeks to break that control by requiring existing LECs to interconnect with competing LECs. *Id.*; *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

> Specifically, the Act forces an incumbent LEC (1) to permit a requesting new entrant in the incumbent LEC's local market to interconnect with the incumbent LEC's existing local network . . . (interconnection); (2) to provide its competing telecommunications carriers with access to individual elements of the incumbent LEC's network on an unbundled basis (unbundled access); and (3) to sell to its competing telecommunications carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its customers at retail rates, in order to allow the competing carriers to resell their services (resale).

Iowa Utils. Bd., 120 F. 3d at 791 (citing 47 U.S.C. § 251(c)(2)-(4)). The Act also requires that the incumbent and competing LECs enter into interconnection agreements fulfilling the duties described in section 251 by following the procedures set forth in section 252. § 251(c)(1)

Section 252 articulates a four-step process to guide the parties toward an interconnection agreement which adheres to the requirements of the Act. First, section 252(a)(1) provides for the parties to attempt to reach an agreement through negotiation or mediation. If no agreement can be reached voluntarily, section 252(b) and (c) set out the specific standards and procedures by which either party may request that the state commission arbitrate any open issues. Once an agreement has been executed, it must be submitted to the state commission for approval pursuant to section 252(e). The state commission may only reject an agreement under certain limited circumstances delineated in section 252(e)(2). Finally, review of any determination made by the state commission approving or rejecting an agreement under this section lies exclusively within the jurisdiction of the federal district court. § 252(e)(4) & (6). If, however, the state commission elects not to participate in this

process or fails to act within 90 days to resolve a matter arising under section 252, the Federal Communications Commission (FCC) is granted preemptive jurisdiction by section 252(e)(5).

Ameritech brings this suit pursuant to section 252(e)(6), alleging in part that the Order issued by the Commissioners interprets the interconnection agreements between itself and the Defendant competing LECs in a manner which violates federal law. The case arose when Ameritech ceased paying reciprocal compensation[2] to the Defendant competing LECs for calls made to Internet Service Providers (ISPs).[3] Contending that calls made to ISPs are not local calls, Ameritech asserted that it was not required to pay such compensation under either the terms of the agreements or under federal law. Several of the competing LECs then filed complaints with the state commission[4] seeking an Order requiring Ameritech to pay both past and future charges for calls made to the ISPs. On January 28, 1998, interpreting the terms of the various interconnection agreements, the MPSC issued an Order ruling in favor of the competing LECs and requiring, among other things, that

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[2] Reciprocal Compensation is the principle by which interconnected telecommunications companies compensate one another for calls their customers initiate but which must be terminated by the competitor telecommunications company.

[3] Internet Service Providers "typically offer modem telephone access to a computer or computer network linked to the Internet. Many such providers . . . are commercial entities offering Internet access for a monthly or hourly fee." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 165 (S.D.N.Y. 1997).

[4] MSP Intelenet of Michigan, Inc., TCG Detroit, MCI Telecomm. Corp, MCIMetro Access Transmission Serv., Inc. and Brooks Fiber Comm. of Michigan, Inc. filed the original complaints with the MPSC. Subsequently, the cases were consolidated and AT&T Comm. of Michigan, Inc. and BRE Comm., LLC, d/b/a/ Phone Michigan, were granted intervenor status. Together these companies comprise the "Defendant telecommunications carriers" or "Defendant competing LECs."

Ameritech pay more than $6 million in back charges within 10 days, and pay all future reciprocal compensation for the disputed calls.

On February 2, 1998, Ameritech filed a motion to stay further proceedings with the MPSC while it sought judicial review of the January 28 Order. Ameritech then filed this action on February 6, 1998, nine days after the MPSC Order was issued, against both the competing LECs and the MPSC Commissioners who entered the Order. Plaintiff alleges that: 1) the MPSC Commissioners incorrectly interpreted the terms of the interconnection agreements in light of federal law; 2) the interconnection agreements as interpreted by the MPSC in the January 28 Order violate the federal regulations enacted pursuant to section 251; 3) the MPSC has no jurisdiction to regulate the calls in question because they are interstate calls and therefore can only be regulated by the FCC; 4) the MPSC award of attorney's fees is without statutory basis; and 5) the MPSC Order is in violation of Michigan law. In the instant Motion to Dismiss, the Defendant Commissioners argue that this Court does not have jurisdiction to review the January 28 Order issued by the MPSC under either section 252(e)(6) or 28 United States Code section 1331. Furthermore, the Defendant Commissioners argue that, if the Court finds that it does have subject matter jurisdiction over this action, the suit is barred by either: 1) the Eleventh Amendment; 2) the Abstention doctrines articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Company*, 319 U.S. 315 (1943); or 3) the Johnson Act, 28 U.S.C. § 1342. Both Plaintiff Ameritech and the Defendant competing LECs respond that, because this action questions whether an interconnection agreement entered into pursuant to the Telecommunications Act is in violation of federal law, this Court does in fact have jurisdiction under both section 252(e)(6) and 28 U.S.C. § 1331. Indeed, it has exclusive jurisdiction under the Act to

serve at least one of the claims and none of the grounds presented serve as a basis for dismissal of this case.

II. STANDARD

A. *Rule 12(b)(1)*

The Sixth Circuit has adopted two standards of dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). A facial attack merely questions the sufficiency of the pleading. In that context, the Court will utilize the standard applied to Rule 12(b)(6) motions. On the other hand, where a court reviews a complaint under a factual attack, no presumptive truthfulness applies to the factual allegations. In such cases, the Court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts. *Fairpoint Int'l Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1081 (6th Cir. 1997). In the instant case, Defendants' Motion to Dismiss falls within the first category of Rule 12(b)(1) motions. Therefore, this Court will apply a 12(b)(6)-type standard to the 12(b)(1) motion.

B. *Rule 12(b)(6)*

Under Rule 12(b)(6), a complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." The complaint must be construed in the light most favorable to the plaintiff, and its well-pleaded facts must be accepted as true. The Court, however, need not accept as true legal conclusions or unwarranted factual inferences. *Lewis v. ACB Business Serv., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998).

The purpose of this motion is to determine whether plaintiff has stated a claim upon which relief may be granted.

III. ANALYSIS

A. Subject Matter Jurisdiction

Fundamental to federal court authority is the principle that federal jurisdiction is limited by the restrictions embodied in Article III of the United States Constitution. *Plastic Engineered Components, Inc. v. Titan Indemnity Co.*, 974 F. Supp. 1106, 1109 (W.D. Mich. 1997) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Consequently, whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction over the subject matter, the Court is required to dismiss the action. FED. R. CIV. PRO. 12(h)(3). Furthermore, subject matter jurisdiction is presumed lacking until the pleader provides otherwise. *Plastic Engineered Components, Inc.*, 974 F. Supp. at 1109. *See* FED. R. CIV. PRO. 8(a)(1).

Plaintiff alleges that jurisdiction to hear this matter is specifically provided by section 252(e)(6) of the Act. Section 252(e)(6) provides in pertinent part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

In the instant case, Plaintiff Ameritech alleges that an Order rendered by the Commissioners involving an interconnection agreement created under, and indeed mandated by, this subpart of the Act, is in violation of the Act. Arguing that the Order is a determination within the meaning of 252(e)(6), Plaintiff asserts jurisdiction is proper.

In their motion, the Commissioners argue that, because the MPSC Order involves the interpretation and enforcement of an interconnection agreement, rather than its approval or rejection, this Court is without jurisdiction to proceed. Looking to recent case law interpreting the term "determination" in the context of section 252(e)(6), the Movants assert that the term is limited to those decisions in which the State commission approves or rejects the agreement. Neither the reasoning of those cases nor the structure of the statute support the Commissioners' assertion, however. First, the line of cases to which the Commissioners cite confronts a profoundly different legal question. For example, in *GTE North v. Strand,* No. 5:97CV01, 1997 WL 811422 (W.D. Mich.), Judge Robert Holmes Bell was called upon to decide whether the Court had jurisdiction to review an MPSC decision arbitrating certain aspects of an interconnection agreement which had not yet been submitted to the state commission for final approval. Like every other federal court confronting the question, after reviewing the structure of the Act, Judge Bell held that the Court had no jurisdiction to review MPSC decisions arising during the § 252 process until *after* the interconnection agreement had become final by way of commission approval or rejection. *See, e.g., GTE Southwest, Inc. v. Graves,* 989 F. Supp. 1148, 1150 (S.D. Okla. 1997); *GTE North Inc. v. Glazer,* 989 F. Supp. 922 (N.D. Ohio 1997); *GTE Northwest, Inc. v. Nelson,* 969 F. Supp. 654 (E.D. Wash. 1997); *GTE Florida, Inc. v. Johnson,* 964 F. Supp. 333 (N.D. Fla. 1997); *GTE South Inc. v. Breathitt,* 963 F. Supp. 610 (E.D. Ky. 1997); *GTE South Inc. v. Morrison,* 957 F. Supp. 800 (E.D. Va. 1997); *Contel of Minnesota, Inc. v. Jacobs,* No. 97-169, 1997 WL 809628 (D. Minn. May 30, 1997). In the instant case, the Order in question involves an agreement which has already received final approval. Consequently, these cases provide no support for the Commissioners' assertion that Plaintiff's claims should be dismissed.

Furthermore, consideration of the statutory scheme demonstrates that permitting state court review of this type of Order would directly contravene the intent of Congress. The Court's ultimate purpose in interpreting a statute is "to give effect to the intent of Congress[.]" *Cummings v. West*, 136 F.3d 1468, 1472 (D.C. Cir 1998) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)). To accomplish that goal, the Court must look "not only [to] the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990)). Thus, the Court must view each individual term as part of the entire statutory scheme so as not to frustrate the purpose Congress sought to achieve.

Reviewing this subpart of the Act as a whole,[5] the Court notes that Congress has created a unique framework which, while inviting state commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure that those agreements meet federal requirements. *See Michigan Bell Tel. Co. v. Climax Tel. Co.*, No. 5:97CV197, Transcript of Hearing at 5 (W.D. Mich. Feb. 12, 1998) (Quist, J.); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *U.S. West Comm., Inc. v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997); *U.S. West Comm., Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1370 (W.D. Wash. 1997). In sections 252(e)(4) and (6), Congress stated in no uncertain terms its intention to have the federal courts, and not the state courts, review MPSC decisions approving or rejecting interconnection agreements born of this subpart. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). "This framework obviously recognizes the various state commissions' expertise in technical matters related to

[5] 47 U.S.C. ch. 5, subch. II, Pt. II (entitled "Development of Competitive Markets") (encompassing 47 U.S.C. §§ 251-261).

intrastate telecommunications . . . [,]" but also recognizes that those same state agencies lack expertise in interpreting federal law. *Hix*, 986 F. Supp. at 17. Thus, the statutory structure demonstrates Congress' intent to enlist the assistance of the state commissions while creating a uniform body of federal law in this area. See *Id.* at 17.

The Commissioners, nevertheless, argue that the state courts have concurrent jurisdiction to review MPSC decisions enforcing such agreements in which the MPSC would once again be interpreting federal law. Were this the case, parties could avoid the exclusive jurisdiction provision of the Act by simply waiting to challenge a given issue until an enforcement proceeding had been conducted rather than at the approval stage. Such an interpretation defies logic. Furthermore, as the Eighth Circuit Court of Appeals recently noted, "authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commission has approved." *Iowa Utils. Bd.*, 120 F.3d at 804. Thus, the language of subsection (e)(4) prohibiting state courts from reviewing approval and rejection decisions implicitly encompasses interpretation and enforcement decisions. Given the statutory structure and language of section 252, the Court finds that the MPSC decisions interpreting or enforcing interconnection agreements born of this subpart are also within the exclusive jurisdiction of the federal courts. Because the Court holds that section 252 provides specific, statutory jurisdiction, it need not determine whether section 1331 also supports federal jurisdiction.[6]

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[6] The Commissioners also argue that the MPSC's decision is not reviewable because it based solely on state law. Plaintiff, however, alleges that the agreement violates federal law as interpreted by the Commissioners, which brings the action within the parameters of (e)(6). The fact that the Commissioners did not consider federal law in interpreting the agreements does not exempt the Order from that review or the requirements of federal law. Rather, it indicates that the Commissioners failed to comprehend their role under the Act.

Having determined that this Court has exclusive jurisdiction to review the MPSC Order herein challenged, the remainder of the Commissioners' motion loses its force. Indeed, every court that has confronted the questions herein presented has held in favor of Nonmovants' position. Because this Court finds the reasoning of those numerous other courts persuasive, a cursory review of the Defendant Commissioners' remaining arguments will suffice.

B. Eleventh Amendment

The Commissioners contend that whether or not the Act provides jurisdiction, they are immune from suit under the Eleventh Amendment to the United States Constitution. Under the Eleventh Amendment, the federal courts generally lack jurisdiction to hear suits filed by individual citizens against the several states.[7] *Port Auth. Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 304 (1990); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). As an extension of this doctrine, suits in federal court against state agencies and employees sued in their official capacities may also be barred. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). This sovereign immunity is not unlimited, however. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1. Where Congress has explicitly abrogated a state's immunity to suit on the face of a statute pursuant to a valid exercise of power, or where the state itself has consented to being sued, the federal courts are permitted to exercise jurisdiction. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Furthermore, where a plaintiff seeks only prospective relief against state officials, generally no Eleventh Amendment protection exists to bar suit. *Ex parte Young*, 209 U.S. 123 (1908). The

[7] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Nonmovants here assert that the Commissioners are not entitled to the benefits of sovereign immunity because: 1) the State constructively waived its immunity by electing to participate in the process set forth in section 252; and 2) the *Ex parte Young* doctrine applies to this case.

1. Waiver

A state may effectuate waiver of its immunity "by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular program." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n. 1 (1985). Although in most instances waiver must be explicit, in certain limited circumstances, the State will be deemed to have constructively waived its Eleventh Amendment protection. *MCI Telecomm., Corp. v. BellSouth Telecomm., Inc.*, __ F. Supp. __, No. 97-76, 1998 WL 325953, *3 (E.D. Ky. June 29, 1998). One such circumstance occurs when a state voluntarily engages in an activity regulated by a federal law that mandates federal review of the activity. *MCI Telecomm., Corp.*, 1998 WL 325953 at *3; *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, No. 97 C 2225, 1998 WL 156678, *8 (N.D. Ill Mar. 31, 1998). The test for determining whether waiver exists is stringent, however. *Atascadero*, 473 U.S. at 241. Waiver will be found "only where stated by the most express language or 'by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). *See also Pennhurst*, 451 U.S. at 17 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."). Thus, the federal statute must make it clear that state participation in the activity is contingent upon consent to federal jurisdiction. *MCI Telecomm., Corp.*, 1998 WL 325953 at *3; *MCI Telecomm. Corp.* 1998 WL 156678 at *8.

In the instant case, Congress has spoken in one such clear voice. *U.S. West Comm., Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1370 (W.D. Wash. 1997). First, the Telecommunications Act demonstrates unequivocally that state participation in the section 252 process is entirely voluntary by providing a mechanism for the FCC to fulfill the State's role if it declines to participate. § 252(e)(5); *U.S. West Comm.*, 971 F. Supp. at 1369; *U.S. West Comm. v. Public Serv. Comm'n*, 991 F. Supp. 1295, 1301-02 (D. Utah 1998). Second, section 252(e)(6) explicitly states that the federal courts will have jurisdiction to review any determination made by the State commission. Given that there is no other reasonable construction of the statute, the Court finds that "[t]he implication that Congress conditioned state participation in the interconnection agreement process on waiver could hardly be clearer." *U.S. West Comm.*, 971 F. Supp. at 1370. For these reasons, the Court joins the numerous other federal courts which have uniformly held that the State's actions in this context constitute a constructive waiver of its Eleventh Amendment immunity. *Michigan Bell Tel. Co. v. Climax Tel. Co.*, No. 5:97CV197, Transcript of Hearing at 5 (W.D. Mich. Feb. 12, 1998) (Quist, J.); *MCI Telecomm., Corp. v. BellSouth Telecomm., Inc.*, __ F. Supp. __, No. 97-76, 1998 WL 325953, *3 (E.D. Ky. June 29, 1998); *U.S. West Comm., Inc.*, 991 F. Supp. at 1301-02; *U.S. West Comm., Inc.*, 971 F. Supp. at 1370; *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, No. 97 C 2225, 1998 WL 156578, *8 (N.D. Ill Mar. 31, 1998); *AT&T Comm., Inc. v. Michigan Bell Tel., Co.*, Nos. 97-CV-60018, 97-CV-60176, slip op. at 6-7, 9 (E.D. Mich. Mar. 19, 1998); *AT&T Comm., Inc. v. BellSouth Telecomm., Inc.*, Nos. 1:97-cv-884-RCF, 1:97-cv-1318-RCF, slip op. at 5 (N.D. Ga. Feb. 11, 1998); *U.S. West v. TCG Oregon*, No. 97-858-JE, slip op. at 15 (D. Ore. Jan. 30, 1998); *MCI Telecomm. v. AT&T Comm.*, No. 3:97-0523, slip op. at 11-12 (M.D. Tenn. Jan. 27, 1998); *MCI Telecomm., Inc. v. Bell Atlantic-Virginia Inc.*, No. 3:97CV629, slip op. at 5 (E.D. Va. Dec. 24, 1997); *AT&T Comm.*

v. BellSouth Telecomm., Inc., No. 97-79, slip op. at 5-6 (E.D. Ky. Dec. 15, 1997); *AT&T Comm., Inc. v. BellSouth Telecomm., Inc.*, Nos. 3:97-2164, 3:97-2388, slip op. at 4-5 (D.S.C. Dec. 11, 1997); *MCI Telecomm., Inc. v. Sprint-Florida, Inc.*, No. 4:97-CV-231-MP, slip op. at 5 (N.D. Fla. Nov. 21, 1997); *AT&T Comm., Inc. v. BellSouth Telecomm.*, Nos. 5:97-CV-405-BR, 5:97-CV-425-BR, slip op. at 10-11 (E.D.N.C. Nov. 20, 1997); *GTE South v. Morrison*, No. 3:97CV493, slip op. at 4 (E.D. Va. Nov. 7, 1997); *GTE Midwest, Inc. v. Thoms*, No. 4:97-CV-70118, slip op. at 5 (S.D. Iowa Aug. 4, 1997); *U.S. West Comm., Inc. v. Thoms*, 4-97-CV-70082, slip op. at 5 (S.D. Iowa Aug. 4, 1997); *U.S. West Comm., Inc. v. Reinbold*, No. A1-97-25, slip op. at 7 (D.N.D. July 28, 1997); *MCIMetro Access Transmission Servs, Inc. v. GTE Northwest, Inc.*, Nos. C97-742WD, C97-905WD, C97-928WD, slip op. at 1 (W.D. Wash. July 24, 1997).

2. Ex parte Young

Turning to Plaintiff's next argument, the Court notes from the outset that the instant case is, as Plaintiff puts it, a "garden variety" *Ex parte Young* case. In *Ex parte Young*, 209 U.S. 123, the Supreme Court "recognize[d] that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct[.]" *Idaho v. Coeur D'Alene*, ___ U.S. ___, 117 S. Ct. 2028, 2043 (1997) (citing *Young*, 209 U.S. at 159-60). More recently, the Supreme Court reiterated this position, stating: "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." *Coeur D'Alene*, 117 S. Ct. at 2043 (citing *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977)).

Plaintiff Ameritech seeks an order enjoining the Commissioners from enforcing an Order which Plaintiff alleges violates federal law. Such enforcement constitutes an "ongoing violation"

and the relief sought is clearly prospective despite the fact that the Order involves monetary relief. Consequently, this Court, like the many courts cited below, holds that *Ex parte Young* applies in the instant case to permit this suit to proceed. *U.S. West Comm., Inc. v. Public Servs. Comm'n*, 991 F. Supp. 1299, 1301 (D. Utah Jan 23, 1998); *MCI Telecomm., Corp. v. BellSouth Telecomm., Inc.*, __ F. Supp. __, No. 97-75, 1998 WL 325953, *4 (E.D. Ky. June 29, 1998); *U.S. West Comm., Inc. v. Public Serv. Comm'n*, 991 F. Supp. 1299, 1301 (D. Utah 1998); *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, No. 97 C 2225, 1998 WL 156678, *13 (N.D. Ill. Mar. 31, 1998); *AT&T Comm., Inc. v. Michigan Bell Tel., Co.*, Nos. 97-CV-60018, 97-CV-60176, slip op. at 6-7, 8 (E.D. Mich. Mar. 19, 1998); *AT&T Comm., Inc. v. BellSouth Telecomm., Inc.*, Nos. 1:97-cv-884-RCF, 1:97-cv-1318-RCF, slip op. at 5 (N.D. Ga. Feb. 11, 1998); *U.S. West v. TCG Oregon*, No. 97-858-JE, slip op. at 17 (D. Ore. Jan. 30, 1998); *MCI Telecomm. v. AT&T Comm.*, No. 3:97-0523, slip op. at 12-16 (M.D. Tenn. Jan. 27, 1998); *MCI Telecomm., Inc. v. Bell Atlantic-Virginia Inc.*, No. 3:97CV629, slip op. at 4 (E.D. Va. Dec. 24, 1997); *AT&T Comm. v. BellSouth Telecomm., Inc.*, No. 97-79, slip op. at 7-8 (E.D. Ky. Dec. 15, 1997); *AT&T Comm., Inc. v. BellSouth Telecomm., Inc.*, Nos. 3:97-2164, 3:97-2388, slip op. at 6 (D.S.C. Dec. 11, 1997); *MCI Telecomm., Inc. v. BellSouth Telecomm., Inc.*, No. 4:97-CV-141-RH, slip op. at 5 (N.D. Fla. Nov. 21, 1997); *GTE Florida, Inc. v. Clark*, No. 4:97-CV-211-RH, slip op. at 6 (N.D. Fla. Nov. 21, 1997); *MCI Telecomm., Inc. v. Sprint-Florida, Inc.*, No. 4:97-CV-231-MP, slip op. at 5 (N.D. Fla. Nov. 21, 1997); *AT&T Comm., Inc. v. BellSouth Telecomm.*, 4:97-CV-262-RH, slip op. at 5-6 (N.D. Fla. Nov. 21, 1997); *AT&T Comm., Inc. v. BellSouth Telecomm.*, No. 5:97-CV-405-BR, 5:97-CV-425-BR, slip op. at 11-13 (E.D.N.C. Nov. 20, 1997); *GTE South v. Morrison*, No. 3:97CV493, slip op. at 4 (E.D. Va. Nov. 7, 1997); *U.S. West Comm., Inc. v. Hix*, No. 97-D-152, slip op. at 2 (D. Colo. Oct. 15, 1997); *GTE Midwest, Inc. v.*

Thoms, No. 4:97-CV-70118, slip op. at 5 (S.D. Iowa Aug. 4, 1997); *U.S. West Comm., Inc. v. Thoms*, 4-97-CV-70082, slip op. at 4 (S.D. Iowa Aug. 4, 1997); *U.S. West Comm., Inc. v. Reinbold*, No. A1-97-25, slip op. at 7 (D.N.D. July 28, 1997). *Cf. MCI Telecomm. Corp. v. Frisby*, 998 F. Supp. 625 (D. Md. 1998) (holding *Ex Parte Young* did not apply to permit relief under 28 U.S.C. § 1331, because § 252(e)(6) provided appropriate remedial structure for claim).

C. *Abstention*

The Defendant Commissioners also suggest that because Plaintiff has also filed an appeal of the MPSC Order in state court, this Court should abstain under the doctrines set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Company*, 319 U.S. 315 (1943). "It is axiomatic . . . that '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.' Abstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976)). Nevertheless, under certain circumstances, the Abstention doctrines demand that federal courts sitting in equity abstain from judgment in accordance with the principles of comity and federalism. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996). Two such doctrines are embodied in the above-mentioned cases. Application of both doctrines, however, is contingent upon the availability of an adequate state remedy. *See GTE Mobilnet v. Johnson*, 111 F.3d 1072 (6th Cir. 1997) (noting abstention inappropriate where federal courts have exclusive jurisdiction over claims); *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962, 968 (6th Cir. 1991); *Great Lakes Steel v. Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983) (citing *General Motors Corporation v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980)). Having determined that the federal courts have

exclusive jurisdiction over Plaintiff's 252(e)(6) claim, the Court finds that abstention is not appropriate.

D. Johnson Act

Turning to the Commissioners' last argument, the Court holds that Ameritech's claims are clearly not barred by the Johnson Act. The Johnson Act prohibits federal district courts from enjoining "the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
(2) The order does not interfere with interstate commerce; and,
(3) The order has been made after reasonable notice and hearing; and
(4) A plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1342. Thus, the Johnson Act deprives a federal court of jurisdiction to review a state commission's order only when all four stated conditions are met. *U.S. West Comm., Inc. v. Public Serv. Comm'n*, 991 F. Supp. 1299, 1302 (D. Utah 1998). In the instant case, however, the Court has already determined that jurisdiction in this case is not based on either diversity or a question arising under the Federal Constitution as required in subsection (1). Consequently, the Johnson Act does not pose a bar to adjudication. *See U.S. West Comm., Inc. v. Public Serv. Comm'n*, 991 F. Supp. 1299, 1302 (D. Utah 1998); *AT&T Comm., Inc. v. Michigan Bell Tel., Co.*, Nos. 97-CV-60018, 97-CV-60176, slip op. at 10 (E.D. Mich. Mar. 19, 1998); *U.S. West Comm. v. TCG Oregon*, No. 97-858-JE, slip op. at 18 (D. Ore. Jan. 30, 1998); *MCI Telecomm., Inc. v. Sprint-Florida, Inc.*, No. 4:97-CV-231-MP, slip op. at 4 n.1 (N.D. Fla. Nov. 21, 1997); *MCI Telecomm., Inc. v. BellSouth Telecomm., Inc.*, No. 4:97-CV-141-RH, slip op. at 4 n.1 (N.D. Fla. Nov. 21, 1997).

IV. Conclusion

For the foregoing reasons, the Defendant Commissioners' Motion to Dismiss is denied.

DATED in Kalamazoo, MI:

July 20, 1998

RICHARD ALAN ENSLEN
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
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SOUTHWESTERN BELL TELEPHONE COMPANY

VS.

PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; ROBERT W. GEE; JUDY WALSH; AT&T COMMUNICATIONS OF THE SOUTHWEST; MCI TELECOMMUNICATIONS CORPORATION; MCIMETRO ACCESS TRANSMISSION SERVICES, INC.; TELEPORT COMMUNICATIONS GROUP, INC.; MFS COMMUNICATIONS COMPANY, INC.; and AMERICAN COMMUNICATIONS SERVICES, INC.

NO. A-97-CA-108-SS

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SOUTHWESTER BELL TELEPHONE COMPANY

VS.

MCIMETRO ACCESS TRANSMISSION SERVICES, INC.; MCI TELECOMMUNICATIONS CORPORATION; PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; ROBERT W. GEE, and JUDY WALSH

NO. A-97-CA-171-SS

ORDER

This suit concerns judicial review of several interconnection agreements entered into between the plaintiff Southwestern Bell Telephone Company ("SWBT") and the corporate defendants AT&T Communications of the Southwest, Inc. ("AT&T"); MCIMetro Access Transmission Services, Inc.

and MCI Telecommunications Corporation (collectively, "MCI"); Teleport Communications Group, Inc. ("Teleport"); MFS Communications Company, Inc. ("MFS"); and American Communications Services, Inc. ("American"). These interconnection agreements were arbitrated and approved by the Public Utility Commission ("PUC") pursuant to §§ 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252, Pub. L. No. 104, 110 Stat. 56 (1996) (the "FTA"). Numerous challenges to the interconnection agreements are currently pending before the Court in Consolidated Cause No. A-97-CA-132-SS.

In the two above-styled and numbered causes, SWBT asserts the PUC committed various errors of state law in arbitrating and approving the interconnection agreements. Before the Court are SWBT's Conditional Motions to Remand, as well as the Motions to Dismiss filed by the PUC and the individual Commissioners Wood, Gee, and Walsh; AT&T; MCI; Teleport; and MFS. In the motions to remand, the Court must determine whether the Eleventh Amendment bars the exercise of subject matter jurisdiction in these cases. If subject matter jurisdiction is proper, the Court must then consider whether SWBT's state-law claims are preempted by the FTA, the issue presented in the motions to dismiss.[1]

I.

In its Conditional Motions to Remand, SWBT states that it has no objection to this Court hearing its state-law claims, as long as the Court determines that these claims are not barred by Eleventh Amendment immunity. When Congress clearly conditions state participation in a program

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[1] SWBT's motions to remand are identical in both cases, as are the motions to dismiss filed by the PUC, the Commissioners, and MCI. All of the motions to dismiss, including those filed by AT&T, Teleport, and MFS, seek dismissal on the grounds of federal preemption. MFS merely joins in the PUC's motion to dismiss, while Teleport conclusorily asserts that SWBT's state-law claims are preempted by federal law.

or activity upon the State's consent to federal court jurisdiction, a State is deemed to have waived its sovereign immunity when it voluntarily participates in that program or activity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-241, 105 S. Ct. 3142, 3145-47 (1985). It appears every federal court that has considered the issue presented in SWBT's motions to remand has concluded that a State's voluntary participation in the interconnection agreement negotiation, arbitration, and approval process outlined in § 252 of the FTA constitutes a constructive waiver of Eleventh Amendment immunity:

> The overwhelming implication of th[e] statutory structure [of the FTA] is that Congress conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted—but not required—to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court. There is no room for any other reasonable construction of the statute. By participating in the arbitration and approval process, [the state] consented to review of its actions.

US West Comm'n, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997) (citations and quotations omitted); *US West Communications, Inc. v. Public Service Comm'n of Utah*, 991 F. Supp. 1290, 1301-1302 (concluding that §§ 252(e)(4)-(6) of the Federal Telecommunications Act, when read together, "evince a clear Congressional intention to condition regulation by a state commission upon review of that commission's actions in federal court");[2] *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. Civ. A 97-76, 1998 WL 352953, at *3 (E.D. Ken. June 29, 1998); *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, No. 97 C 2225, 97 C 4096, 1998 WL 156678, at *8 (N.D. Ill. March 31, 1998) (unpublished) (citing other unpublished

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[2] Section 252(e)(5) provides that state commissions may participate in the arbitration of interconnection agreements, or they may leave such matters to the Federal Communications Commission ("FCC"). Section 252(e)(6) provides for federal judicial review of interconnection agreements to ensure that such agreements meet the substantive requirements of the FTA, while § 252(e)(4) specifically precludes state court review of interconnection agreements.

cases supporting waiver of Eleventh Amendment immunity). These courts have also found subject matter jurisdiction proper on the basis of *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *See, e.g., US West*, 991 F. Supp. at 1301. The Court agrees that the State of Texas, by participating in the arbitration and approval process, has effectively waived its Eleventh Amendment immunity. Accordingly, jurisdiction is proper in federal court, and SWBT's conditional motions to remand are overruled.

II.

The corporate defendants, the PUC, and the Commissioners move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss SWBT's complaint for failure to state a claim and on the basis of federal preemption. With regard to its argument that the complaint fails to state a claim, the PUC contends it did not apply Texas law in resolving any of the disputed issues in the interconnection agreements; the PUC and remaining defendants therefore argue that there are no valid allegations of state-law error to assert. With regard to preemption, the defendants methodically discuss each state-law claim asserted by SWBT and explain in detail how each claim is preempted by a specific provision of the FTA. As the defendants accurately note, SWBT fails to respond to the majority of these arguments. Instead, SWBT simply observes that other provisions of the FTA preserve issues of state law and argues that the PUC should not have relied exclusively on federal law in arbitrating and approving the interconnection agreements.

A.

Before delving into federal preemption, it is useful to discuss the historical background and procedural posture of these cases. Congress enacted the FTA in 1996 to foster rapid competition in the local telephone service market and to end the monopoly market of incumbent local service carriers ("LECs"). In order to allow new entrants to gain competitive access to the market, FTA §

251(c) mandates that new entrants be permitted (i) to interconnect their facilities with the incumbent LEC's facilities "at any technically feasible point," *see* 47 U.S.C. § 251(c)(2); (ii) to purchase access to functionalities of the incumbent LEC's network on an "unbundled" basis, *see* 47 U.S.C. § 251(c)(3); (iii) to purchase services at wholesale prices, which new entrants can then resell to their own customers at retail value, *see* 47 U.S.C. § 251(c)(4); and (iv) to construct facilities necessary for interconnection on the incumbent LEC's premises ("collocation"), *see* 47 U.S.C. § 251(c)(6).

Section 252(a) implements these provisions by requiring the incumbent LEC—in this case, SWBT—to negotiate interconnection agreements with requesting telecommunications carriers, such as the corporate defendants, who wish to enter the market. If voluntary, private negotiations between the incumbent LEC and new entrants prove unsuccessful, either party may petition the appropriate state commission under § 252(b) to resolve any disputed issues. In these cases, each corporate defendant filed a petition for arbitration; the PUC consolidated the arbitration proceedings and held a three-week hearing in which the Commissioners served as the arbitration panel. The PUC issued an Arbitration Award on November 7, 1996, which resolved various disputes relating to the terms and conditions of interconnection, including the methodology for determining the compensation to which SWBT would be entitled. The PUC based its decisions in the Arbitration Award exclusively on a construction of federal law:

> The Arbitrators find that the following decisions, and the conditions imposed on the parties by these decisions, meet the requirements of FTA96 § 251, and any applicable regulations prescribed by the Federal Communications Commission pursuant to FTA96 § 251. The following decisions establish rates for interconnection, services, and network elements according to the standards set forth in FTA96 § 252(d).
>
> * * *
>
> At the end of each decision, the Arbitrators have included a reference to (1) the section of FTA96 on which the decision is based . . .

PUC's Motion to Dismiss, Exh. A, Arbitration Award at 6 ("Award"). On December 19, 1996, the PUC issued a separate Order Approving Interconnection Agreement with respect to each corporate defendant in which the PUC reiterated that the proposed interconnection agreements, if revised as directed, "complies with the standards of FTA96 § 252." *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest*, Cause No. A-97-CA-044-SS (consolidated with A-97-CA-132-SS), Complaint, Exh. 4A (¶ 7), Exh. 4B-D (¶ 10).

The FTA permits, but does not require, state commissions to impose state-law requirements when reviewing interconnection agreements. *See* 47 U.S.C. § 253(a)(3) ("[N]othing in [§ 252] shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."). In light of this discretionary authority, the PUC decided to implement the FTA and the Public Utility Regulatory Act of 1995, TEX. UTIL. CODE ANN. § 11.001 *et seq.* (Vernon 1998) ("PURA 95") on separate "parallel tracks" to avoid federal preemption issues.[3] *See* PUC's Motion to Dismiss, Exh. B, Order Addressing Certified Issues at 5. Because the PUC resolved disputed issues in the interconnection agreements without reference to PURA 95 or other state law, the defendants argue that SWBT's state-law claims are "fundamentally misconceived."

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[3] Significantly, SWBT has failed to identify any provision of Texas law mandating that state law requirements must apply to interconnection agreements arbitrated pursuant to the FTA. In other words, it is far from clear that the PUC acted unlawfully by limiting the scope of the arbitration proceeding to a determination of whether the interconnection agreements complied with federal law only. Given that state courts are expressly precluded from reviewing interconnection agreements entirely, it appears the PUC acted correctly in reserving state law issues for another day and another forum. In any event, it appears that federal judicial review is limited to a determination of whether the interconnection agreement complies with §§ 251 and 252 of the FTA. *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.").

This argument has some intuitive appeal but is ultimately unavailing. Where the FTA and PURA 95 conflict, such that application of PURA 95 to the interconnection agreements would yield a different result, the Constitution dictates that the FTA controls. *See* Part II(B), *infra*. Conversely, where state law is consistent with federal law, there can be no error of state law. However, assuming *arguendo* that it was error for the PUC to restrict the scope of the arbitration proceeding solely to a determination of federal law, it is conceivable that there may be instances in which PURA 95 imposes some requirement, above and beyond that required by the FTA yet which is consistent with the FTA, which would render the interconnection agreements invalid under state law.[4] Fortunately, the Court need not decide these issues today because, as explained below, the Court finds that all of SWBT's state-law claims are, in fact, preempted by federal law.

B.

Federal preemption *is* rooted in the Supremacy Clause, U.S. Const. art. VI, cl. 2, and requires an examination of congressional intent. *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 3022 (1982); *In re Cajun Electric Power Cooperative, Inc.*, 109 F.3d 248, 253 (5th Cir. 1997). "Congress may either expressly define the extent to which state law is to be preempted by a federal statute or implicitly preempt state law by regulating comprehensively so as to preclude state law from occupying any part of the regulated field." *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1093 (1997); *Cajun Electric*, 109 F.3d at 253 ("Pre-emption may be *either* express or implied, and it is compelled *whether* Congress' command is explicitly stated in the statute's language or implicitly

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[4] At this point, these concerns are more hypothetical than real. It is apparent that SWBT asks this Court to apply PURA 95 to the interconnection agreements precisely because the Texas statutory scheme imposes fewer requirements on incumbent LECs and provides incumbent LECs with far more protection than does the FTA.

achievement of congressional objectives." *Texas Manufactured Housing*, 101 F.3d at 1099. As the Fifth Circuit has explained, state law directly conflicts with federal law when "compliance with both federal and state regulations is a physical impossibility" or when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Cajun Electric*, 109 F.3d at 254.

In this case, there is no question that Congress did not intend to preempt state regulation of telecommunications services entirely. *See* 47 U.S.C. § 601(c) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."). The issue then, is whether specific provisions of the FTA and the FCC's implementing regulations supersede the state-law claims. *See* 47 U.S.C. § 251(d)(3)(B) & (C) ("In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . is consistent with the requirements of this section; and . . . does not substantially prevent implementation of the requirements of this section and the purposes of this part."); *see also Cajun Electric*, 109 F.3d at 254 ("Federal regulations have no less pre-emptive effect than federal statutes."). In its state court petition, SWBT asserts numerous "categories" of claims relating to various aspects of the interconnection agreements. The Court will consider each series of claims seriatim.

In its first series of claims (Petition ¶¶ 45-51), SWBT asserts the interconnection agreements violate certain pricing requirements of PURA 95 because they do not allow recovery of actual costs for interconnection, collocation, and unbundled elements. As the defendants point out, the FTA

prescribes specific, mandatory pricing standards for interconnection, *see* 47 U.S.C. §§ 251(c)(2), 252(d)(1), access to unbundled elements, *see* 47 U.S.C. §§ 251(c)(3), 252(d)(1), and resale, *see* 47 U.S.C. §§ 251(c)(4), 252(d)(3). For instance, the FTA mandates that the rates for interconnection and network elements must be based on the cost of providing interconnection or network elements. *See* 47 U.S.C. § 252(d)(1)(A) ("Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section . . . shall be . . . based on the cost . . . of providing the interconnection or network element . . ."). The PUC applied these federal pricing standards in arbitrating the interconnection agreements. Award ¶¶ 62-83. Whether the PUC's determinations ultimately conform to federal standards remains to be seen; however, in light of Congress's comprehensive pricing scheme, the only way the Court can review the legality of rates imposed in the interconnection agreements is to review their compliance with the FTA. If, as SWBT appears to contend, the application of PURA 95 or any other state law would have resulted in the imposition of rates different than those obtained by applying federal law, those rates would be in direct conflict with—and therefore superseded by—the FTA.

In its second series of claims (Petition ¶¶ 52-54), SWBT contends the PUC's aggregate resale discount of 21.6% is erroneous and excessive in light of a maximum wholesale discount rate of 5% under PURA 95. Section 252(d)(3) of the FTA mandates that wholesale rates be determined "on the basis of retail rates charges to subscribers for the telecommunications service requested," less an amount attributable to certain "marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Applying this federal pricing standard and taking the foregoing factors

into account, the PUC determined that a resale discount of 21.6% was appropriate. Award ¶¶ 48-51. There can be no clearer example of federal preemption than in this instance.

In its third series of claims (Petition ¶¶ 55-56), SWBT challenges the PUC's decision to allow new entrants to combine network elements in order to provide telecommunications service. Award ¶ 1. SWBT fails to cite any support for its claim that this alleged "sham unbundling" violates Texas law, and, in fact, the combining of unbundled elements is specifically mandated by the FTA. *See* 47 U.S.C. § 251(c)(3) ("An incumbent local exchange carrier shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."); 47 C.F.R. § 51.315 (same). Therefore, any state law prohibiting the combination of unbundled elements would be preempted.

In its fourth series of claims (Petition ¶¶ 57-59), SWBT contends that the interconnection agreements substantially reduce its revenues from access charges contrary to PURA 95. SWBT alleges PURA 95 "prohibits reductions in [SWBT's] switched access rates during the four-year period of incentive regulation, during which [SWBT's] rates for basic local exchange services cannot be increased." Petition ¶ 58. However, it is clear the PUC was following federal pricing mandates when it determined that interconnection rates be based on costs. *See* 47 U.S.C. § 252(d)(1)(A); Award ¶ 57 ("Interconnection rates, including transport and termination, must be based on costs. . . . The Arbitrators therefore conclude that SWBT shall not impose access charges on LSPs [local service providers] that purchase unbundled network elements, over and above the rates that LSPs have already paid for the unbundled network elements . . ."). Any state law provision which would require that rates be based on something other than, or in addition to, costs would directly conflict with the FTA and would therefore be rendered a nullity.

In its fifth series of claims (Petition ¶¶ 60-66), SWBT asserts the interconnection agreements impose unbundling, interconnection, collocation, and other operational requirements "beyond any standards stated in PURA 95." Petition ¶ 60. For instance, SWBT contests the PUC's determination that it must provide "dark fiber" and "subloop elements" to new entrants on an unbundled basis. Petition ¶¶ 61-63; Award ¶¶ 4, 6. Under the FTA, LECs are required to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . ." 47 U.S.C. § 251(c)(3). As the defendants correctly argue, the PUC's determination that it was technically feasible to require SWBT to provide dark fiber and subloop elements on an unbundled basis was a straightforward application of § 251(c)(3). The PURA 95 provision relied upon by SWBT in support of its position, however, requires consideration of "the public interest and competitive merits of further unbundling." *See* TEX. UTIL. CODE ANN. § 60.022. If application of this state law standard would require a different conclusion than that reached under the FTA, then this provision of state law would clearly be preempted by § 253(c)(3).

SWBT further challenges various rulings the PUC made regarding collocation, *see* Petition ¶¶ 65-66, and claims that the PUC unlawfully ordered SWBT to develop and implement electronic interfaces to facilitate communication between SWBT's network and the networks of new entrants, *see* Petition ¶ 64. In imposing these implementation requirements, the PUC expressly relied upon §§ 253(c)(3) and (6) of the FTA, which requires incumbent LECs to provide (i) nondiscriminatory access to unbundled network elements and (ii) physical collocation of equipment necessary for interconnection or access to unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *See* Award ¶ 10, 13, 25. With respect to SWBT's claims regarding electronic interfaces, FCC regulations require that incumbent LECs "provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning,

violation of § 60.022(b) of PURA 95, which, as indicated above, requires consideration of the public interest and competitive merits of further unbundling. Once again, while the merits of the PUC's determinations may be challenged under federal law standards, any contrary conclusions derived by applying conflicting state law standards would be preempted. Finally, SWBT complains that it must include competitors' entries in its white pages in violation of state law. *See* Petition ¶ 66. This claim is entirely foreclosed by the FTA, which specifically mandates that incumbent LECs permit all competing providers to have, among other things, nondiscriminatory access to directory listings. *See* 47 U.S.C. § 251(b)(3).

In its sixth series of claims (Petition ¶¶ 69-75), SWBT contends the PUC made numerous procedural errors in conducting the arbitration proceeding. For instance, SWBT claims it was denied proper notice and an opportunity to be heard because the PUC declined to re-open the arbitration proceeding following the Eighth Circuit's stay of certain FCC regulations, which regulations the PUC had previously declared were controlling. SWBT's claims of procedural errors under Texas law are made only in the most conclusory and vague fashion:

> To the extent the PUC Orders are based on principles of Texas law, the arbitration proceedings that led to the PUC Orders can only apply Texas law principles reflected in existing laws, rules and decisions, which have previously been validly adopted and determined through required procedures. To the contrary, the PUC Orders contain and apply principles, policies and decisions which either violate Texas law, or have not been validly adopted through proceedings required by Texas law.

Petition ¶ 71. As explained earlier, the PUC expressly stated that it did not apply Texas law to the arbitration proceedings in reviewing and approving the interconnection agreements. Moreover, SWBT utterly fails to identify which state laws were violated by the arbitration procedure adopted

by the PUC. Finally, the FTA generally sets forth the procedure by which arbitrations shall be conducted: both parties may file petitions with the appropriate state commission, *see* 47 U.S.C. §§ 252(b)(2) & (3), and the state commission must resolve disputed issues in a manner consistent with the FTA and relevant FCC regulations, *see* 47 U.S.C. § 252(c)(2), and within certain time limitations established under the federal act, *see* 47 U.S.C. § 252(b). SWBT's vague and conclusory assertions either fail to state a claim or are preempted by the FTA.

In its seventh and final series of claims (Petition ¶¶ 76-79), SWBT asserts the PUC's orders approving the interconnection agreements constitute unlawful "takings" in violation of the Texas Constitution. Specifically, SWBT challenges the PUC's rulings concerning subloop elements, dark fiber, and electronic interfaces and claims that the compensation provided to SWBT under the interconnection agreements is inadequate. Again, the PUC made these determinations by applying the relevant FTA provisions on unbundling, *see* 47 U.S.C. § 251(c)(3), and pricing standards, *see* 47 U.S.C. § 252(d). Therefore, the Texas Constitution's prohibition against takings is nullified by federal law which expressly authorized the PUC's actions in this regard.

In conclusion, the Court finds that the PUC did not conduct the arbitration proceeding or resolve any disputed issues in the interconnection agreements with reference to Texas law. Further, the Court finds that each purported state-law claim in Cause No. A-97-CA-105-SS and Cause No. A-97-CA-171-SS is preempted by the FTA. For all of the foregoing reasons, the Court enters the following orders:

IT IS ORDERED that SWBT's Conditional Motion to Remand [#24] in Cause No. A-97-CA-105-SS is OVERRULED AND DENIED;

IT IS FURTHER ORDERED that the Motion to Consolidate filed by the PUC and the PUC Commissioners [#27] in Cause No. A-97-CA-105-SS is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that the Motions to Dismiss filed by AT&T [#43], the PUC and the PUC Commissioners [#45], MCI [#46], Teleport [#48], and MFS [#50] in Cause No. A-97-CA-108-SS are GRANTED;

IT IS FURTHER ORDERED that SWBT's Motion for Status Conference [#66] in Cause No. A-97-CA-108-SS is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that SWBT's Conditional Motion to Remand [#8] in Cause No. A-97-CA-171-SS is OVERRULED AND DENIED;

IT IS FURTHER ORDERED that the Motions to Dismiss filed by the PUC and the PUC Commissioners [#15] and MCI [#19] in Cause No. A-97-CA-171-SS are GRANTED;

IT IS FURTHER ORDERED that SWBT's Motion to Exceed Page Limitation [#21] in Cause No. A-97-CA-171-SS is GRANTED; and

IT IS FINALLY ORDERED that SWBT's Motion for Status Conference [#29] in Cause No. A-97-CA-171-SS is DISMISSED AS MOOT.

SIGNED on this 7th day of August 1998.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MCI TELECOMMUNICATIONS CORP., :
CIVIL ACTION NO. 97-1857
Plaintiff :
(CALDWELL, J.)
V. : (DURKIN, M.J.)

BELL ATLANTIC-PENNSYLVANIA, INC., et al., :

Defendant :

FILED
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PER
DEPUTY CLERK

REPORT AND RECOMMENDATION

Before the court is a motion by the defendants, Pennsylvania Public Utility Commission and its members, to dismiss the complaint for lack of personal jurisdiction, and a motion by the same defendants to dismiss the crossclaim of defendant Bell Atlantic-Pennsylvania, Inc., against them. (Doc. Nos. 7 and 19).

By way of background, The Telecommunications Act of 1996, 47 U.S.C. §§151, et seq., (hereinafter "The Act" or "TA-1996") (Attached as Appendix B) seeks to promote telecommunications services throughout the nation by competition. Interexchange Carriers ("IXCs"), such as MCI, are expected to enter the local markets of Local Exchange Carriers ("LECs") as Competitive Local Exchange Carriers ("CLECs"). Interconnection agreements, arrived at through negotiation and arbitration, play an important part in promoting that competition. These agreements generally govern the prices, terms, and conditions under which a specific CLEC accesses an ILEC's network.

Sections 252(a)(2) and (b))(1)-(4) of the Act authorize state

commissions to conduct negotiations, mediations, and arbitration proceedings to facilitate and to resolve any terms, prices, or conditions that a specific CLEC and an ILEC are unable to resolve themselves. Thereafter, the CLEC and ILEC are required to submit the final interconnection agreement (contract) to the state commission for approval under Section 252(e). Section 252(e)(6) authorizes the judicial review of state commission actions approving any interconnection agreement.

Throughout 1996, plaintiff MCI Communications Corporation and MCI Metro Access Transmission Services, Inc. ("MCI") and Bell Atlantic-Pennsylvania, Inc. ("Bell-Atlantic") engaged in a lengthy, negotiation in an attempt to reach an interconnection agreement. On August 30, 1996, MCI sought compulsory arbitration of unresolved issues before the Pennsylvania Public Utility Commission (PUC). Hearings were held in October 1997 and briefs were submitted by MCI and Bell Atlantic.

On December 20, 1996, the PUC issued a final opinion and order disposing of the arbitration proceedings (December 1996 Order). The December 1996 Order required the submission of an interconnection agreement reflecting the PUC's determinations in the December Order. The December Order also required incorporation of the Commission's determinations in the related proceeding at PaPUC Docket No. A-310203F0002 (the "MFS Phase III" proceeding) concerning the prices for unbundled network elements ("UNEs")[1] under litigation in that proceeding.[2]

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[1]The three methods to attain some of the goals of the Act are, generally, interconnection, resale, and facilities-based competition. Under interconnection, a CLEC negotiates with an ILEC to obtain the UNEs needed to provide competitive local

The parties later filed a Joint Application for Approval of an interconnection agreement using the MFS Phase III Interim Rate Order rates. However, the parties could not agree on the appropriate Interconnection Point (IP) for the Philadelphia and Pittsburgh LATAs.[3] The parties requested the Commission to approve the interconnection agreement and determine the number of Ips for the LATAs.

On September 3, 1997, the PUC entered an Order (September 1997 Order) approving the interconnection agreement on the condition that the final rates would be those established by the MFS Phase III Proceeding. The September 1997 Order also adopted Bell's proposed language on the number of IPs. A Secretarial Letter issued on November 14, 1997 deeming the September 1997 Order to be final.

On December 8, 1997, MCI filed this action against the PUC and its commissioners in their official capacities, and against Bell Atlantic challenging a number of the PUC's determinations which the

---

exchange service to end-user customers through a combination of CLEC-owned components and those secured from the ILEC. Under resale, the CLEC purchases the retail services of an ILEC, at a pre-determined discount established by a state commission, for resale to an end-user customer. Under facilities-based competition, a competitor builds the telephone network needed to provide competitive services to end-users.

[2]MCI and Bell were parties to the MFS Phase III proceeding. On April 10, 1997, the PUC issued an order establishing interim rates (MFS Phase III Interim Order). On August 7, 1997, the PUC issued a final order establishing final rates (MFS Phase III Final Order).

[3]Interconnection Point (IP) is a term of art that refers to the physical connection between two competing carriers. In this case, MCI and Bell disputed the number of points serving the Philadelphia and Pittsburgh areas. MCI thought one point was sufficient whereas Bell wanted at least two.

PUC ordered MCI and Bell Atlantic to include in the interconnection agreement which MCI contends are violative of the Act. The PUC defendants filed a motion to dismiss the complaint for lack of personal jurisdiction. Bell Atlantic filed an answer to the complaint which included a counterclaim against MCI and also filed a crossclaim against the other defendants, also contending that certain actions of the PUC violated the Act. MCI then moved to dismiss Bell Atlantic's crossclaim.

Turning first to the PUC's motion to dismiss the complaint, the documents related to that motion are the PUC's supporting brief and exhibits (Doc. Nos. 8 and 9); MCI's opposing brief (Doc. No. 18), the PUC's reply brief related to both the motion to dismiss the complaint as well as the motion to dismiss Bell Atlantic's crossclaim (Doc. No. 25); an opposing brief by Intervenor United States in opposition to PUC's motion to dismiss the complaint on constitutional grounds (Doc. No. 35); MCI's surreply in opposition to defendant's motion to dismiss which addresses the constitutional arguments raised in the PUC's reply brief (Doc. No. 42) and MCI's notice of supplemental authority. (Doc. No. 52).

A central element of the 1996 Act is the introduction of competition into local service markets pursuant to agreements negotiated in accordance Sections 251 and 252 of the Act. Section 251 of the Act imposes a variety of obligations upon incumbent local telephone companies requiring them to provide access to their facilities to new entrants with the aim of hastening the growth of competition in their markets, by permitting other telecommunications carriers to interconnect with the incumbent, thereby allowing calls to carry between an incumbent's network

facility and those of a competitor; by providing other carriers access to elements of the incumbent's local network on an "unbundled" basis, thereby permitting a prospective competitor to repackage elements to be offered to the public as a competitive service; and by selling to other carriers, at wholesale rates, any telecommunications service that the incumbent provides to its retail customers. 47 U.S.C. §251(c). Section 251 also requires incumbent exchange carriers to provide physical access to their poles, ducts, conduits and rights of way to allow other carriers to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. §251(b)(4) and 251(c)(6).

Sections 251 and 252 impose a duty on incumbent local exchange carriers to negotiate in good faith with new entrants to arrive at the terms and conditions of agreements regarding facilities' access, interconnection, resale of services, or any of the other arrangements contemplated by the Act. 47 U.S.C. §251(c), 252. Section 252 provides that the parties may enter into voluntary agreements that become effective upon approval by the responsible state public service commission, or, failing negotiation of a voluntary agreement, that any party to such a negotiation "may petition a state commission to arbitrate any other issues." 47 U.S.C. §252(c). The 1996 Act permits any party "aggrieved" by a determination of a state commission to bring an action in federal district court to determine whether the agreement or statement meets the requirements of Section 251 and Section 252. 47 U.S.C. §252(e)(6).

Although Congress might have preempted the regulatory role

under the Act, it gave the states, through their commissions, the right to participate in this regulatory role, perhaps on the basis that the states had traditionally participated in the regulation of facilities. However, the Act plainly permits state commissioners to opt out of their regulatory role. If a state declines to accept the regulatory role contemplated by the statutes, its duties are assumed by the FCC, 47 U.S.C. §252(e)(5), and there is no judicial relief against the state commissioners' decision to opt out. 47 U.S.C. §252(e)(6). Review of the FCC's actions in such cases would constitute the sole avenue of judicial redress. See Id., 47 U.S.C. §402(a); 28 U.S.C. §2342(2). However, if the commission decides to accept the regulatory role, then as noted above, any party aggrieved by a decision of a state commission may bring an action in federal district court to determine whether the agreement or statement meets the requirements of the Act.

It is this provision for review in a federal court of the commission's actions which forms the basis for the PUC's contention that a federal court lacks jurisdiction to review the commission's actions. The PUC argues that the Eleventh Amendment bars suits against an unconsenting state, and an arm of that state such as the PUC, by its own citizens as well as those citizens of another state. The PUC argues that Pennsylvania has not consented to this suit by MCI, a citizen of Delaware and doing business in Pennsylvania and thus the action should be dismissed. In its reply brief, the PUC argues that Section 252(e)(4) to (e)(6) of the Act are unconstitutional because they exceed Congress' powers under the Commerce Clause and also that the Tenth Amendment which reserves to the states the powers not delegated to the United

States by the Constitution prohibits Congress' attempt to "commandeer the Commonwealth's legislative and executive functions" by forcing it to waive its sovereignty in order to implement the federal regulatory program of the Act.

However, as the briefs of MCI, the United States and indeed Bell Atlantic in connection with a identical attack on the crossclaim, clearly demonstrate, all of the courts that have addressed the Eleventh Amendment issue have held that the Eleventh Amendment does not bar district court review of state decisions under Section 252 of the Telecommunications Act either because suit can properly be brought against state officials, such as the commissioners here, for prospective injunctive relief without regard to the Eleventh Amendment, ex Parte Young, 209 U.S. 123 (1908), or because the Act does not impose an obligation on the states, the performance of which is subject to federal court review, but rather offers state regulatory bodies the option of participating in the federal system for regulation of private conduct and only then subjects their determinations to review in the district court, and that in accepting regulatory authority under the Act in full knowledge of the attendant judicial review provisions, Pennsylvania has waived any Eleventh Amendment protections. The briefs of MCI, the United States and indeed, Bell Atlantic, also contain a host of authority that Sections 252 (e)(4) to 252(e)(6) of the Act do not exceed Congress' commerce power nor do they violate the Tenth Amendment. Although PUC also argues that the complaint against the individual commissioners should also be dismissed pursuant to the Eleventh Amendment, the opposing briefs clearly establish that any relief here would be

prospective injunctive relief, directing the individual commissioners to implement properly the Telecommunications Act in approving the interconnection agreement at issue, and that therefore relief of the nature contemplated against individual officials is wholly consistent with the ex Parte Young exception to Eleventh Amendment immunity.

The PUC attempts to avoid this host of authority set forth in the opposing briefs, which have considered and rejected the PUC's various arguments, by culling from various cases language which it feels would support its position or by attempting to distinguish the authorities. However, the briefs of the parties demonstrate that these attempts are without merit.

At oral argument, the PUC offered brief argument in reply. Although recognizing that every one of a great number of courts when faced with these various issues has rejected the PUC's position, the PUC's reply was that these issues have not been authoritatively decided by the Third Circuit or by the Supreme Court of the United States and therefore the PUC is certainly not precluded from advancing the same arguments. Thus, it appears that the PUC's intent in filing these motions is more to preserve the record so that these issues may be revisited in the future, perhaps by the Third Circuit or the Supreme Court. Under these circumstances, it would only unduly lengthen this report to set forth the many cases that have rejected these very arguments and with which the magistrate judge agrees. Suffice it to say that the opposing briefs establish that the review of the PUC's actions is not barred by the Eleventh Amendment, the Commerce Clause, or the Tenth Amendment. Indeed, subsequent to oral argument, MCI

provided the court with even more authority through May 27, 1998 which supports its position in opposition to the motion of the PUC and its commissioners to dismiss the complaint. (Doc. No. 52).

Since the motion of the PUC to dismiss Bell Atlantic's crossclaim is based on the same arguments directed at the MCI complaint, the motion to dismiss the crossclaim should similarly be denied.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT:

the motion by the defendants PUC and its commissioners to dismiss the complaint be denied and the motion by the same defendants to dismiss the Bell Atlantic crossclaim be denied.

RAYMOND J. DURKIN
United States Magistrate Judge

Dated: August 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation Defendants.	)	Civil Action No. 99-5024 **CERTIFICATE OF SERVICE**

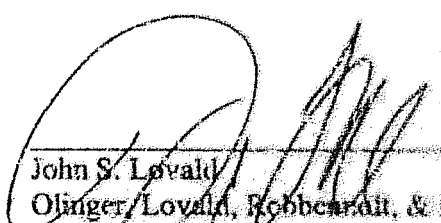
I HEREBY CERTIFY that I have served a true and correct copy of AT&T COMPENDIUM OF UNREPORTED DECISIONS by first class mail, on the date designated below, postage prepaid, upon the following:

Thomas J. Welk
Tamara A. Wilka
BOYCE, MURPHY, MCDOWELL
& GREENFIELD
PO Box 5015
Sioux Falls, SD 57117-5015

Norton Cutler
Todd Lundy
Blair A. Rosenthal
U S WEST Communications Inc.
1801 California, Suite 5100
Denver, CO 80202

Rolayne Wiest
Public Utilities Commission General Counsel
500 E. Capitol
Pierre, SD 57501

dated this 17th day of May, 1999.



John S. Lovald
Olinger, Lovald, Robbenaldt, & McCahren
PO Box 66
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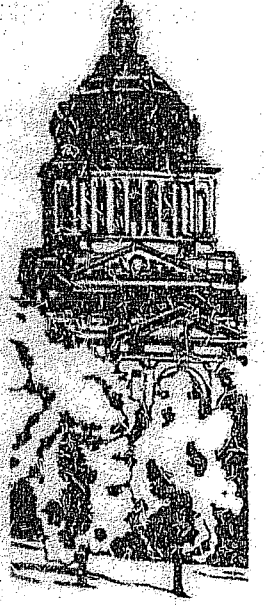

South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

May 26, 1999

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Mr. Haas:

Enclosed for filing you will find original and copy of Reply Brief with reference to the above captioned matter

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Michele M. Farris
Marlette Fischbach
Shirleen Fugitt
Lewis Hammond
Leni Healy
Cannon Hoseck
Lisa Hull
Dave Jacobson
Katie Johnson
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Terry Nerum
Gregory A. Rislov
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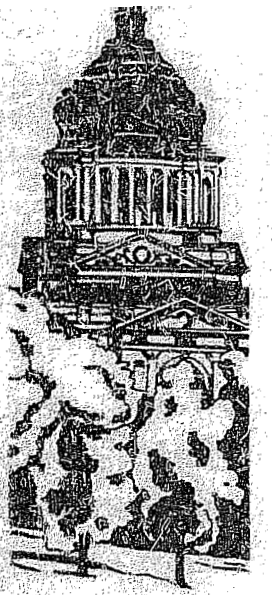

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

May 26, 1999

Mr. Todd L. Lundy
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U S WEST Communications, Inc.
1801 California, Suite 5100
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Ms. Maria Aria -Chapiseau
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1875 Lawrence Street, Suite 1575
Denver, CO 80202

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

Enclosed each of you will find a copy of Reply Brief in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

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Enc.

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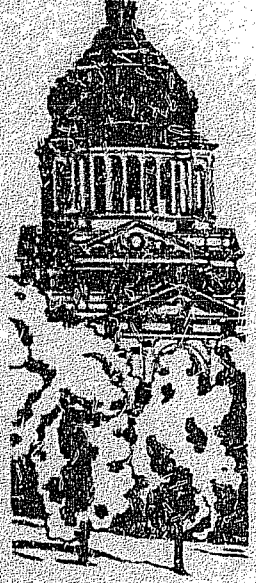

South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

May 26, 1999

Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find a courtesy copy of Reply Brief in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

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Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,	)	
Plaintiff,	)	Civ. No. 99-5024
v.	)	REPLY BRIEF
JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation	)	
Defendants.	)	

State Defendants submit this reply brief in response to arguments raised by Defendant AT&T and Plaintiff U S WEST which opposed the State Defendants' motion to dismiss.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS THIS ACTION.

A. Ex Parte Young Does Not Provide An Exception to the State's Eleventh Amendment Immunity.

Both AT&T and U S WEST argue that the doctrine of *Ex parte Young* is applicable. The Commission asserted five reasons why *Ex parte Young* cannot be invoked in this case to circumvent the State's Eleventh Amendment immunity. (1) the State is the real, substantial party in interest; (2) the suit does not involve an ongoing violation of a federally protected right; (3) the doctrine of *Ex parte Young* cannot

compel discretionary acts; (4) the Act sets forth a limited remedial scheme evincing Congressional intent that it did not intend to subject a State official to the type of liability that could be found under *Ex parte Young*; and (5) the claim must be for prospective injunctive relief and may not be a claim for damages.

When the State is the real party in interest the doctrine of *Ex parte Young* is inapplicable. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S.Ct. 684, 688 (1993) (*Ex parte Young* "has no application in suits against the States and their agencies, which are barred regardless of the relief sought.") State agencies are the sole creation of the State and have no separate identity. *Glick v. Henderson*, 855 F.2d 536, 540 (8th Cir. 1988). U S WEST's naming of the individual commissioners cannot change the fact it is the state agency that is required to act. *See* 47 U.S.C. § 252 (The Act consistently requires a "State commission" to take certain actions). When a statute at issue unmistakably authorizes a state or its agency to act, as opposed to an individual state official, the doctrine of *Ex parte Young* cannot be applied. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75, n. 17, 116 S.Ct. 1114, 1133, n. 17, 134 L.Ed.2d 252 (1996) (The Court stated that the duty imposed by the IGRA on the state "stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers").[1] In this case, the federal Act requires a State agency to approve interconnection

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[1] U S WEST argues that this footnote support its position that the use of the words "State commission" means the State is not implicated. However, the Commission asserts that since a state agency has no separate identity apart from the state, the citing of a state agency, as opposed to individual state officials, means that any suit filed is against the State.

agreements, not individual state officers or even a group of officers, it is the *State commission*. *See* 47 U.S.C. § 252(e). The individual Commissioners cannot take any action independent of one another and the fact that U S WEST has included a takings claim only reinforces the fact that the State of South Dakota is the real party here. *See Ford Motor Co.*, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945).[2] U S WEST asserts that this is a case involving an ongoing violation of a federally protected right that seeks only prospective injunctive relief and is not a claim for damages. U S WEST Brief at 6. U S WEST contends that it "does not seek monetary relief in its complaint, nor is the relief it seeks a predicate for a request for monetary relief." *Id.* However, later in its brief, U S WEST appears to imply that it could claim compensation at a later date based on its takings claim.[3] The question then becomes: if the Court determined a taking had occurred, could U S WEST attempt to use that finding "as a predicate" for requesting monetary relief? U S WEST asserts that it is not seeking compensation since it is asking the Court to "review the Agreement so as to avoid permitting enforcement of state-commission imposed interconnection agreements that threaten either an unauthorized taking of U S WEST's property or taking without [] st

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[2] In fact, U S WEST, in its takings argument, equates the Commission with the State by arguing that the arbitration process was a solicitation of compensation from the *state*. In its brief U S WEST states that "[t]he Commissioners assert that U S WEST has not sought compensation from the *state*... [b]ut that is precisely what U S WEST did in the arbitration proceedings below...." US WEST brief at 15 (emphasis added).

[3] U S WEST states "[e]ven if compensation for takings resulting from agreements imposed under the Agreement [sic] may be available to U S WEST at a later date, federal courts must nevertheless employ a 'policy of avoidance' and interpret the Act and Agreement in a manner that does not 'expose the Treasury to liability both massive and unforeseen.'" U S WEST Brief at 16 (emphasis added).

compensation." *Id.* However, no stay has been issued by the Court prohibiting the enforcement of the Interconnection Agreement and, therefore, the Commission is unaware of any legal impediment prohibiting AT&T from providing local competition under the terms of the Agreement. U S WEST cannot have it both ways. It cannot claim that it is not seeking compensation in this case in order to circumvent restrictions on the use of the *Ex parte Young* doctrine, and then, later, if the Court would find a taking had occurred, use that decision "as a predicate for a request for monetary relief."

On the issue of whether this case involves discretionary acts, AT&T asserts that "the relief requested here by USWC does not involve any admonition to the Commissioners to take any 'affirmative action' involving discretion." AT&T brief at 18. AT&T likens this case to the situation in *Ex parte Young* where the Supreme Court found that restraining a state officer from enforcing an unconstitutional enactment does not direct any affirmative action by the state officer. *Id.* at 18-19. This comparison ignores the issues raised by U S WEST in this case. U S WEST is contesting rates, terms, and conditions as decided by the Commission in its arbitration decisions. For example, U S WEST is requesting that this Court declare that the provision of the Agreement providing for a single aggregate discount for resold service violates the Act. If the Court were to find this was a violation, then the case should be remanded back to the Commission to set additional discounts. The setting of additional discounts would involve review of complex cost studies. A remand would involve a high degree of discretion. It is difficult to see how the relief requested could avoid requiring the Commission to take affirmative action involving discretion.

In its initial brief, the Commission asserted that the Act limits the relief available to a party, therefore, under the reasoning of *Seminole Tribe*, Congress did not intend to subject a State official to the type of liability that could be found under *Ex parte Young*. Commission Brief at 16-17. The question to be asked pursuant to *Seminole Tribe* is whether the enforcement statutes at issue in *Seminole Tribe* were "quite modest" when compared to the type of relief available under *Ex parte Young*. 517 U.S. at 75, 114 S.Ct at 1133. AT&T asserts that section 252(e)(6) is silent as to any available remedies. AT&T Brief at 15. The Commission disagrees. The remedy is clearly stated: it is a determination of whether the agreement meets the requirements of sections 251 and 252. 47 U.S.C. § 252(e)(6). This enforcement statute does not authorize suits against the individual members of the Commission.

Moreover, U S WEST is not just asking for a determination of whether the Agreement meets the requirements of sections 251 and 252, it is also asking this Court to find "the Commissioners have violated the Fifth and Fourteenth Amendments to the U.S. Constitution . . . ." U S WEST Complaint at 16. Exposing the individual Commissioners to a takings claim certainly goes beyond Congressional intent since review was to be limited to a determination of whether the agreement meets the requirements of sections 251 and 252. *See AT&T v. BellSouth*, 1998 WL 1811574 *5.

AT&T's argument that this Court can conduct an appellate-style review and therefore it is not a suit against the state because there would be no coercive process is less than compelling. *See* AT&T Brief at 19-21. U S WEST's complaint is based on its request for declarative and injunctive relief, including an allegation that the

Commission committed an unconstitutional taking. AT&T appears to suggest that the Court may ignore the entire basis of the complaint, find this is not a suit against the state, review the case, and, if necessary, remand the case back to the Commission. AT&T quotes *Pennhurst State School & Hosp. v. Halderman* as providing that the test to determine whether the suit is against the State is if the judgment would affect the public treasury, interfere with public administration, restrain the State from acting or compel it to act. 465 U.S. at 101, n. 11. However, within this same argument, AT&T mentions the possibility of remand. AT&T Brief at 21. Requiring the Commission to change its decision and conduct further proceedings consistent with the Court's decision is certainly compelling the State to act. Thus, the test to determine whether this is a suit against the sovereign as articulated in *Pennhurst* is easily passed.

B. The Commission Did Not Waive Its Eleventh Amendment Immunity.

Both AT&T and U S WEST argue that the Commission waived its immunity by participating in the arbitration process. However, as stated in its initial brief, the Commission asserts that the doctrine of constructive consent is no longer viable following the *Seminole Tribe* decision. Commission Brief at 11. In support of its position, the Commission cited to *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998). In that decision, the Fifth Circuit found that *Seminole Tribe* provides that implied waivers can no longer be found. *Id.* at 286-287. AT&T attempts to distinguish *Chavez* by claiming that case involved federal regulation of state activity and this case involves a case of "cooperative federalism." AT&T Brief at 10.

AT&T's attempts to distinguish *Chavez* are unavailing. First, interconnection agreements are specifically designed to introduce competition into local markets. State Commissions, not the federal government, have traditionally regulated local markets. Thus, this is a case involving the federal regulation of state activity. Moreover, the *Chavez* Court's finding was not a limited one. The Court states that "[a] fair reading of Seminole inescapably suggests that we must 'drop the other shoe,' and declare that Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court." *Id.* at 287.

U S WEST disputes the Commission's assertion that the Commission lacks the power to waive the State of South Dakota's sovereign immunity. U S WEST Brief at 10. U S WEST cites to SDCL 49-31-81 which provides that "[t]he commission may implement and comply with the provisions of the federal Telecommunications Act of 1996." U S WEST argues that SDCL 49-31-81 authorizes the Commission to waive the State's sovereign immunity. The Commission disagrees. In *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427 (8th Cir. 1997), the Eighth Circuit was faced with a similar issue. In that case, the Santee Sioux Tribe argued that the Nebraska Legislature intended to waive Nebraska's immunity by enacting Neb.Rev.Stat. § 9-1,106 (Supp. 1996) that stated in relevant part:

> (1) Upon request of an Indian tribe having jurisdiction over Indian lands in Nebraska, the Governor or his or her designated representative or representatives shall, pursuant to 25 U.S.C. 2710 of the federal Indian Gaming Regulatory Act, negotiate with such Indian tribe in good faith for the purpose of entering into a tribal-state compact governing the conduct of Class III gaming as defined in the act. A compact which is negotiated pursuant to this section shall be executed by the Governor without ratification by the Legislature.

* * *

(3) Such compact negotiations shall be conducted pursuant to the provisions of 25 U.S.C. 2710 of the federal Indian Gaming Regulatory Act.

Id. at 430-431.

The Eighth Circuit found that this language did not indicate the State's consent to federal court jurisdiction. The Court specifically found that "[t]he plain language of section 9-1,106 does not contain a clear and unequivocal waiver of Eleventh Amendment immunity." *Santee Sioux Tribe*, 121 F.3d at 431. Similarly, the language in SDCL 49-31-81 is not a clear and unequivocal waiver of the State of South Dakota's Eleventh Amendment immunity. It merely states that the Commission may implement and comply with the Act. This is comparable to the language of section 9-1,106 which authorized the Governor to negotiate with Indian tribes and conduct those negotiations in accordance with federal law. Thus, SDCL 49-31-81 does not unequivocally waive the State's immunity and the Commission does not have the power to waive the State's sovereign immunity.

C. State Court Review of Interconnection Agreements is Available.

U S WEST argues that if section 252(e)(6) is found unconstitutional then the entire process for State Commission implementation of the Act must also be invalidated. U S WEST Brief at 11. U S WEST asserts section 252(e)(6) is not severable and, without it, there would be no oversight over state Commission decisions concerning interconnection agreements. However, it is clear that section 252(e)(6) is in fact, severable from the other parts.

Although there is no express severability clause in the amended Act, there is a severability clause in the Communications Act of 1934. See 47 U.S.C. § 608. The Supreme Court has applied this severability clause to a later enacted telecommunications act. *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2350 (1997). The application of that clause in this case gives rise to a strong presumption of severability for the different provisions. *Alaska Airlines v. Brock*, 480 U.S. 678, 686, 107 S.Ct. 1476, 1481 (1987).

However, the presence of an express clause is not determinative as to whether a specific portion is severable. *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 803 (Temp.Emerg.Ct.App); cert. denied, 469 U.S. 852, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984). Rather, in making that decision "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 107 S.Ct. at 1480.

The main focus must be on Congress' intention when it created the Act. *Denver Area Educ. Telecom. Consortium v. FCC*, 116 S.Ct. 2374, 2397 (1996). That intention is articulated in the language written in the Congressional record stating that:

> The purposes of the bill are to revise the Communications Act of 1934 . . . to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for all other purposes.

S. Rep. No.23, 104th Cong., 1st Sess. (1995). The focus of Congress was on providing more efficient telecommunications services to Americans, not necessarily on providing a federal form of judicial review of Commission decisions. Consequently, the

ultimate question to ask is whether Congress would have preferred the Act without section 252(e)(6) as opposed to no Act at all. *See Gulf Oil Corp*, 734 F.2d at 604. It seems abundantly clear that the modified Act would be much more preferable. Congress would not want to compromise its goal of deregulation for the sake of saving section 252(e)(6), thus, even without federal review it seems likely that Congress would have passed the Act.

The Commission recognizes a problem that arises in absence of the federal review provided by section 252(e)(6). If section 252(e)(6) is removed, then the Court must ensure that parties have a form of state review otherwise "serious constitutional question[s]" would arise. *Webster v. Doe*, 486 U.S. 592, 603 (1988). Currently section 252(e)(4) bars any state review of Commission decisions. Furthermore, if section 252(e)(6) is removed, the remaining portion of the Act must be "fully operative as a law." *Alaska Airlines*, 107 S.Ct. at 1480. The Act would not meet this standard if parties are left with no opportunity for review.

In light of this situation, the Court must also strike section 252(e)(4) since it also would become unconstitutional by violating the due process right to judicial review following the removal of section 252(e)(6). This is the correct procedure since "a court should refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 30 S.Ct. 21, 24, 54 L.Ed. 106 (1909). The Court in *Regan* goes on to state that "whenever an act of Congress contains unobjectionable provisions severable from those found to be

unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Id.* Once again, the Court need not strike other major portions when the problems can be cured by this course of action. U S WEST's contention that this Court lacks authority to act in this manner is not supported by the case law. The cases cited for U S WEST's position are inapplicable since the Courts in those cases were merely considering interpretation of statutes, not removal of an unconstitutional provision as is the case here. *See* U S WEST's Brief at 12, referring to *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 541 U.S. 122, 136, 115 S.Ct. 1278, 1288 (1995), and *Abert v. United States*, 78 F.3d 241, 244 (6th Cir. 1996). If section 252(e)(4) was removed then South Dakota law would provide parties with a forum in which the Commission's decisions would be reviewed. SDCL 1-26-30, (Right to Review of Administrative Decisions). A Court decision eliminating only sections 252(e)(6) and 252(e)(4) would be the most consistent in following the general goals Congress set out to meet when it created the Act.

II. U S WEST'S TAKINGS CLAIM MUST BE DISMISSED FOR LACK OF JURISDICTION.

In its initial brief, the Commission asserted that U S WEST's takings claim must be dismissed because U S WEST must first seek just compensation from the State. U S WEST claims that it requested compensation from the Commission and was denied and thus it had already sought compensation from the State. However, this fails to satisfy the requirements of *Williamson*, which provides that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a

violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-195, 105 S.Ct. 3108, 3120-3121 (1985). The Eighth Circuit applied this principle in *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997). In that case, the property owners, the McKenzies, specifically requested compensation for their land from the City but the City refused and forced the McKenzies to give City an easement over the land instead. *Id.* at 315. Despite the fact that the McKenzies had requested compensation from the City and had been denied, the Eighth Circuit still found that the McKenzies' claim was not ripe for federal review because they had failed to seek "just compensation from the state." *Id.* at 317. Thus, U S WEST's contentions that it had satisfied the *Williamson* requirements by appearing before the Commission must fail. U S WEST has not attempted to show that there are inadequate state procedures to determine whether a taking has occurred.

As to U S WEST's contention that it is not seeking compensation but is attempting to prevent a taking, the Commission reiterates its concerns stated earlier that U S WEST could attempt to use any determination by this Court that a taking has occurred in a later proceeding to argue for compensation. No stay has been issued so nothing prevents AT&T from using the Interconnection Agreement to provision competitive local services in South Dakota.

AT&T argues that a state court would have no jurisdiction to determine a taking because of 47 U.S.C. § 252(e)(4), the Commission refers the Court to its argument on

the issue section C in which the Commission asserts that section 252(e)(4) must also be found unconstitutional.

CONCLUSION

For the reasons set forth above and in its initial brief, the Commissioners respectfully request that this Court dismiss U S WEST's Complaint.

Dated at Pierre, South Dakota, this 26th day of May, 1999.

Rolayne Ailts Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Reply Brief were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 26th day of May, 1999.

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May 27, 1999

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Re: U.S. West Communications, Inc. v. James A. Berg, et al.

Dear Counsel:

Please find enclosed a true and correct copy of the United States of America's Acknowledgment of Receipt of State Defendants' Motion to Dismiss in the above-referenced matter. This is intended as service by mail.

Very truly yours,

KAREN E. SCHREIER
United States Attorney

Bonnie P. Ulrich

BONNIE P. ULRICH
Assistant United States Attorney
Chief, Civil Division

BPU:plh

Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U.S. WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

vs.

JAMES A. BERG, et al.,

Defendants.

CIV99-5024

UNITED STATES OF AMERICA'S ACKNOWLEDGMENT OF RECEIPT OF STATE DEFENDANTS' MOTION TO DISMISS

Undersigned counsel for the United States of America hereby acknowledge receipt of an April 23, 1999 motion to dismiss recently filed by the defendant commissioners of the South Dakota Public Utility Commission. In that motion, those defendants ("the state defendants") ask that the Court declare unconstitutional certain judicial review provisions of the Telecommunications Act of 1996. Counsel for the United States respectfully advise the Court that the United States may wish to exercise its right under 28 U.S.C. § 2403(a) to intervene to defend the constitutionality of those provisions. See Wallach v Lieberman, 366 F.2d 254, 258 n.9 (2d Cir. 1966) ("Certification and intervention [under 28 U.S.C. § 2403(a)] are permissible at any stage of the proceeding.").

Undersigned counsel, however, only became aware of the state defendants' motion on May 25, 1999, and, under the Department of Justice's regulations, the Solicitor General is required to authorize any motion to intervene. See 28 C.F.R. § 0.20. Although undersigned counsel from the Civil Division are attempting to secure a decision from the Solicitor General regarding intervention in the instant case as expeditiously as possible, based on previous experiences, undersigned counsel do not necessarily anticipate the Solicitor General's decision before June 12, 1999.

The United States respectfully requests until that date to advise the Court further as to participation in this case. Should the United States intervene, it would anticipate filing a brief in support of the constitutionality of the challenged provisions on or shortly after its intervention.

Dated this 27th day of May, 1999.

Respectfully submitted,

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Acting Assistant Attorney General

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Attorneys for the United States of America

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing United States of America's Acknowledgment of Receipt of State Defendants' Motion to Dismiss were served this 27th day of May, 1999, by first-class mail upon the following:

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May 28, 1999

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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5021)

Dear Rolayne and John:

I am enclosing to Rolayne the original Joint Motion to Exceed Page Limitation and Joint Case Management Statement which have been revised after discussion with counsel. I am asking that you forward these documents to John and that he return them to me after signing. I will forward the fully signed documents to Judge Battey.

If you have any questions, please do not hesitate to call me.

Sincerely yours,

BOYCE, MURPHY, McDOWELL
& GREENFIELD, L.L.P.

Tamara A. Wika

TAW/vjj
Enclosure
cc: Todd Lundy
Norton Cutler
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June 1, 1999

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Tamara A. Wilka
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Sioux Falls, South Dakota 57117-5015

RE: U S West Communications, Inc. v. James Burg, et al, Civ. No. 99-5024

Dear Tamara:

Per instructions in your letter of May 28, 1999, and with authorization of AT&T I have executed and am returning the original Joint Motion to Exceed Page Limitation and Joint Case Management Statement to you for execution and filing with the Court.

Yours very truly,

John S. Lovald
Attorney at Law

JSL:hmh

cc: Rolayne Ailts Wiest
Michael D. Warden

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June 2, 1999

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

The Honorable Richard H. Battey
United States Senior District Judge
515 9th Street, #318
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)

Dear Judge Battey:

The parties met via telephone conference on Thursday, May 20, 1999, pursuant to Rule 26(f) and your Order for Form 35 Report and Scheduling Information dated May 4, 1999.

Although this case does not fit squarely within the exceptions listed in Local Rule 16.1, it is in the nature of an administrative appeal. Accordingly, I telephoned your law clerk on May 27, 1999 and explained that the parties had met and would like to proceed via the enclosed Joint Case Management Statement which was used in similar litigation in Nebraska. Your clerk indicated that we should submit the same, along with a Motion to Exceed Page Limitation, in lieu of the Rule Form 35, Report of Parties' Planning Meeting referred to in your May 4th Order. I am sending the original and one copy of both Documents to the Clerk for filing.

If you would like additional information, please let us know.

Respectfully submitted

BOYCE, MURPHY, McDOWELL
& GREENFIELD, L.L.P.

Tamara A. Wilka

TAW/vjj
Enclosure
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Norton Cutler
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June 2, 1999

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of the Joint Motion to Extend Page Limitation and Joint Case Management Statement.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Wilka

TAW/vjj
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cc: Rolayne Ailts Wiest
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Michael Thompson
Larry Toll
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JUN 11 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-3024

JOINT MOTION TO EXCEED PAGE LIMITATION

The parties, through their counsel of record, move for an order allowing them to file briefs in excess of the page limitation set forth in LR 7.2(B). Specifically, they seek an order allowing the filing of opening and responsive briefs of up to fifty pages, followed by a ten-page five page reply brief by U S WEST Communications, Inc. An extension is requested in light of the complex issues raised in this case and the lengthy administrative record.

Dated this 2nd day of June, 1999.

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Attorneys for U S WEST Communications, Inc.

Dated this 1 day of May, 1999
June.

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Rolayne Ailts Wiest, General Counsel
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Attorney for James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota

Dated this 1st day of May, 1999
June

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Attorneys for AT&T Communications of the Midwest

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

JOINT CASE MANAGEMENT STATEMENT

The parties, U S WEST Communications, Inc. ("U S WEST"), James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota ("Commissioners") and AT&T Communications of the Midwest, Inc. ("AT&T"), by their attorneys, respectfully submit this Case Management Statement proposing the following rules and framework for management of this pending action.

1. Preliminary Statement. This particular proceeding arises under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various sections of Title 47 U.S.C., hereafter referred to as the "Act"), and involves on-the-record judicial review of an interconnection agreement between U S WEST and AT&T, which was arbitrated and approved by the Commissioners, pursuant to 47 U.S.C. § 252(e)(6). The parties agree that there will be no discovery and no trial; this Court may resolve all issues on the basis of motion, briefing and oral argument. Accordingly, a scheduling order of the type ordinarily contemplated by Rule 16 of the

Federal Rules of Civil Procedure is not appropriate. Settlement of this matter is unlikely, and the parties agree that alternative dispute resolution procedures would not be appropriate in this case. The parties agree that all issues can be resolved by the Court on the record and the briefs.

2. Settlement of the Record. The record before the District Court shall consist of all materials and evidence presented to the Commissioners during the arbitration proceeding below. The parties shall agree on a true and correct copy of the record and arrange for its transmittal to the Court on or before December 10, 1999.

3. Briefing Schedule and Page Limitations. U S WEST shall file its initial brief on the merits of its affirmative claims, not to exceed fifty (50) pages, on or before September 14, 1999. The Commissioners and AT&T will then file response briefs, again not to exceed fifty (50) pages, on or before November 2, 1999. U S WEST may file an optional reply brief limited to twenty-five (25) pages on or before December 7, 1999.

4. Appendix. The parties agree that the record on the merits before the Court consists of all materials and evidence presented to the Commissioners. It is anticipated at or that each party will present an appendix of record excerpts with its briefs to the Court or that the parties will stipulate to a joint appendix following the close of briefing.

5. Oral Argument. The Court shall schedule oral argument on all issues as soon as practicable after the close of the briefing schedule.

Dated this 2nd day of June, 1999.

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Dated this 1 day of May, 1999

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Dated this 21 day of May, 1999

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Attorney for AT&T Communications of the Midwest

IT IS SO ORDERED this _____ day of _____, 1999.

_____

Richard H. Battey
United States Senior District Judge

FILED
JUN 0 1 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
A Colorado Corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., and Iowa Corporation

Defendant.

Civil Action No. 99-5034

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

RECEIVED
JUN 0 1 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Statement of Movant

I, John S. Lovald, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Stephen B. Kinnaird, an attorney admitted to practice in the U.S. Supreme Court, U.S. Court of Appeals, Federal and Sixth Circuits; U.S. District Court, Colorado and District of Columbia, and the New York Court of Appeals and the D.C. Court of Appeals, but not admitted to the Bar of this Court, who will be counsel for the Defendant AT&T Communications of the Midwest, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

6-1-99
Date

Signature

Statement of Proposed Admittee

I, Stephen B. Kinnaird, am currently a member in good standing of the U.S. Supreme Court; U.S. Court of Appeals; Federal and Sixth Circuits, U.S. District Court, Colorado and District of Columbia; and the New York Court of Appeals and the D.C. Court of Appeals, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Date	Stephen B. Kinnaird Name	Signature

Law Firm: Sidley & Austin

Suite/Building: 1722 Eye Street, N.W.

Address: Washington, DC 20006

Telephone Number: (202) 736-8000

Comments: _____

ORDER

It is hereby

ORDER that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $150.00 shall be paid to the Clerk of Courts, 515 9th Street, #302, Rapid City, South Dakota 57701.

Dated this 5th day of June, 1999.

By the Court:

U.S. District Judge

ATTEST:

JOSEPH HAAS, Clerk

By: _____

NOTICE OF ENTRY

This original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 6-8-99

Deputy Clerk

FILED
JUN 09 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
A Colorado Corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., and Iowa Corporation

Defendant.

Civil Action No. 99-5024

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

RECEIVED
JUN 09 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Statement of Movant

I, John S. Lovald, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Michael D. Warden, an attorney admitted to practice in the Supreme Court of Virginia, District of Columbia Court of Appeals, and the United States District Courts for the Eastern District of Virginia, the District of Columbia, Colorado and Arizona, but not admitted to the Bar of this Court, who will be counsel for the Defendant AT&T Communications of the Midwest, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

6-1-99
Date

Signature

Statement of Proposed Admittee

I, Michael D. Warden, am currently a member in good standing of the Supreme Court of Virginia, District of Columbia Court of Appeals, and the United States District Courts for the Eastern District of Virginia, the District of Columbia, Colorado and Arizona, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

5/23/99
Date

Michael D. Warden
Name

Signature

Law Firm: Sidley & Austin

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Address: Washington, DC 20006

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Comments: _____

ORDER

It is hereby

ORDER that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Courts, 515 9th Street, #312, Rapid City, South Dakota 57701.

Dated this 8th day of June, 1999.

By the Court:

U.S. District Judge

ATTEST:

JOSEPH HAAS, Clerk

By:

CLERK'S OFFICE
I hereby attest that the document was
entered on the docket of the Clerk
of the United States District Court
for the District of South Dakota
6 8 99
Clerk

U.S. Department of Justice

Karen E. Schreier
United States Attorney
District of South Dakota

Post Office Box 5073
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[illegible]
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June 14, 1999

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RECEIVED
JUN 15 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Re: U.S. West Communications, Inc. v. James A. Burg, et al.

Dear Counsel:

Please find enclosed true and correct copies of the United States of America's Motion to Intervene and Intervenor United States of America's Brief in Opposition to Defendant's Motion to Dismiss in the above-referenced matter. This is intended as service by mail.

Very truly yours,

KAREN E. SCHREIER
United States Attorney

[signature]

BONNIE P. ULRICH, AUSA
Chief, Civil Division

BPU/lm
enclosures

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

RECEIVED
JUN 15 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U.S. WEST COMMUNICATIONS, INC., a Colorado corporation,

CIV99-3024

Plaintiff,

vs.

JAMES A. BURG, et al.,

Defendants.

UNITED STATES OF AMERICA'S
MOTION TO INTERVENE

Introduction

In this action, defendants James A. Burg, Pam Nelson, and Laska Schoenfelder, commissioners of the South Dakota Public Utilities Commission (hereafter, the "commissioners") have moved the Court to dismiss plaintiff's complaint on the ground, inter alia, that this suit cannot be maintained against them because of the Eleventh Amendment immunity of a state from suit by a private party in federal court. Because the federal statute under which this action arises, the Telecommunications Act of 1996, expressly provides for district court jurisdiction to review certain determinations by such officials under the statute, the commissioners' motion to dismiss on Eleventh Amendment grounds represents a challenge to the constitutionality of the statute. Furthermore, a ruling that the commissioners were not amenable to suit in federal court could render their determinations based upon the interpretation of a federal statute unreviewable by a federal court, a result at odds with the purpose of Congress and contrary to the interests of the United States. The United States accordingly moves this Court

pursuant to 28 U.S.C. § 2403(a) and Federal Rule of Civil Procedure 24, for leave to intervene as a matter of right or permissively, in order to address the Eleventh Amendment issue raised by the commissioners' defense to this litigation.[1]

ARGUMENT

I. THE UNITED STATES MAY INTERVENE OF RIGHT

Rule 24 of the Federal Rules of Civil Procedure, which governs intervention in civil cases, provides for two types of intervention: intervention of right and permissive intervention. With respect to intervention of right, the rule states:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). The United States may intervene under either provision of Rule 24(a).

A. The United States May Intervene Of Right Under 28 U.S.C. § 2403(a)

The United States possesses an unconditional right to intervene in this action under 28 U.S.C. § 2403(a). That statute provides, in pertinent part:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. . . .

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[1] The United States' brief in opposition to the commissioners' motion to dismiss accompanies this motion and brief in support of intervention.

Section 2403(a) by its plain language confers on the United States an unconditional right to intervene when the constitutionality of an act of Congress is challenged. O'Keefe v. New York City Board of Elections, 246 F. Supp. 978, 980 (S.D.N.Y. 1965); Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644, 648 n.7 (5th Cir.), cert. denied, 340 U.S. 829 (1950). Inasmuch as the motion to dismiss challenges, inter alia, the constitutionality of the statutory review provisions of the federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6), which expressly provide for district court review of determinations of state public utility commissions rendered pursuant to authority conferred by the 1996 Act, section 2403 confers upon the United States an unconditional right to intervene in this action.[2]

B. The United States May Intervene Of Right Under 28 U.S.C. § 517

The United States also has a right to intervene in this action under 28 U.S.C. § 517, which provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

The only explicit limitation upon § 517 is "that the interests of the United States be at stake." Bowers v. Horowitz, 535 F.2d 830, 834-35 (3rd Cir. 1976).[3] In this case, there can be no question that the

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[2] In the event this case proceeds to the merits of plaintiff's claims, the Federal Communications Commission may seek leave to appear as amicus curiae for purposes of advising the Court of their views on whether the challenged commissioners' determinations meet the requirements of the 1996 Act. As potential amici, they will cooperate with counsel for the parties in any ultimate briefing schedule on dispositive motions.

[3] 28 U.S.C. § 518(b) contains language similar to that found in § 517, and provides overlapping authority under which the United States can intervene under Rule 24(a). Section 518(b) provides as follows:

United States has an interest in the constitutionality of the various provisions of a federal statute that governs the introduction of competition into the erstwhile monopoly local telephone market as regulated under federal law.

C. The United States Has A Right To Intervene Under Rule 24(a)(2)

Intervention is also appropriate under Rule 24(a)(2) if: (1) the intervenor's motion is timely; (2) the intervenor has an interest relating to the transaction which is the subject matter of the action; (3) disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) its interest is not adequately represented by other parties. Sierra Club v. R. Jorgensen, 960 F.2d 83, 85 (8th Cir. 1992); Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978). See also 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil § 1908, at 265 (2d Ed. 1986). In applying these criteria, "Rule 24 . . . is to be given a liberal construction." 7C C. Wright, A. Miller, & M. Kane, supra, § 1908, at 238; see In re Benny, 791 F.2d 712, 721 (9th Cir. 1986).

The United States meets the requirements for intervention under Rule 24(a)(2) in this case. First, the United States has filed its motion as promptly as feasible under the circumstances.[4] Accordingly, there should be no question that intervention is timely. Second, the United States has

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> When the Attorney General considers it is in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or an officer of the Department of Justice to do so.

(emphasis supplied).

[4] As far as undersigned counsel are aware, no notice has been received by the Attorney General under the statute.

an obvious interest in the interpretation and enforcement of new federal legislation that has a fundamental impact on the development of competition in the nation's telecommunications markets.

Courts have characterized the "interest" requirement under Rule 24(a)(2) as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); United States v. Reserve Mining Company, 56 F.R.D. 408, 412 (D. Minn. 1972), accord, Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983). The interest requirement has thus been "interpreted in broad terms . . . ." Natural Resources Defense Council v. United States Environmental Protection Agency, 99 F.R.D. 607, 609 (D.D.C. 1983). The interest of the United States in addressing the constitutional challenge to the review provisions of the local competition subchapter of the 1996 Act satisfies the "interest" requirement of Rule 24(a)(2).

Third, a ruling by this Court that the Eleventh Amendment barred the type of judicial review contemplated by the statute would surely "impair or impede" the interests of the United States in ensuring uniform interpretation of the new telecommunications law.

Fourth, the basic interests of the United States are quite different from the interests of any original private party to this lawsuit, and none of the original parties will adequately represent the United States' interests.[5] As noted above, the United States has long-term interests in the

---

[5] Thus, it has been held in some cases that for an intervenor to demonstrate that its interests are not "adequately" represented by existing parties only a "minimal" showing is required. Sagebrush Rebellion, Inc. v. Watt, supra, 713 F.2d at 528. See SEC v. Dresser Industries, 628 F.2d 1368, 1390 (D.C. Cir.) (stating that an applicant "need only show that the representation of his interest may be inadequate; the burden of proof rests on those opposing intervention." (emphasis added)), cert. denied, 449 U.S. 993 (1980). See also Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972) (intervention appropriate where representation "may be" inadequate"); Sierra Club v. Robertson, 960 F.2d at 85-86.

constitutionality of the Telecommunications Act of 1996, and the public interest in connection with the Act seeks to further, while a private party's interests are confined to its individual business objectives. Furthermore, the United States has a broad interest in the application of the Eleventh Amendment in general, which may transcend the particular interests of the private parties to the outcome of this case. See Natural Resources Defense Council, 778 F.2d at 1546. Because the United States satisfies all the requirements of Rule 24(a)(2), leave to intervene as a matter of right should be granted.

II. PERMISSIVE INTERVENTION BY THE UNITED STATES IS APPROPRIATE IN THIS CASE

Alternatively, the United States seeks leave to intervene in this proceeding pursuant to Fed. R. Civ. P. 24(b)(2), which provides:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Here, the United States would intervene regarding a common question of law with the main action, constitutional issues concerning statutory review of determinations rendered by the state commissioners pursuant to federal law. Intervention by the United States, which would not prejudice adjudication of the rights of the original parties in any way, is thus appropriate. See Peters v. Ennis, 385 F.2d 694 at 704, 706 (permissive intervention liberally granted to public officials seeking to assert public interest); Securities and Exchange Commission v. United States Realty and Improvement Co., 310 U.S. 434, 459-460 (1940). The Court should, therefore, permit the United States to intervene.

Conclusion

For the foregoing reasons, the Motion of the United States to Intervene for the limited purpose of defending the constitutionality of the Act's judicial review provisions should be granted.

Dated this 14th day of June, 1999.

Respectfully submitted,

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Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing United States of America's Motion to Intervene was served this 14th day of June, 1999, by first class mail upon the following people:

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KAREN E. SCHREIER
UNITED STATES ATTORNEY

/s/ Laurie J. Nadel
BONNIE P. CLARK, AUSA
Chief, Civil Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

RECEIVED
JAN 11 '99
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U.S. WEST COMMUNICATIONS, INC., a Colorado corporation,

CIV99-5024

Plaintiff,

vs.

JAMES A. BURG, et al.,

Defendants.

INTERVENOR UNITED STATES OF AMERICA'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

PRELIMINARY STATEMENT

Defendants James A. Burg, Pam Nelson, and Laska Schoenfelder, in their official capacities as commissioners of the South Dakota Public Service Commission (hereafter the "commissioners"), have moved the Court to dismiss this action, which is filed under section 252(e)(6) of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in sections of 47 U.S.C.). The commissioners assert that this action violates the Eleventh Amendment to the Constitution. Intervenor, the United States of America, files this memorandum in support of the constitutionality of the judicial review provisions of the local competition subchapter of the 1996 Act, 47 U.S.C. § 252(e)(6), and of this Court's jurisdiction thereunder.

This action and the 1996 Act do not violate the Eleventh Amendment. In the vast majority of cases to date in which the issue has been decided, courts have held that state public utility commissions have no Eleventh Amendment immunity from prospective relief under

section 252(e)(6). First, although the Eleventh Amendment generally bars an action directly against a state in federal court, it does not preclude an action that seeks only prospective relief against state officials whose actions are alleged to violate federal law. E.g. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring in part). Second, South Dakota has waived its Eleventh Amendment immunity in any event by voluntarily participating in the federal regulatory program created by the Telecommunications Act of 1996.[1]

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[1] Courts upheld jurisdiction over state commissioners on Ex parte Young grounds in the following § 252(e)(6) cases: U S West v. Serna, No. CIV 97-124 JP DJS (D.N.M. Mar. 31, 1998); GTE Fla. Inc. v. Johnson, No. 4:97cv234-RH (N.D.Fla. Nov. 21, 1997); AT&T Communications, Inc. v. BellSouth Telecommunications, Inc., No. 4:97cv236-RH (N.D. Fla. Nov. 21, 1997) (same court as No. 4:97cv234-RH). Courts held that jurisdiction over state commissions was proper on waiver grounds in the following cases: Bell Atlantic-Pennsylvania, Inc. v. Nextlink Pennsylvania, L.L.P., No. CV 99-494 (E.D.Pa. May 28, 1999); Southwestern Bell Tel. Co. v. PUC of Tex., No. A-97-CA-108-SS (W.D.Tex. Aug. 7, 1998); MCI Metro Access Transmission Services, Inc. v. GTE Northwest, Inc., No. C97-743 (W.D.Wash. July 23, 1998) (appeal pending); GTE Midwest Inc. v. Johnson, No. 4:97CV3218 (D.Neb. March 16, 1998); U S West v. Boyle, No. 8:97CV449 (D.Neb. Feb. 19, 1998); Ind. Bell Tel. Co., Inc. v. Smithville Tel. Co., Inc., 31 F.Supp.2d 628, 636-37 (S.D.Ind. 1998); U S West v. TCG Seattle, 971 F. Supp. 1365, 1370 (W.D.Wash. 1997) (appeal pending) (same court as No. C97-743). Courts upheld jurisdiction on both Ex parte Young and waiver grounds in the following cases: MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, Inc., No. 1:CV-97-1037 (M.D.Pa. Nov. 5, 1998); Ill. Bell Tel. Co. v. Worldcom Technologies, Inc., No. 98 C 1925, 1998 WL 547278, at *3 (N.D.Ill. Aug. 27, 1998); Ind. Bell v. McCarty, No. IP 97-0652-C-B/S (S.D.Ind. June 25, 1998); U S West v. Jennings, No. CIV-97-0025-PHX-ROS (D.Ariz. June 1, 1998); AT&T Communications v. Contel, No. 97-901 (D.Minn. May 1, 1998); MCI v. Ill. Bell, No. 97 C 2225, 1998 WL 156678, at *7, *13 (N.D.Ill. Mar. 31, 1998) (same court as 1998 WL 547278), affirmed MCI Telecommunications Corp. v. Ill. Commerce Comm'n, 168 F.3d 315, 321 (7th Cir. Feb. 10, 1999) (petition for rehearing pending); AT&T Communications, Inc. v. Mich. Bell Tel. Co., No. 97-CV-60018-AA (E.D.Mich. Mar. 19, 1998); AT&T v. BellSouth, 1:97-cv-2198-HTW (N.D. Ga. Feb. 11, 1998); U S West v. Anderson, No. CV 97-2-II-CCL (D.Minn. Jan. 30, 1998); BellSouth v. Tenn. Regulatory Auth., No. 3-97-0523 (M.D.Tenn. Jan. 27 & Feb. 11, 1998); U S West v. TCG Or., 35 F.Supp.2d 1237, 1245-46 (D.Or. 1998); U S West v. MFS Intelenet, Inc., 35 F.Supp.2d 1221, 1230 (D.Or. 1998) (same court as 35 F.Supp.2d 1237); Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 16 F.Supp.2d 817, 825-26 (W.D.Mich. 1998); U S West v. Public Serv. Comm'n, 991 F. Supp. 1299, 1301-02 (D.Utah 1998); MCI Telecommunications Corp. v. Bell Atlantic-Virginia, Inc., No. 3:97CV029 (E.D.Va. Dec. 24, 1997); AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., No.

STATUTORY AND PROCEDURAL BACKGROUND

The Telecommunications Act of 1996 ("the 1996 Act") represents the first major amendment of the country's communications laws since the Communications Act was passed in 1934, and reflects a fundamental reworking of the regulatory scheme away from monopoly industries to open competition among service providers. A keystone of the 1996 Act is the introduction of competition into local service markets, pursuant to agreements negotiated in accordance with Sections 251 and 252 of the Act, the provisions at issue here.

Title I, Part II of the 1996 Act ("Development of Competitive Markets") added a subchapter to the Communications Act of 1934 directed toward ending the historic local monopolies held by the Bell operating companies, and other incumbent local exchange providers over local telephone service. The subchapter establishes standards and procedures to encourage the rapid development of competition in local telephone markets. See 47 U.S.C. §§ 251-261. In addition, as an incentive to the Bell companies, the 1996 Act requires them to demonstrate that they have complied with statutory obligations to open their markets to competition before they can receive approval from the FCC to begin providing long distance service in their regions. 47 U.S.C. § 271.

As a central element of the development of open market competition in local phone

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97-79 (E.D.Ky. Dec. 15, 1998); AT&T v. BellSouth, No. 3-97-2164-17 (D.S.C. Jan. 11, 1998); AT&T v. BellSouth, No. 5:97-CV-405-BR (E.D.N.C. Nov. 20, 1997); GTE South v. Morrison, No. 3:97CV493 (E.D.Va. Nov. 7, 1997) (appeal pending); U S West v. Hix, No. 97-D-1537 (D.Colo. Oct. 29, 1997); U S West v. Thoms, No. 4-97-CV-10092 (S.D. Iowa Aug. 4, 1997); U S West v. Reinbold, No. A1-97-25 (D.N.D. July 28, 1997). With the exception of Bell Atlantic-Pennsylvania, Inc. v. Nextlink Pennsylvania, L.L.P., No. CV 99-494 (E.D.Pa. May 26, 1999), the unpublished versions of these cases are set forth in an appendix that accompanies this brief.

service, the 1996 Act contemplates an end to the "bottleneck" control by local exchange carriers over local services and the facilities necessary to originate and terminate long distance telephone services that is accomplished by exclusive ownership of the wires connecting to private residences and businesses. Congress recognized that new entrants to the local telephone market would not be able rapidly and efficiently to duplicate the facilities developed over time by incumbents, and that relying upon parallel facilities development by new entrants would thus inhibit the growth of competition. See generally Joint Explanatory Statement of the Committee of Conference on Telecommunications Act of 1996, H.R. Conf. Rep. No. 104-458, at 1-9 (1996), reprinted in 1996 U.S.C.C.A.N. 124.

Section 251 of the 1996 Act accordingly imposes a variety of obligations upon incumbent local telephone companies requiring them to provide access to their facilities to new entrants with the aim of hastening the growth of competition in their markets. These obligations include the duty 1) to permit other telecommunication carriers to "interconnect" with the incumbent, which allows calls to carry between an incumbent's network facilities and those of a competitor; 2) to provide other carriers access to elements of the incumbent's local network on an "unbundled" basis; and 3) to sell to other carriers, at wholesale rates, any telecommunications service that the incumbent provides to its retail customers. 47 U.S.C. § 251(c). Section 251 also requires incumbent exchange carriers to provide physical access to their poles, ducts, conduits, and rights-of-way to allow other carriers to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. §§ 251(b)(1) and 251(c)(6).

Sections 251 and 252 impose a duty on incumbent local exchange carriers to negotiate in

good faith with new entrants to arrive at the terms and conditions of agreements regarding facilities access, interconnection, resale of services, or any of the other arrangements contemplated by the 1996 Act. 47 U.S.C. §§ 251(c), 252. Section 252 provides that the parties may enter into voluntary agreements that become effective upon approval by the responsible state public service commission, or, failing negotiation of a voluntary agreement, that any party to such a negotiation "may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(c). The 1996 Act permits any party "aggrieved" by a determination of a state commission to bring an action in federal district court to determine "whether the agreement or statement meets the requirements of Section 251 and [§ 252]." 47 U.S.C. § 252(e)(6).[2]

The 1996 Act thus establishes a comprehensive regulatory system to ensure that incumbent carriers permit entry into the market. The Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, setting terms and conditions subject to the standards set forth in the Act and in FCC regulations, and exercising review and enforcement authority. If a state chooses not to assume regulatory responsibility, the sole consequence is that the FCC will assume the state's duties under the statute. 47 U.S.C. § 252(e)(5). In such a case, the FCC's actions would be subject to review in the federal courts of appeals. 47 U.S.C. § 252(e)(6); 28 U.S.C. § 2342(2). 47 U.S.C. § 252(e)(5). In either circumstance, the agreement is ultimately subject to federal judicial review.

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[2] The section reads in full:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

ARGUMENT

A. Suit Against the Commissioners May Proceed on the Principle Enunciated in *Ex parte Young*

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court held that, notwithstanding the Eleventh Amendment, federal courts could consider a claim that the commissioners of a state regulatory agency had set local rail rates in a manner that violated federal law. Despite the commissioners' claims to the contrary, Motion to Dismiss at 14-15, a claim that the commissioners of a state regulatory agency have set local phone service interconnection terms and rates in a manner that violates federal law may likewise be heard by the federal courts. See e.g., U S West Communications, Inc. v. Public Service Comm'n of Utah, 991 F. Supp. 1299, 1301 (D. Ut. 1998).

Ex parte Young is a well-recognized exception to the Eleventh Amendment, in which the Supreme Court explained that a federal court has jurisdiction in a suit against a state officer to enjoin official actions violating federal law (statutory or constitutional), even though the state itself may be immune. E.g., Id. at 1301. The logic in Ex parte Young is that

> acts by state officials which are contrary to federal law cannot have been authorized or be ratified by the state; thus, [acts contrary to federal law] cannot be considered acts of or under the state's authority. Therefore, any suit seeking to enjoin wrongful — and post facto unauthorized — acts by state officials is not a suit against the state, and the federal

court's injunction of those wrongful acts is not a judgment against the state itself. Brennan v. Stewart, 834 F.2d 1248, 1252 (5th Cir. 1988).

Under the Ex parte Young doctrine, therefore, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." Quern v. Jordan, 440 U.S. 332, 337 (1979). As the district court in Iowa explained, "this [section 252] case 'seeks to vindicate important federal rights, and thus falls squarely within the doctrine of Ex parte Young.'" U S West v. Thoms, No. 4-97-CV-70[illegible] (S.D. Iowa Aug. 4, 1997), slip op. at 3-4. Thus, as here, "[w]hen a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." Coeur d'Alene Tribe, 521 U.S. 261, 286, 294 ("a Young suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective") (O'Connor, J., concurring in part).

Courts have repeatedly found that the Ex parte Young exception overcomes the presumptive immunity of state officials. See, e.g., Pugh v. Alabama, 438 U.S. 781 (1978) (allowing suit against officers to go forward, even if suit may not be brought directly against the state agency for which the officers work). That the 1996 Act refers to review of "Commission" actions and not individual commissioners does not defeat the Ex parte Young doctrine. Motion to Dismiss at 15. Fully consistent with Ex parte Young, any relief here would be prospective injunctive relief, directing the individual commissioners to implement properly the Telecommunications Act of 1996 in approving the interconnection agreement at issue. Courts have repeatedly found that relief of the nature contemplated here against individual officials is wholly consistent with the Ex parte Young exception. See, e.g., Pugh v. Alabama, 438 U.S. 781

(1978) (allowing suit against officers to go forward, even if suit may not be brought directly against the state agency for which the officers work). As the Morrison court held, the fact that the 1996 Act refers to review of "Commission" actions and not those of individual commissioners is "immaterial" and does not defeat the Ex parte Young doctrine. Morrison, supra, slip op. at 4; BellSouth - Tennessee, supra, slip op. at 9-10; U S West - Oregon, supra, slip op. at 15-16.

Nor does the Supreme Court's decision in Seminole direct that the Ex parte Young exception should not apply to this case. Motion to Dismiss at 16-17. The Seminole decision, while on one hand limiting the availability of an Ex parte Young action where Congress "prescribe[s] a detailed remedial scheme," 116 S. Ct. at 1132-33, also reaffirmed the vitality of the Ex parte Young exception, 116 S. Ct. at 1131 n.4, 1132-33 & n. 17.

Moreover, the limitation to Young identified in Seminole is narrow and not applicable here. Section 252 of the Telecommunications Act in no way prescribes a "detailed remedial scheme" comparable to that set forth in the Indian Gaming Regulatory Act ("IGRA") that was challenged in Seminole. Thoms, slip op. at 4. Furthermore, by contrast with the IGRA, there is nothing in the 1996 Act that suggests that Congress intended to foreclose the type of relief available under Ex parte Young. To the contrary, district court review of the Commissioners' decision for conformity with federal law is precisely the type of relief the 1996 Act contemplates.

The IGRA, in Seminole, provided for compulsory negotiation of contract terms between a state and an Indian Tribe wishing to develop gaming enterprises on tribal lands within that state. 25 U.S.C. § 2710(d)(3). The IGRA made the state's statutory obligation to negotiate in good faith judicially enforceable in district court. 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). A plaintiff

who prevailed in the district court action was thereafter entitled only to limited relief in accordance with a complex procedural scheme, independent of the federal court. 116 S. Ct. at 1120. In light of this very specific post-judgment enforcement scheme, the Court held that permitting a suit against state officials under Ex parte Young would frustrate the clear congressional purpose. In that context, an Ex parte Young action would authorize forms of relief that Congress, in enacting a detailed post-judgment remedial scheme, had expressly foreclosed. 116 S. Ct. at 1132.

By comparison, the 1996 Act imposes an obligation to negotiate in good faith upon private parties, and makes their final agreement — after review by a state commission that has elected to participate in the process — subject to review in district court for compliance with federal law. There is no further administrative remedy provided after the judicial review, as there was in the IGRA.

The "remedial process" contemplated by Congress under the 1996 Act, far from representing a "detailed scheme" such as that set forth in the IGRA, is entirely in keeping with the principle of Ex parte Young. Thoms, slip op. at 4. Here, the commissioners have voluntarily assumed regulatory responsibility that would otherwise be undertaken by the FCC. 47 U.S.C. § 252(e)(5). The commissioners' posture in the litigation is that of an impartial regulator implementing federal law in a dispute among private parties (not, as in Seminole, as one of the parties to the controversy). While the 1996 Act stipulates procedures to be followed by private parties and the state commission prior to a district court action, section 252 does not set forth any post-judgment enforcement procedures or limit relief in any way. Indeed, the 1996 Act does not contemplate that relief of any kind against the state will result from judicial review, except

insofar as a federal court may correct the prospective application of federal law by state officials. This is precisely the type of review that Ex parte Young permits. See BellSouth - Tennessee, supra, slip op. at 13-15.

The commissioners also argue that the relief sought by plaintiff under the Act is not prospective, and therefore not covered by Ex parte Young, because their order was issued in the past. Motion to Dismiss at 16. But because that order requires the plaintiff to conform its future to the requirements set forth by the South Dakota commission, the order represents an ongoing requirement imposed on the plaintiff. In such circumstances, "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." Coeur d'Alene, 117 S.Ct. at 2043 (citing Milliken v. Bradley, 433 U.S. 267, 289-290 (1977)); Michigan Bell Telephone Co., 16 F.Supp.2d at 826 (citing cases).

Finally, the commissioners claim that because plaintiff has alleged a takings claim, with its potential for damages, in addition to its claims for injunctive relief under section 252(e)(6), review under Ex parte Young is inappropriate. Motion to Dismiss at 17-18. But plaintiff's takings claim is made under a different jurisdictional and legal basis from its claims for relief under section 252(e)(6). Complaint ¶¶ 5, 81. Whatever relief plaintiff seeks as a remedy for its takings claim, plaintiff's predominant claims under the Act do feature the sort of prospective injunctive relief permissible under Ex parte Young. The commissioners cannot prevent this Court from hearing plaintiff's claims under the Act solely because plaintiff has joined those claims with a takings claim.

If the commissioners are not subject to suit for prospective injunctive or declaratory

relief, they would be able to violate federal law without an aggrieved party's recourse in the federal courts. This would be precisely the result the Ex parte Young doctrine seeks to avoid. Green v. Mansour, 474 U.S. 64, 68 (1985) ("prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.")

B. By Participating in the Regulatory Program Established Under Sections 251 and 252 of the 1996 Act, the Commission Has Also Waived Any Immunity from Suit Under the Statute

The Supreme Court has understood the Eleventh Amendment as confirming a broad, preexisting principle "that a State will ... not be subject to suit in federal court unless it has consented to suit." Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991); accord, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996). However, it is equally clear that "If a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); accord, e.g., Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State ... is a personal privilege which it may waive at pleasure."); Seminole Tribe, 517 U.S. at 54. Thus, "[t]he Eleventh Amendment does not bar suit against a state that has waived its sovereign immunity." U S West Communications, 991 F.Supp. at 1301. The most obvious way in which a state can waive its Eleventh Amendment immunity is by passage of state legislation expressing the state's consent to be sued in federal court. See Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306-08 (1990); cf. Atascadero, 473 U.S. at 241. But such a waiver is not the only way. When Congress unambiguously provides that specified conduct will have the legal effect of subjecting the states to suit in federal court, and a state thereafter voluntarily elects to engage in

that conduct, the state has impliedly waived its Eleventh Amendment immunity.

As the Supreme Court has explained, "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular program." Atascadero, 473 U.S. at 238 & n.1 (emphasis added). See also Seminole, 517 U.S. at 63 (characterizing as "unremarkable . . . [the] proposition that the States may waive their sovereign immunity") (citing Parden v. Terminal Railway of Ala. Docks Dept., 377 U.S. 184 (1964)); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) ("Pennhurst II"); Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997) (recognizing that state may waive Eleventh Amendment immunity by agreeing to participate in a federal program).

As the Seventh Circuit and at least thirty-three federal district court decisions have concluded, the voluntary exercise of regulatory authority established by the 1996 Act is plainly conditioned upon amenability to suit in federal district court. If the commissioners choose to exercise this authority, they do so with full knowledge that their determinations will be subject to federal court review. 47 U.S.C. § 252(e)(4-6); see Atascadero State Hospital, 473 U.S. at 246-47 (with clear Congressional notice that state participation in a federal regulatory program will subject the state to federal court review, a state's voluntary participation in that system may be deemed constructive waiver of Eleventh Amendment immunity); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) ("Pennhurst I") (States may be required to comply with "federally imposed conditions" when Congress "speak[s] with a clear voice, [ ] enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation [in a federal program]."); see generally E. Chemerinsky, Federal Jurisdiction, at 410 (3d ed.

1994) (constructive waiver of Eleventh Amendment immunity may be found "in situations where Congress indicates a clear intent to make states liable in federal court if they engage in a particular activity, and then a state voluntarily chooses to engage in that conduct"). Despite the commissioners' contentions to the contrary, Commissioners' brief at 9-10, by giving states the option of participating in the regulatory framework fashioned under the 1996 Act, but conditioning that participation on federal court review, there can be no doubt that Congress manifested its clear intention obligate participating states to accept federal court review of their implementation of a federal statute. "Considered together, these provisions evince a clear Congressional intention to condition regulation by a state commission upon review of that commission's action in federal court." U S West Communications, 991 F. Supp. at 1301; accord U S West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997), appeal pending, No. 98-35203 (9th Cir.).

Furthermore, the Act gives the states a choice on whether to administer the Act and thus accede to federal court jurisdiction. As the Seventh Circuit has explained, "the Act provides state commissions with a realistic and genuine choice whether to involve themselves in the regulatory process ..., or whether to let the FCC assume those functions." MCI Telecommunications Corp. v. Illinois Commerce Comm'n, 168 F.3d 315, 323 (7th Cir. Feb. 10, 1999) (petition for rehearing pending). "[B]y electing to assume responsibility for the pertinent regulatory functions," the court concluded, "the defendants waived the State's immunity from suit in federal court provided by the Eleventh Amendment."[3] Id.

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[3] Although the commissioners imply that Congress is improperly attempting to abrogate the state's immunity (Motion to Dismiss at 7-10), they are confusing abrogation with constructive waiver. As the Seventh Circuit has explained, the difference between abrogation and

Nor are the requirements of the Act in any sense unexpected or novel. The commissioners are acting in the stead of the FCC which, like other federal regulatory agencies, is always named as respondent in suits brought to review its orders. See 28 U.S.C. § 2342 (Hobbs Act); Fed. R. App. P. 15(a) (requiring that agency be named respondent in actions brought to review agency orders). By accepting the statutory option to put themselves in the regulatory position otherwise occupied by the FCC, the commissioners must have foreseen the possibility that it could be named as a defendant in a judicial review proceeding. It would be anomalous indeed for Congress to have provided for federal court review of the federal agency's actions but not the state's.

Finally, the commissioners cannot claim that they could not anticipate being sued in federal court to ensure prospective compliance with federal law under the 1996 Act. Although "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," waiver can be found "by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Edelman, 415 U.S. at 673. That the Commissioners' determinations under the 1996 Act will be subject to federal court review is plain from the text of section 252(e)(6), notably entitled "Review of State commission actions."

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constructive waiver is "the voluntariness of the state's choice in the waiver situation — a choice between waiving its immunity or foregoing participation in the federal statutory scheme at issue." MCI Telecommunications Corp., supra, 168 F.3d at 321. In holding that Congress may not abrogate the States' immunity pursuant to its Article I powers, the Supreme Court in Seminole Tribe stated that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72 (emphasis added). But where, as here, "Congress gives states a genuine choice, clearly stated, as to whether or not to waive their sovereign immunity, the doctrine of constructive waiver survives Seminole Tribe." 168 F.3d at 321.

and from the fact that state court jurisdiction is expressly prohibited by section 252(e)(4).

The vast majority of federal district courts to consider the waiver question have concluded that the states have waived their immunity by agreeing to participate in the regulatory apparatus set forth in the Act. See, e.g., U S West Communications Inc. v. TCG Oregon, 35 F. Supp.2d 1237, 1245 (D. Or. 1998) U S West Communications, 991 F. Supp. at 1301-02; Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc., 16 F.Supp.2d 817, 825-26 (W.D.Mich.1998) (citing the "numerous ... federal courts which have ... held that the State's actions in this context constitute a constructive waiver of its Eleventh Amendment immunity" and listing nineteen other published and unpublished district court opinions); see also footnote 1, supra. The only court of appeals that has ruled on the question has concluded that "by electing to assume responsibility for the arbitration contemplated by the [Telecommunications] Act, the defendant[commission] waived the State's immunity from suit in federal court provided by the Eleventh Amendment." MCI Telecommunications Corp., 168 F.3d at 323.

Only two district courts have held differently. In Wisconsin Bell, Inc. v. Public Serv. Comm'n, 27 F.Supp.2d 1149, 1158 (W.D.Wis.1998), the district court was persuaded that the state could not have voluntarily waived its immunity because a state that declined to participate in the review mechanism created by the 1996 Act would be obligated, "against a backdrop of fifty years of regulatory history during which state commissions served as the primary regulators of local telephone service," to turn the regulatory authority provided by the Act over to the FCC despite "the risk that local service providers may act contrary to the public interest." See also AT&T Communications of the Southwest, Inc. v. BellSouth Telecommunications, __ F.Supp.2d ___, 1999 WL 181674, *7 (M.D.La.). But the Wisconsin court's decision, which is not the law

of its circuit, MCI Telecommunications Corp., 168 F.3d at 323, confuses past history with law. See also Motion to Dismiss at 13-14. Experience with telecommunications regulation may make a state public service commission well suited to implement the requirements set forth in the 1996 Act. But if a public service commission's experience or other factors lead it to reject the prospect of implementing the detailed regulations set forth in the Act, the Act permits the commission, and through it the state, to turn over its duties to the FCC. 47 U.S.C.§252(e)(5). The FCC is then charged with ensuring that local service providers do not act contrary to the terms of the Act; a state commission is not, in short, left with the difficult choice of choosing regulation or no regulation at all, but rather need only choose whether it wishes to enforce the requirements of the Act or whether it should leave that task to the FCC. When it chose to do so, and thus to enforce the provisions of the Act, it was obligated to accept federal judicial oversight of its interpretation of federal law.[4]

The commissioners' reliance on a Fifth Circuit decision applying the Eleventh Amendment to other federal statutes also is misplaced.[5] First, even assuming that the case

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[4] The only other district court to have found that a public service commission had not waived its Eleventh Amendment immunity held "that the Public Service Commission could not constructively waive its Eleventh Amendment immunity." AT&T Communications of the Southwest, Inc. v. BellSouth Telecommunications, __ F.Supp.2d ___, 1999 WL 1516714, *7 (M.D.La.) (emphasis added). But where a state is given a clear choice to opt into a scheme that provides for federal judicial review, or to opt out of that scheme, constructive waiver is appropriate. See Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997); Kit K. Epperly, Implied Waiver After Seminole Tribe, 82 Minn. L.Rev. 793, 831-32 (1998). Furthermore, the Louisiana court felt itself bound by a then-recent Fifth Circuit case ruling that "implied immunity" was no longer "viable" after Seminole Tribe, Chavez v. Arte Publico Press, 157 F.3d 282, 286-287 (5th Cir. 1998), vacated, rehearing en banc granted (Oct. 1, 1998), and presumably did not know of that case's status with respect to rehearing. In any event, no such case binds the Court here.

[5] The Commission cites Chavez v. Arte Publico Press, 157 F.3d 282 (5th Cir. 1998), vacated, rehearing en banc granted (Oct. 1, 1998).

presented by that case was the same as that presented here, no conflict exists. The Fifth Circuit's decision in Chavez v. Arte Publico Press, 157 F.3d 282 (5th Cir. 1998), was vacated when the Fifth Circuit granted en banc rehearing. Further consideration of Chavez has been stayed pending the Supreme Court's review of College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 131 F.3d 353 (3rd Cir. 1997), cert. granted, ___ U.S. __; 119 S. Ct. 790 (1999).

The commissioners cannot plausibly argue that they are entitled to exercise authority available to them solely through a delegation from Congress without accepting as well the condition attendant to its exercise — that is, federal district court review of the conformity of its determinations applying federal law. Cf. New York v. United States, 505 U.S. 144, 179 (1992) (although Congress cannot require states to administer federal regulatory programs, when federal law properly applies, such as by a state's voluntary participation, "the Supremacy Clause makes federal law paramount over the contrary positions of state officials, the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply," citing Puerto Rico v. Branstad, 483 U.S. 219, 227-28 (1987)). Indeed, to permit the commissioners to exercise the authority granted them by the 1996 Act free of the attendant district court review would essentially be to permit them to apply federal law free from any judicial review. See 47 U.S.C. § 252(e)(4) (state commission determinations not reviewable in state court). Congress cannot have intended, and this Court should not effect, such an anomalous result.[5]

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[5] The commissioners also have moved to dismiss the takings claim in U S West's complaint, which asserts that the state commission's interconnection decision effects a taking of U S West's property. Given the nature of its proposed intervention, the United States, as intervenor takes no position on that specific issue, but suggests that its resolution be deferred until after separate briefing in which the FCC, as amicus curiae, might seek leave to participate.

CONCLUSION

For the foregoing reasons, this action does not violate the Eleventh Amendment to the Constitution, and the commissioners' motion to dismiss plaintiff's complaint should be denied.

Dated this 14th day of June, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Intervenor United States of America's Brief in Opposition to Defendants' Motion to Dismiss were served this 14th day of June, 1999, by first-class mail upon the following:

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NITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

RECEIVED
JUN 19 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5024

AT&T'S COMPENDIUM OF UNREPORTED DECISIONS REGARDING ELEVENTH AMENDMENT IMMUNITY

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APPENDIX A

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U.S.D.C. - Atlanta

FEB 19 1998

LUTHER D. THOMAS, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

vs.

BELLSOUTH TELECOMMUNICATIONS, INC. and GEORGIA PUBLIC SERVICE COMMISSIONERS, in their official capacities

1:97-cv-861-RCF

MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.; GEORGIA PUBLIC SERVICE COMMISSION; DAVID N. BAKER; ROBERT B. BAKER; MAC BARBER; BOB DURDEN; and STAN WISE, in their official capacities

1:97-cv-1518-RCF

ORDER

These related actions are before the court on motions to dismiss by defendants Georgia Public Service Commission [GPSC], Georgia Public Service Commissioners, David N. Baker, Robert B. Baker, Mac Barber, Bob Durden, and Stan Wise [collectively, the State Defendants]. These actions are also before the court on motions to intervene by the United States and the Federal

Communications Commission [the FCC]. Because the motions in both cases are, for all intents and purposes, identical, the court addresses them together in this consolidated Order.[1]

Background

In February 1996, President Clinton signed into law the Telecommunications Act of 1996 [the Act], 47 U.S.C. § 251 et seq., which provides a statutory framework for the development of competitive local telephone markets. Pursuant to the Act, local telephone utilities, such as defendant BellSouth Communications, Inc. [BellSouth], must negotiate with requesting competitors, such as plaintiffs AT&T Communications of the Southern States, Inc. [AT&T], MCI Telecommunications Corporation, and MCIMetro Access Transmission Services, Inc. [collectively, MCI], to facilitate those competitors' entry into the local market. See 47 U.S.C. § 252(a). If the parties are unable to negotiate an "Interconnection Agreement" [the Agreement], they may petition the state public utility commission--in Georgia, GPSC--to arbitrate any unresolved issues. See id. § 252(b)(1). The parties must then incorporate the negotiated and arbitrated terms into the Agreement, which is subsequently submitted to the state commission for approval. Id. § 252(e)(1). After the Agreement is either approved or rejected, the parties may seek judicial review of the state commission's decision in federal district court. Id. § 252(e)(6).[2] If, however, the state commission does not act when petitioned for arbitration, the FCC becomes responsible for arbitrating and approving the Agreement. Id. § 252(e)(5).

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[1]The court sees no need to hear argument on these motions and thus denies AT&T's request for oral argument.

[2]The state courts are prohibited from reviewing the commission's decision. Id. § 252(e)(4).

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In the actions at bar, AT&T and MCI seek the court's review of the terms of their respective Agreements, both of which were arbitrated and approved by GPSC. In connection therewith, plaintiffs have sued BellSouth and the State Defendants. Against the State Defendants, plaintiffs seek prospective injunctive relief.[3] In response to the complaints, the State Defendants have moved for dismissal under the Tenth and Eleventh Amendments to the United States Constitution.[4] The United States and the FCC seek to intervene.

Motions to Intervene

Seeking to defend the constitutionality of the Act, the United States and the FCC move to intervene in both actions pursuant to 28 U.S.C. § 2403(a) and Fed. R. Civ. P. 24. BellSouth, the only party to have responded to the motions for intervention, opposes only the FCC's ability to intervene. This opposition implicitly recognizes the undeniable right of the United States to intervene. See 28 U.S.C. § 2403(a) ("In any action in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United

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[3]The court rejects the argument that plaintiffs are, in reality, seeking retroactive relief.

[4]The State Defendants have also questioned the constitutionality of the Act under the Guarantee Clause. Claims raised under the Guarantee Clause are, however, generally thought to be nonjusticiable. See, e.g., Deer Park Independent School District v. Harris County Appraisal District, — F.3d —, 1998 WL 3336, *4 (5th Cir. Jan. 22, 1998) ("challenges to Congressional action under the Guarantee Clause are not justiciable"); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) ("The Supreme Court traditionally has held that claims brought under the Guarantee Clause are nonjusticiable political questions."). To the extent this claim may be justiciable, the State Defendants do not adequately explain the merits of their claim, "silence which warrants rejection." Deer Park, 1998 WL 3336 at *4.

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States to intervene."). Although the FCC does not enjoy the same right under § 2403(a), it argues that it may intervene pursuant to Fed. R. Civ. P. 24(b)(2),[5] which provides as follows:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute . . . administered by a federal . . . governmental officer or agency . . . , the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

BellSouth does not argue either that the FCC's motion is untimely or that undue delay or prejudice would result were the FCC permitted to intervene. Rather, BellSouth relies on the fact that the United States can adequately speak for the FCC. This fact is not, however, relevant to a discussion of permissive intervention. The relevant issues are: (1) whether the FCC has a claim or defense in common with a question of law or fact in the main action; and (2) whether the parties to the action rely on a statute administered by the FCC. Because the FCC has substantial regulatory responsibility over the administration of the Telecommunications Act of 1996 and because intervention will neither delay the action nor prejudice the parties, the court will allow the FCC to intervene. Accord AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, Inc., File No. 97-CV-901 (ADM/JGL), slip op. at 3-4 (D. Minn. Sept. 26, 1997) (allowing the FCC to intervene under Fed. R. Civ. P. 24(b)). But see US West Communications, Inc. v. ICG Seattle, 971 F. Supp. 1365, 1368 (W.D. Wash. 1997) (denying the FCC's motion to intervene under Fed. R. Civ. P. 24(b)).

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[5]Because the United States will undoubtedly represent the FCC's interests in this action adequately, the court does not find that the FCC has a right to intervene pursuant to Fed. R. Civ. P. 24(a).

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Motions to Dismiss

The arguments raised by the State Defendants in support of their motions to dismiss are not new. Over the course of the last year, these same arguments have been made throughout the nation by various state public utility commissions and rejected every time. See, e.g., TCG Seattle, 971 F. Supp. 1365; AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2164-17 (D.S.C. Dec. 11, 1997); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-cv-405-BR (E.D.N.C. Nov. 10, 1997); US West Communications, Inc. v. Thoms, Civil No. 4-97-cv-70082 (S.D. Iowa Aug. 4, 1997); US West Communications, Inc. v. Reinbold, Civil No. A1-97-25 (D.N.D. July 28, 1997).

Under the reasoning expressed in these earlier decisions, the court holds that the Tenth and Eleventh Amendments do not bar the actions brought by AT&T and MCI against the State Defendants pursuant to § 252(e)(6) of the Act. More specifically, the court holds that suit may proceed against GPSC on the grounds that, "by participating in the interconnection agreement process," the State of Georgia "has waived its Eleventh Amendment immunity from federal judicial review of its actions." TCG Seattle, 971 F. Supp. at 1370. See also Reinbold, Civil No. A1-97-25, slip op. at 8-9 ("By deciding to take an active role in the approval of the agreement, [the state commission] has affirmatively waived its Eleventh Amendment immunity and consented to federal review, as provided for by the Telecommunications Act of 1996."). The court also holds that, regardless of whether GPSC may be sued in the actions at bar, suit may proceed against the individual commissioners in their official capacities pursuant to the doctrine enunciated in Ex Parte Young, 28 S. Ct. 441 (1908), whereby suit against state officials in their official capacities seeking prospective injunctive relief is excepted from Eleventh Amendment immunity. Accord Reinbold, Civil No. A1-

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97-25, slip op. at 7 (holding that plaintiff's claim against the individual commissioners "rests squarely within the Ex parte Young exception"); AT&T, No. 5:97-cv-405-BR, slip op. at 13 (same). Lastly, the court holds that the State Defendants are not protected by the Tenth Amendment because they are not being compelled to act on behalf of the federal government. Accord AT&T, No. 3:97-2164-17, slip op. at 7 (holding that Tenth Amendment does not protect state commission from suit brought under the Act); AT&T, No. 5:97-cv-405-BR, slip op. at 14-15 (same).[6]

One last argument deserves the court's attention. In the action brought by AT&T, the individual commissioners argue that GPSC should be joined as a necessary party because AT&T is, in reality, petitioning for review of GPSC's actions.[7] The court suspects that this argument was made in an attempt to escape the result compelled by Ex parte Young with respect to GPSC's individual members. In fact, the argument that GPSC is a necessary party appears to be incidental to the argument that the State has not waived its Eleventh Amendment immunity. In light of its finding that the State of Georgia has waived its immunity with respect to federal judicial review of its actions in connection with the AT&T/BellSouth Agreement, the court doubts that the commissioners wish to pursue their argument that GPSC is a necessary party. The court thus declines to address the necessity of joining GPSC as a party to the AT&T action at this time. If, however, the parties to the AT&T action believe GPSC must be joined, they may so move the court within 30 days of the filing of this Order.

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[6]By so holding, the court rejects GPSC's arguments under Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), New York v. United States, 112 S. Ct. 2408 (1992), and Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997).

[7]This issue is not relevant to MCI's action because MCI brought suit against both GPSC and the individual commissioners responsible for approving its Agreement.

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Conclusion

Accordingly, for the reasons explained in the body of this Order, defendant Georgia Public Service Commissioners' motion to dismiss [#4-1 in Case No. 1:97-cv-884-RCF] is DENIED. Defendants Georgia Public Service Commission, David N. Baker, Robert B. Baker, Mac Barber, Bob Durden, and Stan Wise's motion to dismiss [#6-1 in Case No. 1:97-cv-1318-RCF] is also DENIED. The United States and the FCC's motions to intervene [#17-1 in Case No. 1:97-cv-884-RCF and #20-1 in Case No. 1:97-cv-1318-RCF] are GRANTED. The Clerk is thus DIRECTED to add the United States and the Federal Communications Commission as parties to these actions. Defendant BellSouth's motion for enlargement of time [#27-1 in Case No. 1:97-cv-884-RCF] is GRANTED nunc pro tunc. The parties' joint motion for enlargement of page limit [#13-1 in Case No. 1:97-cv-1318-RCF] is also GRANTED nunc pro tunc.

If the parties to the AT&T action believe GPSC to be a necessary party, they are DIRECTED to file a motion requesting joinder within 30 days of the filing of this Order.

SO ORDERED, this 12 day of February, 1998.

RICHARD C. FREEMAN
SENIOR UNITED STATES DISTRICT JUDGE

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FEB 13 1998

U.S.D.T. CLERK

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APPENDIX B

Entered 12/11/97
FILED
DEC 11 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

AT&T Communications of the Southern States, Inc., Plaintiff, v. BellSouth Telecommunications, Inc.; The Public Service Commission of South Carolina; and Warren D. Arthur, IV; Cecil A. Bowers; Philip T. Bradley; Guy Butler; Rudolph Mitchell; William Saunders; and C. Dukes Scott, who are the Commissioners of The Public Service Commission of South Carolina, acting in their official capacities, Defendants.	C/A No.: 3:97-2164-17 (26) C/A No.: 3:97-2388-17 (28) ORDER

This matter comes before the court on a motion to dismiss filed by the South Carolina Public Service Commission (PSC) and its individual Commissioners. The parties submitted detailed briefs on the issues raised, and the court heard oral argument on November 20, 1997. For the reasons stated herein, the defendants' motion to dismiss is denied.

I. BRIEF HISTORY

The Telecommunications Act of 1996 provides a statutory framework for the development of competitive local telephone markets. 47 U.S.C. § 251 *et seq.* The Act requires local telephone utilities, such as BellSouth, to negotiate in good faith with long distance carriers, such as AT&T, to facilitate entry into local markets. 47 U.S.C. § 251(c)(1). Should the parties not reach an agreement, the Act allows the state regulatory body, here the PSC, to become an arbiter of the terms left in dispute. The Act also specifically limits review of the agency's decision to the appropriate federal district court. 47 U.S.C. § 252(e)(6).

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AT&T has filed an action seeking this court's review of terms of BellSouth's Statement of Generally Available Terms and Conditions (SGAT) as approved and arbitrated by the PSC. AT&T asserts that the PSC decision is not consistent with the requirements of the Telecommunications Act. AT&T seeks injunctive relief against the PSC and its Commissioners, prohibiting the enforcement of their decision. The PSC and its Commissioners have moved for dismissal of the case, arguing that the action has been brought in violation of the Ninth, Tenth, and Eleventh Amendments of the Constitution. Furthermore, the Commissioners contend that the Telecommunications Act does not provide for relief against them individually and that they are not necessary parties to the dispute.

II. DISCUSSION

A. Eleventh Amendment

The Eleventh Amendment has been interpreted as establishing that a "[s]tate is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). As a general matter, therefore, a state cannot be sued in federal court. Congress cannot abrogate a state's Eleventh Amendment immunity unless it acts pursuant to a provision of the Constitution granting Congress that power. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). A state can, however, "effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985).

A state can waive its immunity only through express language or by overwhelming implication. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In the present case, AT&T asserts that the PSC impliedly waived its immunity by conducting the arbitration between BellSouth and AT&T.

To understand AT&T's waiver argument, the court must briefly review the relevant

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provisions of the Telecommunications Act. The Act provides in part, "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(a)(1). When negotioning the agreement, either party can request that the PSC arbitrate any unsettled issues. 47 U.S.C. § 252(a) & (b). The Act also states that "[n]o State court shall have jurisdiction to review any action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4).

Importantly, the Act also provides a mechanism for approval of the agreement if the state commission refuses to become involved.

> If a State Commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(6). In other words, if the PSC fails to act, the FCC will do so. Notably, the Act does not impose any penalty upon the state for failing to become involved in the arbitration.

AT&T argues that the PSC's acquiesence in arbitrating the dispute between the utilities amounts to a clear waiver of its Eleventh Amendment immunity. AT&T asserts that the State's waiver must be inferred from its actions because the State was well aware that the Act provided for an alternative FCC review and that the Act provided for appeals to the federal court only.

The PSC asserts that waiver is not truly an issue in this case. The PSC argues that it had no choice but to become involved in the matter because it was required to do so by its statutory duties under state law. Therefore, the PSC argues, any "choice" to become involved in the process is merely illusiory.

Even assuming that state law compels the PSC to participate in the arbitration, state law

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cannot convert a federal opt-in program into a federal mandatory program. In fact, a state law requiring the PSC to act would simply constitute more concrete proof of a waiver or opt-in by the State. *See AT&T Communications of the United States, Inc. v. BellSouth Telecommunications*, 5:97-CV-405-BR, (E.D.N.C. November 20, 1997). Furthermore, if Congress could totally preempt the telecommunications field, as presumably it could, it can certainly allow the states a choice of either participating in the process subject to federal court review or not participating at all. The fact that the states have traditionally played a role in telecommunications is of no importance to the analysis.

Here, the State, through the Commission, opted to arbitrate and approve the Agreement between BellSouth and AT&T. The Telecommunications Act puts the Commission on clear notice that if it participated in the process it may have to defend a suit brought by aggrieved parties in federal court. Nevertheless, the State chose to participate in formulating and approving the agreement, and it now must live with the consequences. The court must again emphasize that the State faced no penalties for failing to participate in the telecommunications process.

The Commission primarily relies upon *Seminole Tribe* in support of its position. However, the statutory duties placed upon the State of Florida in *Seminole Tribe* by the Indian Gaming Act differ greatly from the relevant provision of the Telecommunications Act. In *Seminole Tribe*, Congress had imposed upon the states an affirmative "duty to negotiate in good faith with an Indian tribe." A state's failure to act would land them in federal court. In the present case, Congress has imposed no duties upon the states -- it has merely allowed them to be participants in telecommunications regulation subject to federal court review.[1] Under the Telecommunications

[1] Although not briefed by the parties, the court notes that the actual language used in the Telecommunications Act does not lend itself to an interpretation of the states' duties as being (continued...)

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statute, a state will not find itself in federal court for refusing to act; it is subject to federal court jurisdiction only if it takes affirmative acts.

B. Ex Parte Young

AT&T's alternate argument is that the Commissioner's may be sued in federal court under the doctrine of *Ex Parte Young*. 209 U.S. 123 (1908). *Ex Parte Young* has established that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Here, AT&T seeks the type of declaratory and injunctive relief that falls squarely within the parameters of *Ex Parte Young*. *See Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1449 (4th Cir. 1994)(federal suit against state Medicaid director to enjoin ongoing violations of federal statute is proper).

The Commissioners base their argument against *Ex Parte Young* on the Supreme Court's decision in *Seminole Tribe*. The Commissioners recognize that *Seminole Tribe* did not diminish the continued viability of *Ex Parte Young*. However, they point out that the Supreme Court did recognize that certain situations are "sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 116 S. Ct. at 1132. In *Seminole Tribe*, the Court recognized that in some circumstances Congress can preempt *Ex Parte Young* relief by crafting an "intricate remedial scheme" not including suit against individual state officials. *Id.* The Court explained that in those circumstances if suit could also be

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[1](...continued)
optional. Specifically, Section 252 instructs that a state "*shall*" participate in the process and characterizes a failure to act as a "*failure]* to carry out its *responsibility*." 47 U.S.C. § 252(e)(emphasis added). While this language may seem mandatory, it must be read in the context of the statute as a whole. Taken as a whole, the statute clearly informs the states that failure to participate in the process results in no penalty. Congress may desire that the states be involved in the approval and arbitration of the agreements, but it has not commanded that they do so.

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brought under *Ex Parte Young*, "it is difficult to see why [a party] would suffer through the intricate [statutory] scheme . . . when more complete and more immediate relief would be available under *Ex Parte Young*." *Id.* at 1133. In *Seminole Tribe*, the Court placed great emphasis on the limited remedy that the statute provided. The Court noted that the statute did not provide sanctions that would otherwise be available in a suit brought under *Ex Parte Young*. "In contrast with this quite modest set of sanctions, an action brought against a state official under *Ex Parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* at 1133.

The PSC argues that the Telecommunications Act is similar to the statute construed in *Seminole Tribe*. The PSC points out that the Telecommunications Act prescribes a mechanism for federal court review, which includes an appeal of the *Commission's* decision, *not* an action against *individual commissioners*.

The PSC does make a compelling argument against the applicability of *Ex Parte Young* in this case. Like the statute in *Seminole Tribe*, the Telecommunications Act prescribes a remedial scheme for the enforcement against a state of a statutorily created right. *Id.* at 1332. However, *Seminole Tribe* differs from the present case in that there is no "detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 1132. The Telecommunications Act does not contain a truly "detailed remedial scheme" similar to that under consideration in *Seminole Tribe*. The ultimate holding of Seminol Tribe is that if Congress intends to supplant *Ex Part Young*, it can. The language of the Telecommunications Act simply does not provide a basis for the court to conclude that Congress intended to prohibit the application of *Ex Part Young*.

The PSC next argues that the Commissioners are not necessary parties to this action. Although, it is clear that this case could proceed without them, the court finds that they are proper

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defendants in the action. Therefore, the PSC's motion to dismiss the individual defendants is denied.

C. Ninth and Tenth Amendments

The Commission's final argument is that the Telecommunications Act violates the Ninth and Tenth Amendments. The court finds this argument unpersuasive.

The Tenth Amendment protects a state from being required against its will to participate in a federal program or carry out a federal directive. *See Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). However, when Congress has the authority to regulate activity under the Commerce Clause, it can offer the states a choice of either participating in a regulatory scheme or risking preemption of the state law in that field. That is what Congress has done in the Telecommunications Act.

The PSC's Ninth Amendment argument adds nothing to the analysis. The Ninth Amendment recognizes that other unenumerated rights belong to the people, but the PSC has not alleged what Ninth Amendment rights of the people are being violated.

After careful and thourough consideration of the issues raised, the court respectfully decides defendants' motion to dismiss.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

December 11, 1997
Columbia, South Carolina

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTE CAROLINA
WESTERN DIVISION

No. 5:97-CV-405-BR

AT&T COMMUNICATIONS OF THE SOUTHEAN STATES, INC.,

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., et al.,

Defendants.

ORDER

FILED
MAY 20 1997
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

No. 5:97-CV-425-BR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware corporation,

Plaintiffs,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., et al.,

Defendants.

ORDER

These matters are before the court on motions to dismiss by defendants North Carolina Utilities Commission and the individual Commissioners (all defendants will be referred to collectively as "NCUC"), in their official capacities. Because the motions in both cases are, for the most, identical, they will be addressed jointly in a consolidated order.

I. Background

In light of the pending arguments on the substantive issues in these cases, the court will forego a comprehensive review of the factual history. Instead, a brief chronology is all that is necessary for purposes of these motions.

On 17 July 1996 and 23 August 1996, AT&T and MCI, respectively, filed petitions with NCUC requesting arbitration of proposed interconnection agreements with BellSouth pursuant to 47 U.S.C. § 251 (1995). After conducting evidentiary hearings on the matters, a panel of three Commissioners issued recommended arbitration orders on 23 December 1996. In response to objections by all parties, the panel issued orders on 11 April 1997 requiring the parties to revise the proposed interconnection agreements. On 28 April 1997, the parties submitted signed interconnection agreements to the panel for review and final approval pursuant to 47 U.S.C. § 252(e)(1). The panel approved the agreements on 12 May 1997. AT&T and MCI have now sought review in this court through independent actions, naming BellSouth, NCUC, and the individual Commissioners in their official capacity as defendants. In response, NCUC and the individual Commissioners assert that the Eleventh Amendment bars suit by both AT&T and MCI.

II. Discussion

A. Eleventh Amendment

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be extended to any suit in law or equity,

commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Relevant to this proceeding, the Amendment establishes that a "State is immune from suits brought in federal courts by her own citizens as well as citizens of another state." Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990) (quotations and citations omitted.) In Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1131 (1996), the Court added that "the background principle of sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."

Not surprisingly, however, this immunity is not absolute. In fact, the Supreme Court has acknowledged that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular program." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 & n.1 (1985); see also Seminole Tribe, 116 S. Ct. at 1128. A state is deemed to have waived its Eleventh Amendment immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673 (1974) (internal quotations and citations omitted). In the case at hand, AT&T and MCI assert that NCUC waived its Eleventh Amendment

immunity by participating in the interconnection agreement procedures established in §§ 251 and 252.

To more fully explore this contention, it is helpful to review §§ 251 and 252 of the Telecommunications Act. In seeking to develop competitive markets in the local telephone industry, Congress has authorized telecommunications carriers and incumbent local exchange carriers to negotiate an interconnection agreement in good faith. 47 U.S.C. § 251(c). When negotiating this agreement, either party can request that the relevant State commission participate in the negotiations and arbitrate or mediate any open issues. Id. § 252(a) & (b). The State commission must limit its review to the issues presented and is directed to complete its resolution of the disputed issues within nine months after the request. Id. § 252(b)(4). "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Id. § 252(e)(1). The section further explains that "[n]o State court shall have jurisdiction to review any action of a State commission in approving or rejecting an agreement under this section." Id. § 252(e)(4).

The Act also provides how to proceed if the State commission does not become involved:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the

> responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Id. § 252(e)(5). Finally, section 252(e)(6) sets out the exclusive manner of judicial review:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC]'s actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Id. § 252(e)(6).

To the court's knowledge, only three courts have confronted whether § 252 violates the Eleventh Amendment. All three have reasoned that the state defendants, by voluntarily electing to participate in the federal telecommunications scheme, waived any Eleventh Amendment immunity. See US West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365 (W.D. Wash. 1997); US West Communications, Inc. v. Thoms, No. 4:97-CV-70052 (S.D. Iowa Aug. 4, 1997); US West Communications, Inc. v. Reinhold, No. A1-97-25 (D.N.D. July 28, 1997). In interpreting § 252 as offering states a choice, the courts have emphasized that, if a state neglects to regulate, the FCC will assume the enumerated responsibilities. Thus, a state's failure to accept its suggested role merely defers regulation to the FCC and does not subject the state to any type of official sanction or reproach. Notably, under

§ 252, state commissions are only subject to suit in federal court if they actually participate in the federal procedures for regulation of private telecommunications activity. This condition is unequivocally announced to any participating state in § 252(e)(6). See Atascadero, 473 U.S. at 247 (implying that, where Congress provides clear notice that state involvement will subject it to federal judicial review, a state may be deemed to have waived Eleventh Amendment immunity by voluntarily participating in the regulatory program.)

NCUC insists, however, that its action was, in fact, compelled. Invoking North Carolina law rather than §§ 251 and 252, NCUC maintains that its actions were "not voluntary" and that it "had no choice but to deal with the interconnection agreement because of N.C. Gen. Stat. §§ 62-110(f1), 62-133.5, and regulations adopted by the Commission thereunder." (Defs.' Mem. in Supp. of Mots. to Dismiss, pp. 9-10.) Yet, assuming arguendo that state law even compels participation, state requirements cannot be offered to convert a federal "opt-in" program into a mandatory one. If this were the case, any legislative scheme, carefully drafted by Congress to be voluntary and to elicit waiver of Eleventh Amendment immunity if the state elects to participate, could be negated by unilateral state action. It simply cannot be that a state can avail itself of the opportunities extended to it by Congress but, at the same time, avoid mandated federal review by invoking the protective umbrella of the Eleventh Amendment.

Also, as noted by AT&T, it would be odd indeed to allow NCUC to claim that it is the state for purposes of Eleventh Amendment immunity but, at the same time, claim that "it participated in the interconnection proceedings under the external compulsion of state law." (AT&T's Mem. in Opp'n to Mot. to Dismiss. p. 12.) Finally, such legislation requiring NCUC involvement is just the type that would be expected if the state sought to signal its voluntary assent to participating in the federal program.[1] Thus, despite the analytical quagmire induced by NCUC's argument, the claim of state law coercion does not displace allegations of waiver of sovereign immunity.

Although NCUC predominantly relies on compulsion from state laws, in its reply brief, it alludes to the alleged mandatory language contained in § 252. Specifically, NCUC notes that § 252 repeatedly instructs that the State "shall" operate in a certain manner and characterizes a decision not to act as a "fail[ure] to carry out its responsibility." § 252(e). According to NCUC, this word choice allegedly removes any discretion on the part of the state regarding whether to participate.

Notwithstanding that Congress could have chosen language that more clearly illustrates the voluntariness of the state's role, the strength of the verb choice does not detract from the actual effect of the provisions. It is axiomatic that the court

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[1] The court recognizes that, in this particular case, the state legislation existed before the passage of the federal act and, thus, its signalling function is negated. This circumstance does not alter the court's overall reasoning.

should "not construe statutory phrases in isolation, [but should] read statutes as a whole." United States v. Morton, 467 U.S. 822, 828 (1984). Under § 252(e)(5), if the state elects not to take part in the creation and consummation of the interconnection agreement, the FCC assumes the responsibility with no further involvement of the state. While Congress may have inserted the words "shall" and "fail" in order to underscore their preference for state participation, there are no repercussions or avenues of recourse against the state for failure to participate.

In contrast, the statutory scheme struck down in Seminole Tribe, the Indian Gaming Regulation Act ("IGRA"), varied significantly from the Telecommunications Act and § 252.[2] In 25 U.S.C. § 2710(d)(3)(A) of the IGRA, the State was ordered to negotiate with the Indian tribe in good faith to enter into a Tribal-State compact. Federal district courts were afforded jurisdiction over "any cause of action by an Indian tribe arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Id. § 2710(d)(7)(A). If a tribe produced evidence that the State had not complied with a request to negotiate, the State was encumbered with the burden of showing in federal court that it had, in fact, negotiated in good faith. Id. § 2710(d)(7)(B)(ii). If the federal district court found that the State had failed to negotiate in good faith, it was

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[2] The court recognizes that, in Seminole Tribe, Florida refused to participate at all and the Court struck down the statutory scheme because Congress lacked constitutional authority to abrogate sovereign immunity. A comparison is nonetheless instructive in demonstrating the optional nature of § 252.

expressly authorized to order the tribe and the State to conclude such a compact within a sixty-day period. Id. § 2710(d)(7)(B)(ii). Finally, if the State continued to evade its duties under the IGRA even after judicial intervention, the Secretary of the Interior was directed to prescribe procedures under which designated gaming could occur on the Indian lands. Id. § 2710(d)(7)(B)(vii).

On the surface, the IGRA provisions do not appear that different than the Telecommunications Act provisions. In fact, the ultimate remedy under both is essentially the assumption of the state's obligations by the relevant federal authority. However, significant differences exist. First, the State's prescribed role under the IGRA is an adversarial one or, at the least, as a negotiating party to the compact whereas, under the Telecommunications Act, the State is merely requested to serve as a regulator or overseer of negotiations between private parties.

Most importantly for purposes of the Eleventh Amendment discussion, under the terms of the IGRA, a state could be hauled into federal court for not participating at all; under the Telecommunications Act, a state can only be hauled into court if they do in fact participate. This distinction is crucial. In Seminole Tribe, the Supreme Court dismissed any notion of waiver with the succinct comment that "it is undisputed that Florida has not consented to the suit." 116 S. Ct. at 1123. This statement follows from Florida's refusal to negotiate with the tribe or submit to the mandate of § 2710. Nevertheless, according to the IGRA, a state was subject to federal court jurisdiction even if,

and in fact because, they refused to take part in the negotiations. Thus, pursuant to § 2710, election by a state to forego participation in a Tribal-State compact obligated it to defend its position in a federal court if sought by the tribe.

In contrast, assumption by the FCC of a state's regulatory function is the exclusive remedy for a state's refusal to participate in the telecommunications plan. In other words, the only way a state could subject itself to any type of federal judicial proceeding is if it willingly concedes to accept the role offered by Congress. This distinction insulates the Telecommunications Act from constitutional infirmity because, despite the strong language employed in § 252, states are afforded a true choice regarding whether they consent to federal jurisdiction.

Overall, unlike the situation in Atascadero, the Telecommunications Act by no means "falls . . . short of manifesting a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity." 473 U.S. at 247. The conclusion is inescapable that any state accepting the Congressional invitation to immerse itself in the intricacies of the Telecommunications Act also recognizes and acknowledges that review of its action in federal district court is a distinct possibility. See TCG Seattle, 971 F. Supp. at 1370 ("The implication that Congress conditioned state participation in the interconnection agreement process on waiver could hardly be clearer.") Accordingly, NCUC, by its voluntary involvement in the

consummation of the interconnection agreements, waived its Eleventh Amendment immunity.

B. Ex Parte Young

Even if the Eleventh Amendment precludes federal jurisdiction over the state, jurisdiction over the state officials is proper pursuant to Ex Parte Young, 209 U.S. 123 (1908). As has been exhaustively detailed in prior cases, the Ex Parte Young doctrine represents an exception to Eleventh Amendment immunity, providing that, despite immunity on behalf of the state, state officers can be sued in federal court to enjoin ongoing or prospective violations of federal law. Quern v. Jordan, 440 U.S. 332, 337 (1979); Brennan v. Stewart, 834 F.2d 1248, 1252 (5th Cir. 1988).

NCUC contends that Ex Parte Young is not applicable in this case based on the recent transformation of the doctrine by the Supreme Court in both Seminole Tribe and Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997). Contrary to NCUC's claims, however, the Court in Seminole Tribe did not circumscribe or even adjust the established Ex Parte Young doctrine. Rather, the court recognized that "[t]he situation presented . . . [was] sufficiently different from that giving rise to the traditional Ex Parte Young action so as to preclude the availability of that doctrine." Id. at 1132. In essence, the court simply acknowledged that Congress itself could preempt Ex Parte Young by crafting a comprehensive relief structure. Specifically, "[w]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a

statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex Parte Young." Id. at 1132. In this case, the Telecommunications Act in no way incorporates a "detailed remedial scheme" so as to preclude the customary operation of Ex Parte Young. See Thoms, slip op. at 4.

NCUC further argues that Seminole Tribe and Coeur d'Alene require Congress to indicate explicitly that Ex Parte Young suits are to be part of a statutory scheme before such suits can proceed. This contention misreads the import of these cases. As noted above, in Seminole Tribe, the Court reaffirmed traditional principles of Ex Parte Young and merely explained that Congress could supersede the doctrine by offering its own exhaustive remedial scheme. NCUC's efforts to transform this narrow holding into a requirement that Congress affirmatively state Ex Parte Young's applicability is unavailing. In essence, defendants seek to bootstrap Seminole's holding into a monumental shift of the default presumption. Under NCUC's theory, Congress must offer an affirmative intent to invoke the Ex Parte Young. Yet, Seminole Tribe indicates just the opposite: Congress must offer an affirmative intent to supplant Ex Parte Young, otherwise, the doctrine remains in full operation. As noted by MCI, "[t]he Court did not displace Ex Parte Young from all cases in which Congress authorized 'judicial review.'" (MCI's Mem. in Opp'n to Mot. to Dismiss, p. 10.)

Moreover, in Coeur d'Alene, the tribe was not permitted to invoke Ex Parte Young because the relief sought, quiet title to state land, was not the type contemplated by the doctrine. Evaluating the several opinions issued in Coeur d'Alene, however, seven of the Justices expressed their understanding that Ex Parte Young maintained its historic vitality. 117 S. Ct. at 2045-47 (O'Connor, J., concurring, joined by Scalia, J. and Thomas, J.) and at 2047-48 (Souter, J., dissenting, joined by Stevens, J., Ginsberg, J., and Breyer, J.).[3] Accordingly, the appropriate review remains "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Id. at 2047 (O'Connor, J., concurring).

In this instance, no special circumstances, either from the nature of the relief sought or the plain language of the Telecommunications Act, exist to inhibit the Ex Parte Young doctrine. Instead, it seems that this is a "garden variety" application of the doctrine and, therefore, the arguments of the individual commissioners must fail.

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[3] Even under Kennedy's and Rehnquist's balancing test, see Coeur d'Alene, 117 S. Ct. at 2038-42, the court finds a consideration of the relevant factors weighs in favor of Ex Parte Young jurisdiction. See Reinbold, slip op. at 6-7 (holding that balancing test supports the exercise of federal jurisdiction).

C. Tenth Amendment

NCUC also maintains that the structure of §§ 251-252 offends the Tenth Amendment.[4] NCUC relies on similar arguments offered in support of its Eleventh Amendment violation claim. To wit, it appears that NCUC is asserting that the Telecommunications Act compels them to enforce a federal program as well as depriving North Carolina of jurisdiction to review actions of its own administrative agencies.[5] For the same reasoning employed above, however, the compulsion/deprivation argument must fail.

It is well accepted that a state cannot be forced to administer a federal regulatory program. Printz v. United States, 117 S. Ct. 2365, 2383 (1997); New York v. United States, 505 U.S. 144, 149 (1992) ("[W]hile Congress has substantial power under the Constitution to encourage the States to [perform certain federal regulatory duties], the Constitution does not confer upon Congress the ability simply to compel the States to do so."); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981) (noting that Congress cannot "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"). At the same time, Congress can offer a state the option of participating in the

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[4] NCUC also invokes the protections of the Ninth Amendment. However, no substantive arguments are made in support of this facially invalid claim, and any reference to a Ninth Amendment violation must be dismissed as meritless.

[5] As noted by both AT&T and MCI, the claim that § 252(e)(6) improperly vests the federal courts with exclusive jurisdiction is not only subsumed within the voluntariness discussion but has no bearing upon the constitutionality of § 252(e)(6) and whether this court retains jurisdiction over NCUC.

enforcement of a federal program conditioned upon acceptance of the attendant statutory scheme. New York, 505 U.S. at 167; Hodel, 452 U.S. at 288. "This arrangement . . . has been termed 'a program of cooperative federalism.'" New York, 505 U.S. at 167 (quoting Hodel, 452 U.S. at 289)).

Without any discussion, NCUC cites Printz and New York for the proposition that the § 252 violates the Tenth Amendment. On closer review, both holdings actually militate in favor of the Act's constitutionality. In Printz and New York, the Supreme Court invalidated certain federal directives for the very reason that they failed to provide states a choice about whether to participate in the regulatory scheme. Printz, 117 S. Ct. at 2383 (negating the mandatory obligation imposed by the Brady Bill on state law enforcement officers to perform certain background checks); New York, 505 U.S. at 176-77 (reversing take-title provision in federal waste disposal scheme because it impermissibly forced states to act). The Telecommunications Act eludes similar opprobrium by expressly allowing states to opt out completely from the purview of § 252. See § 252(e)(5) (explicitly denying any remedial action against a state for non-participation). Unlike in New York, states are not merely offered "a choice between two unconstitutionally coercive regulatory techniques." Id. at 176.

In a related situation, the Supreme Court has commented:

> We fail to see why the [Act] should become constitutionally suspect simply because Congress chose to allow the States a regulatory role. . . . Congress could have pre-empted the field . . . ; [the Act] should not be invalid simply because, out of

> deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the conditions that they consider the suggested federal standards.

FERC v. Mississippi, 456 U.S. 7432, 764 (1982). This language is equally applicable to the mechanics of § 252. Overall, recognizing that states can avoid exclusive federal review of state administrative actions on federal issues by not participating, it becomes clear that § 252 is not a prohibited intrusion into state autonomy. Although framed in rather strong language, § 252 does not impugn "the Constitution's division of authority between the Federal Government and the States." New York, 505 U.S. at 162. Consequently, NCUC's willing decision to act under § 252 renders its subsequent Tenth Amendment claims ineffective.

III. Conclusion

For the reasons stated above, defendants' motions to dismiss in both cases are hereby DENIED.

This 10 November 1997.

W. EARL BRITT
United States District Judge

att/mci/ncuc/sdn

APPENDIX D

Eastern District of Kentucky
FILED
DEC 15 1997
AT FRANKFORT
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 97-79

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., PLAINTIFF,

V. MEMORANDUM OPINION AND ORDER

BELLSOUTH TELECOMMUNICATIONS, INC., ET AL., DEFENDANTS.

* * * * * * *

The defendants, Kentucky Public Service Commission and its Commissioners ("PSC"), have moved the Court [Record No. 8] to dismiss the plaintiff's claims. The plaintiff, AT&T Communications of the South Central States, Inc. ("AT&T"), has responded [Record No. 15], to which the defendants have replied [Record No. 16]. This matter is now ripe for decision.[1]

The following are the pertinent facts. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 151, et seq., (the "Act"), which gives rise to this case, is intended to foster competition in all telecommunications markets. The Act permits competitive local exchange carriers ("CLECs") to enter the local market through the following: (1) the purchase of unbundled network elements from the incumbent local exchange carrier ("ILEC"); (2) the

[1] It should also be noted that defendant, BellSouth Telecommunications, Inc., filed a response, stating that PSC's motion should be denied.

purchase of wholesale service from the ILEC for resale to the CLEC's customers; or (3) the construction of the CLEC's own facilities.

The Act requires the ILEC to negotiate interconnection agreements with new entrants to the local market. If the new entrant and the ILEC are unable to agree on terms, either party may petition the applicable state commission to arbitrate the dispute. 47 U.S.C. § 252(b)(1). The state commission must "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this Section." 47 U.S.C. § 252(b)(4)(C).

In the case at bar, AT&T set the 9 month statutory clock ticking on May 6, 1996, by requesting interconnection from BellSouth Telecommunications, Inc. ("BellSouth"), which is the ILEC. AT&T also petitioned the PSC for arbitration on October 11, 1996. The PSC investigated the issues raised in the petition and the response, conducted discovery, held hearings, and issued its order on the statutory deadline.

On August 13, 1997, BellSouth and AT&T filed an executed interconnection agreement. The agreement was approved by the PSC pursuant to the Act. The PSC approved the parties' negotiated change in the term of the contract. The PSC stated that the "parties may renegotiate prices prior to the end of the contract, but the Commission will not arbitrate these

prices during the term of the agreement absent a material change in circumstances." Shortly thereafter, this lawsuit was initiated.

AT&T contends that the actions of the PSC in implementing the Act violated the statute in several respects. The PSC and the Commissioners have moved to dismiss AT&T's suit primarily on the ground that it allegedly violates the Eleventh Amendment to the United States Constitution.[2]

The Eleventh Amendment states the following:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State.

Unless there is a waiver or the state consents, a suit against a state or one of its agencies brought in federal court is proscribed by the Eleventh Amendment. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). It is clear that a state may waive its Eleventh Amendment immunity when it voluntarily participates in a federal statutory scheme that expressly conditions participation on a state's willingness to be sued in federal court. See Edelman v. Jordan, 415 U.S. 651, 673 (1974).

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[2] The defendants also argue that the AT&T's suit should be dismissed because it violates the Tenth Amendment and the Guarantee Clause of the U.S. Constitution. Those arguments will be addressed later on in the Opinion.

In the case at bar, Kentucky, via the PSC, waived its Eleventh Amendment rights when it chose to arbitrate interconnection agreements that are exclusively reviewable in federal court, rather than leaving the arbitration function to the Federal Communications Commission ("FCC").[3] Kentucky's decision to participate in the arbitration and approval scheme, knowing that the statute had an express provision for exclusive federal jurisdiction, was an affirmative waiver of its Eleventh Amendment immunity.[4] See §§ 252(e)(4-6). See Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990).

It should be emphasized that the PSC could have deferred the matter to the FCC for resolution. See 47 U.S.C. § 252(e)(5). If the PSC had declined to participate and deferred to the FCC, it would have preserved its sovereign immunity. However, by deciding to take an active role in the

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[3] The Court notes that the defendants vigorously argue that Congress cannot abrogate sovereign immunity directly or indirectly. Although the Court agrees with their argument, it is a complete red herring. Congress did not directly, nor indirectly, abrogate state immunity by enacting the 1996 Act. The Act gives the states a choice as to whether to participate. If the state chooses not to participate, it cannot be sued in federal court. If, however, a state does choose to participate and subject itself to a statute that is limited to federal review, it waives and consents to being sued in federal court.

[4] The "overwhelming implications" from Kentucky's willingness to participate in the Act are that it was willing to waive its Eleventh Amendment immunity and be sued in federal court. See Edelman, 415 U.S. at 673.

approval of the agreement, the PSC, as an agency of Kentucky, affirmatively waived its Eleventh Amendment immunity and consented to federal review.

The Court's reasoning is bolstered by the Ninth Circuit's recent decision in Premo v. Martin, 119 F.3d 764 (9th Cir. 1997). In Premo, the issue was whether damages awarded by an arbitral panel under the Randolph-Sheppard Vending Standing Act could be enforced against California in federal court. The Ninth Circuit held that the arbitral awards were enforceable against California in federal court because California, by participating in the program, had waived its sovereign immunity. Id. at 770-71. The court went on to state that:

> In this case, the State of California has not expressly consented to suit. Nor has California enacted a statute that provides for waiver. The California statute establishing the state counterpart to the federal Randolph-Sheppard program does provide that the decision of an arbitration panel "shall be final and binding on the parties except as otherwise provided in the act." (citation omitted). While this statute clearly reflects California's intent to be bound by Randolph-Sheppard arbitral awards, it does not provide clear enough consent to suit in federal court to amount to an express statutory waiver of sovereign immunity. (citation omitted). However, the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming. Id. at 770.

The waiver in the case at bar is clear because it states that the action of the state commission is reviewable in federal court and nowhere else. See 47 U.S.C. § 252(e)(4)-(5); Zeran

West Communications, Inc. v. TCG Seattle, 971 F.Supp. 1365 (W.D. Wash. 1997) (holding in an almost identical case that the state of Washington had waived its Eleventh Amendment immunity by participating under the Telecommunications Act); U.S. West Communications, Inc. v. Reinbold, Civil No. A1-97-25, slip op., (D.N.D. July 28, 1997) (holding in an almost identical case that the state of North Dakota had waived its Eleventh Amendment immunity by participating under the Telecommunications Act); U.S. West Communications, Inc. v. Thoms, Civil No. 4-97-CV-70082, slip op., (S.D. Iowa Aug. 4, 1997) (holding in an almost identical case that the state of Iowa had waived its Eleventh Amendment immunity by participating under the Telecommunications Act); U.S. West Communications, Inc. v. Hix, Civil No. 97-D-152, slip op., (D.Colo. Oct. 29, 1997) (holding in an almost identical case that the state of Colorado had waived its Eleventh Amendment immunity by participating under the Telecommunications Act).

The Court also notes that suits brought against state officials in their official capacities seeking injunctive relief are not considered actions against the state for purposes of the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n. 10 (1989). The Young exception applies when there is no adequate state forum available to safeguard the federal interests at issue.

The case at bar is precisely on point with the above condition. The precise language of the Act precludes judicial review within a state forum: "No State court shall have jurisdiction to review the action of a State commission approving or rejecting an agreement under this section". 47 U.S.C. § 252(e)(4). The only logical implication from § 252(e)(4) is that federal judicial review is a party's exclusive remedy. See 47 U.S.C. § 252(e)(6) (stating that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved . . . may bring an action in an appropriate federal court"). Since a state forum is not possible, there is obviously no state forum available to preserve federal interests. Thus, the Commissioners could be sued in their individual capacities under the first Young exception.

Additionally, Young may be applied when a "case calls for the interpretation of federal law." See Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2036 (1997). "This reasoning, which is described as the interest in having federal rights vindicated in federal courts, can lead to an expansive application of the Young exception. Id.

The Supreme Court has also stated that:

> Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of

> state officials. Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar.

Coeur d'Alene, 117 S.Ct. at 2037-38. It is clear that courts must balance state and federal interests in reaching the ultimate conclusion of Young's application. Id. 2038-39.

In the case at bar, the Act's provision for federal judicial review is limited to determining whether federal law is being followed. Congress has also dictated a strong federal interest in restructuring the local telephone service industry through the implementation of the Act. Although Kentucky has an interest in regulating local utilities, the mandate of the Act is overriding. Hence, AT&T would also be able to sue the Commissioners of the PSC in their individual capacities under Young's second exception.

Along with their Eleventh Amendment arguments, the defendants assert that § 252(e) of the Act violates the Tenth Amendment and the Guarantee Clause. The Court finds that these arguments lack merit. The Act gave the states a choice as to whether they wanted to participate; none of them were compelled. Kentucky, via the PSC, chose to participate. Therefore, Kentucky's sovereign rights were not violated.[5]

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[5] It should be emphasized that the states are not being improperly coerced into enforcing the Act's provisions. In fact, they can opt out if they want too. Hence, the defendants' Tenth Amendment argument is meritless. As to the defendants' Guarantee Clause argument, Kentucky has not been

IT IS ORDERED that the defendants' motion [Record No. 8] be, and the same hereby is, DENIED.

This the 15th day of December, 1997.

Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

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denied a republican form of government because of the Act.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
December 15, 1997

Case Number: 3:97-cv-00079

Amy E. Dougherty

William L. Willis

Deborah Tully Eversole

Creighton E. Mershon Sr.

Dorothy J. Chambers

Sean A. Lev

Michael K. Kellogg

Bruce F. Clark

Mark R. Overstreet

William Associate General Counsel BELLSOUTH CORPORATION

R. Douglas Lackey

Thomas B. Alexander

James P. Lamoureux

Holland N. McTyeire V

David L. Lawson

Michael D. Warden

Certificate of Mailing by _____

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

AT&T COMMUNICATIONS OF THE
SOUTHERN STATES, INC.,

Plaintiff,

v. CASE NO. 4:97cv210-RH

BELLSOUTH TELECOMMUNICATIONS, INC.,
et al.,

Defendants.

_____/

ORDER DENYING MOTION TO DISMISS

This action arises under the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252. Defendants include the five members of the Florida Public Service Commission. They have moved to dismiss the complaint under the Eleventh Amendment of the United States Constitution, arguing that the action is, in substance, an action against the State of Florida itself. Because the longstanding doctrine

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[Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCrP]
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TALLAHASSEE, FLA.
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- 30 -

Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), squarely authorizes this action, I deny the motion to dismiss.

Background - The Statutory Structure

The Telecommunications Act of 1996 ("the Act") requires the incumbent local exchange carrier ("LEC") in any territory to negotiate in good faith with any requesting telecommunications carrier on the terms under which the requesting carrier will be allowed to interconnect with the LEC's facilities and equipment. In effect, the interconnection agreements to be entered pursuant to the Act, together with the related duties created by the Act, would allow competition in the market for local telephone services.

In the event of any disagreement between the requesting carrier and LEC on the terms to be included in such an agreement, the Act provides for binding arbitration before the applicable state regulatory authority. In Florida the

applicable regulatory authority is the Florida Public Service Commission ("the Commission").

The Act provides further that any interconnection agreement adopted by negotiation or arbitration must be submitted to the state regulatory authority for approval. 47 U.S.C. § 252(e)(1). The Act provides standards to be applied and procedures to be followed by the state regulatory authority in determining whether to approve any such agreement. See, e.g., 47 U.S.C. § 252(e)(2) & (4). The Act specifically provides for judicial review of any such state regulatory authority decision:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

Plaintiff's Claims

In this action plaintiff AT&T Communications of the Southern States, Inc. ("AT&T") asserts that it has been aggrieved by a determination of the Florida Public Service Commission under § 252. AT&T seeks review of the Commission's action under § 252(e)(6).

As is undisputed, therefore, this is an action squarely authorized by the plain terms of § 252(e)(6). Indeed, an action such as this is precisely the method Congress provided for an aggrieved party to obtain judicial review of a state regulatory authority determination of this type.[1]

The Eleventh Amendment

The defendant commissioners assert that the Eleventh Amendment deprives Congress of the authority to do what it

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[1] The commissioners nonetheless assert that this action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283, or the Johnson Act, 28 U.S.C. § 1342. These statutes are inapplicable by their terms and, in any event, clearly do not foreclose this action as squarely authorized by Congress in a subsequent, more specific statute.

did. They are wrong.

The Eleventh Amendment bars actions in federal court against the states. This bar applies not only to actions against the states by name but extends also to actions against such state entities as the Florida Public Service Commission and to actions seeking damages against state officers in their official capacities. As has been clear at least since Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, the Eleventh Amendment ordinarily does not bar actions based on the federal Constitution or laws seeking prospective injunctive or declaratory relief against state officers. This is such an action.

In asserting the contrary, the commissioners rely on Seminole Tribe v. Florida, 517 U.S. 609, 116 S.Ct. 114, 134 L.Ed.2d 252 (1996). There the Supreme Court held that, when Congress adopts a specific remedial scheme as part of a federal statute, Ex Parte Young does not provide a different judicial remedy, separate and apart from the remedy Congress provided. That holding affects the case at bar not at all,

here AT&T seeks not to pursue a remedy different from the one Congress provided, but instead to pursue precisely the remedy Congress provided in clear and unmistakable language.

Telecommunications of the type at issue here are, beyond doubt, part of interstate commerce. Congress has authority to act in this area and has done so.[2] Congress has provided for jurisdiction in federal court to determine the type of controversy here at issue. Nothing in the Eleventh Amendment prevents Congress from taking this approach.

Accordingly,

IT IS ORDERED:

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[2] This case involves none of the special state sovereignty issues that precluded plaintiffs from invoking Ex Parte Young as a basis to go forward in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

The motion to dismiss (document 5) is DENIED.

SO ORDERED this 21st day of November, 1997.

Robert L. Hinkle
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

AT&T Communications of the Midwest, Inc.,

Plaintiff,

vs.

Contel of Minnesota, Inc., d/b/a GTE Minnesota and MPUC Commissioners,

Defendants.

File No. 97-901 (ADM/JGL)

MEMORANDUM OPINION AND ORDER

US WEST Communications, Inc.

Plaintiff,

vs.

Garvey et al., MPUC, AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company, Inc.,

Defendants.

File No. 97-913 (ADM/JGL)

AT&T Communications of the Midwest, Inc.,

Plaintiff,

vs.

US WEST Communications, Inc., and MPUC Commissioners,

Defendants.

File No. 97-917 (ADM/JGL)

FILED MAY 1 1998
FRANCES E. DOSAL, CLERK
JUDGMENT ENTERED
DEPUTY CLERK'S INITIALS

MCI Telecommunications Corp., et al.,

Plaintiffs,

vs.

US West Communications, Inc., MPUC and Garvey et al.,

Defendants.

File No. 97-919 (ADM/JGL)

US WEST Communications, Inc.,

Plaintiff,

vs.

Garvey et al., MPUC, OCI Communications, Inc. and KMC Telecom, Inc.,

Defendants.

File No. 97-1921 (ADM/JGL)

US WEST Communications, Inc.,

Plaintiff,

vs.

Garvey et al., MPUC, Triad Minnesota L.P., Cellular Mobil Systems of St. Cloud Minnesota, L.L.P., and Sprint Spectrum, L.P.,

Defendants.

File No. 97-1963 (ADM/JGL)

US WEST Communications, Inc.,

Plaintiff,

vs.

File No. 97-2179 (ADM/JGL)

Garvey et al., MPUC, and Sprint Communications Company, L.P.,

Defendants.

US WEST Communications, Inc.,

Plaintiff,

vs.

File No. 98-914 (ADM/JGL)

MPUC, Garvey et al., and AT&T Wireless Services, Inc.,

Defendants.

Each of these actions brought pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), 47 U.S.C. § 252(e)(6), seeks judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). In each case, the Plaintiffs have named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC. The motions presently before the Court include: the MPUC's motions to dismiss based on sovereign immunity in 97-901, 97-913, 97-917, 97-919, 97-2179, and 98-914; US WEST's motion for preliminary injunction in 97-913; MFS' motion to dismiss in 97-913; and Sprint's motion to dismiss in 97-2179. In addition to these motions, this Order will also address

the proper standard of review for these actions.

I. Background

Congress enacted the Telecommunications Act, in part, "to erode the monopolistic nature of the local telephone industry" by making local phone service providers ("incumbent local exchange carriers" or "incumbent LECs") facilitate competing companies' entry into local phone markets. Iowa Utilities Bd. v. F.C.C., 120 F.3d 753, 791 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (U.S. Jan. 26, 1998). The Act obligates an incumbent LEC: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it; (2) to provide competing carriers with access to elements of the local networks on an unbundled basis; and (3) to sell any telecommunications service to competing carriers at a wholesale rate so that the competing carriers can resell the service. Id. In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiations and arbitration. 47 U.S.C. § 252. When a competing carrier seeks interconnection, services or network elements from an incumbent LEC, both parties have an obligation to negotiate in good faith the terms and conditions of an agreement. § 252(c)(1), 252 (a)(1). During the negotiations, if necessary, either party "may petition a State commission to arbitrate any open issues." § 252(b)(1). An agreement adopted pursuant to either negotiation or arbitration is then submitted to the State commission, which approves or rejects the agreement, "with written findings as to any deficiencies." § 252(e)(1). Any party aggrieved by the State commission's decision may bring an action in federal court to determine whether the agreement or statement meets the requirements of the Act. § 252(e)(6). If a State commission opts not to fulfill its role under the Act, then the Federal Communication

Commission ("F.C.C.") assumes the State commission's responsibilities. § 252(e)(5).

II. MPUC's Motion to Dismiss

The MPUC has brought a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (2) in actions 97-901, 97-913, 97-917, 97-919, 97-2179, and 98-914, arguing that the Eleventh Amendment bars these suits.[1] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against on of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The Supreme Court has determined that the Amendment applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355 (1974). State immunity extends to state agencies and state officials acting on behalf of the state. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-46, 113 S.Ct. 684, 687-89 (1993).

The Eleventh Amendment bar to suits is not, however, absolute. Hadden v. Pierce, 964 F.2d 853, 856 (8th Cir. 1992) (citing Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299,

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[1]Nearly all of the federal district courts that have addressed the issue have determined that the Eleventh Amendment does not act as a bar to suits against State commissions under the Telecommunications Act. See, e.g., US WEST Communications, Inc. v. TCG Seattle, 971 F.Supp. 1365, 1368 (W.D. Wash. 1997); US WEST Communications, Inc. v. Sena, Civ. No. 97 124 JP/JGH, slip op. at 3-7 (D.N.M. Mar. 31, 1998); US WEST Communications, Inc. v. Hamlin, No. 8:97CV448, slip op. at 5 (D. Neb. Feb. 1998); GTE Florida Inc. v. Johnson, No. 4:97cv234 RH, slip op. at 5-6 (N.D. Fla. Nov. 21, 1997). The United States District Court for the District of Maryland did find that the Eleventh Amendment barred an Ex parte Young action brought to vindicate rights under the Act. MCI Telecommunications Corp. v. Frisby and Bell Atlantic-Maryland, 1998 WL 138680 (D.Md.). However, unlike the other district courts that have considered the matter, the District Court of Maryland did not address the issue of whether a suit could be brought pursuant to § 252(e)(6) of the Act. Id. at *3.

304, 110 S.Ct. 1868, 1872 (1990)). The Eleventh Amendment neither prohibits suits when a state waives its immunity and consents to suit in federal court, Alexander State Hospital v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985), nor when the suit seeks prospective relief from a state official allegedly acting in violation of federal law. Puerto Rico Aqueduct, 506 U.S. at 145-46, 113 S.Ct. at 688-89.

i. State Waiver

A State may consent to a suit against it in a federal court but the State's consent to the suit must "be unequivocally expressed." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907 (1984) (citation omitted). There are three methods by which a state may waive its sovereign immunity: 1) expressly in writing, in which case the waiver must be stated in the most clear language; 2) implicitly in writing, in which case the implication of waiver from the text must leave no room for any other construction; or 3) through conduct. Hankins, 964 F.2d at 856 (quoting Feeney, 495 U.S. at 305, 110 S.Ct. At 1873). Other circuits have found waiver through conduct when a state voluntarily participates in a federal statutory program for which Congress has a waiver of immunity requirement. See Pugno v. Martin, 119 F.3d 764, (9th Cir. 1997), cert. denied, 118 S.Ct. 1163 (1998); Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ., 772 F.2d 1123, 1137-38 (3d Cir. 1985).

In the 1996 Telecommunications Act, Congress permits the State to opt out of the Act's regulatory process:

> (5) Commission to act if State will not act
>
> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90

days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5). By providing for this alternative method of decision making, Congress acknowledged that the State can decline involvement in the statutory scheme. Because the State can opt out, any decision on its part to participate in the process is voluntary.

In the Act, Congress placed exclusive jurisdiction for review of the State commissions' determinations in the federal courts: "No State court shall have jurisdiction to review the action of a State commission . . ." 47 U.S.C. § 252(e)(4). The Telecommunications Act provides that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). Congress thereby notified the States that the review in federal courts of State commissions' decisions under the statutory scheme requires the States to waive sovereign immunity as a condition of participation in the regulatory process.

MPUC was not required by the statute to regulate the interconnection agreement. It chose to take an active role in the process. By choosing an active role, it waived its sovereign immunity implicitly through its conduct pursuant to the clear requirement of the Act, and therefore the Eleventh Amendment does not act as a bar to these suits.

ii. Ex parte Young

Assuming arguendo a determination that the State had not waived its Eleventh Amendment immunity, these actions could still proceed under the doctrine of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908). Under Ex parte Young and its progeny, suits brought against

state officials in their official capacities that seek prospective, injunctive relief "in order to end a continuing violation of federal law" are not treated as actions against the State for purposes of the Eleventh Amendment. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73, 116 S.Ct. 1114, 1132 (quoting Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985)); see Edelman v. Jordan, 415 U.S. 651, 677, 94 S.Ct. 1347, 1362 (1974). "[T]he Young doctrine has been recognized as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst, 465 U.S. at 105, 104 S.Ct. at 910 (quoting Ex parte Young, 209 U.S. at 160, 28 S.Ct. at 454). This present cases fall clearly within the classic, well-established Young doctrine. The Plaintiffs seek to vindicate federal rights guaranteed under the Telecommunications Act. The relief sought is limited to prospective, injunctive relief, the future compliance with the Act. The suits are directed at state officials, the MPUC commissioners, in their official capacities. All criteria for the Young doctrine are met.

The MPUC relies on the recent Supreme Court decisions, Seminole Tribe and Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997),[2] to support its argument that the Ex parte

[2]The MPUC does not expressly rely upon Coeur d'Alene Tribe, except to the extent that it reaffirms Seminole Tribe. The MPUC is correct that in Coeur d'Alene Tribe, the Supreme Court reaffirmed the holding of Seminole Tribe. Coeur d'Alene Tribe, 117 S.Ct. at 2034. However, any additional effect of the Coeur d'Alene Tribe decision on the Ex parte Young doctrine is limited. A divided Court found that although "[a]n allegation of an on-going violation of federal law where requested relief is prospective is ordinarily sufficient to invoke the Young fiction," it is not sufficient in the unique case where the suit "is the functional equivalent of a quiet title action." Id. at 2040. The Court found that the possible effect of the suit, virtually eliminating the State's control of certain public land, would be at least as intrusive as "any conceivable retroactive levy upon funds." Id. at 2043. In reaching its decision, the Court took note of the strong ties between a sovereign entity and its land. Id. Notwithstanding the MPUC's assertion that the State has a long-standing tradition of regulating local telephone service, see

Young doctrine is inapplicable to the present cases. The MPUC's reliance is misplaced. In Seminole Tribe, the Court found that Congress could not abrogate the States' Eleventh Amendment immunity under the Indian Commerce Clause. Seminole Tribe, 517 U.S. at 72-73, 116 S.Ct. at 1131-32. The Court also determined that the Ex parte Young doctrine could not be applied in the case because "[t]he situation . . . [was] sufficiently different from that giving rise to the traditional Ex parte Young action so as to preclude the availability of that doctrine." Seminole Tribe, 517 U.S. at 73, 116 S.Ct. at 1132. The Court stated that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Seminole Tribe, 517 U.S. at 74, 116 S.Ct. at 1132. The Court reasoned that if an aggrieved party could bring an action under Ex parte Young, the complex remedial scheme designed by Congress in the Indian Gaming Regulation Act ("IGRA") would be superfluous. Seminole Tribe, 517 U.S. at 75, 116 S.Ct. at 1133. The Court expressly noted that its holding did not inhibit Congress' ability to "authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme." Id. at n.17.

In the Telecommunication Act, Congress limited the remedial scheme to the passage in section 252 which provides that "[i]n any case in which a State commission makes a determination under this section any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). As the

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possible outcome of the present actions could rise to the level of intrusiveness of either a quiet title action or a retroactive levy on state funds.

Eighth Circuit noted subsection 252(e)(6) "is the exclusive means to attain review of state commission determinations under the Act." Iowa Utilities Board, 120 F.3d 753, 804 (8th Cir. 1997). This is precisely the type of limited remedial scheme by which Congress can still create federal jurisdiction under Ex parte Young following Seminole Tribe. An Ex parte Young action brought under the Telecommunications Act would not make the remedial scheme provided by the Act superfluous, but would rather fulfill it. Furthermore, throughout the Telecommunications Act, Congress references the State commission, and not the State, see, e.g., § 251(c)(3), 252(b)(1), 252 (a)(4), indicating that Congress contemplated an action being brought against the State commission under the Ex parte Young theory.[3] Seminole Tribe does not bar an Ex parte Young action brought pursuant to the Telecommunication Act. In the Act, Congress effectively authorized such a cause of action.[4]

III. Standard of Review

This Court has previously determined that the scope of its review in these cases is limited to appellate review of the record established before the MPUC. US WEST Communications,

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[3]The repeated reference to the State commission in the Telecommunications Act can be contrasted with the IGRA, the statute at issue in Seminole Tribe, "which repeatedly refers exclusively to 'the State.'" Seminole Tribe, 517 U.S. at n.17, 116 S.Ct. at n.17. IGRA's repeated reference to the State as the actor implied that an Ex parte Young action would be inappropriate under the IGRA because a suit against a state official or group of officials would not provide the necessary remedy. Id.

[4]The MPUC concedes that review provided for under the § 252(e)(6) does not violate the Johnson Act. Because the Court is limiting itself to the review provided for under § 252(e)(6), the Court will not address the parties' arguments concerning the Johnson Act.

Furthermore, because the Court finds that the Eleventh Amendment does not act as a bar to this action based on both the State's waiver of its immunity and the Ex parte Young doctrine, AT&T's argument that these actions are not "suits" against the State within the meaning of the Eleventh Amendment will also not be addressed.

Inc.v. Garvey, No. 97-913, slip op. at 3 (Feb. 11, 1998). Having decided the appropriate scope of the review, the Court must now determine the applicable standard of review.[5] The standard of review issue may be further delineated into two subparts: 1) the review appropriate for questions of law and 2) the review appropriate for factual findings and mixed questions of law and fact. The majority of the federal district courts that have addressed the question of the appropriate standard of review under § 252(e)(6) of the Act have determined that a State commission's interpretation of federal law is subject to *de novo* review while a State commission's factual determinations as well as its application of law to facts is reviewed under the arbitrary and capricious standard. See, e.g., US WEST Communications, Inc. v. MFS Intelnet, No. CV97-222WD, slip op. at 3-4 (W.D. Wash. Jan. 12, 1998); GTE South, Inc. v. Morrison, No. 3:97CV493, slip. op. at 3-4 (E.D. Va. Dec. 17, 1997).

i. Questions of Law

Although the Eighth Circuit has not ruled conclusively concerning the appropriate level of review to be given state agencies' interpretations of federal law, other courts of appeal have determined that state agencies' interpretations of federal laws should be reviewed *de novo* rather than under the deferential standard given to federal agencies. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997); Ritter v. Cecil County of Hous. & Comm. Dev., 33 F.3d

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[5]The Telecommunications Act is silent as to what standard of review should be applied under § 252(e)(6). When a federal statute is silent as to the appropriate standard of review, a court would generally apply the Administrative Procedure Act when reviewing an agency determination. Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Board, 794 F.2d 1339, 1342 (8th Cir. 1986). However, as the parties acknowledge, the APA is inapplicable to the present cases, because the APA does not apply to state agencies. 5 U.S.C. § 701(b)(1).

323, 327 (4th Cir. 1994); Amisub (PSL) v. Colorado Dep't of Social Svcs., 879 F.2d 765, 769 (10th Cir. 1989), cert. denied, 496 U.S. 935 (1990); Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989). These four courts of appeal have all concluded that the reasons for deferring to federal agencies' interpretations of federal law are inapplicable to state agencies. For example, deference is given to federal agencies, in part, because "their activities are subject to continuous congressional supervision by virtue of Congress's powers of advice and consent, appropriation, and oversight." Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989). State agencies are not subject to the same oversight by Congress. Deference is also given to a federal agency because reliance on one centralized agency's determinations promotes uniformity of law. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83 (1984); Turner, 869 F.2d at 141. In passing the Telecommunications Act, Congress apparently sought a coherent nationwide interpretation of the Act, because it placed review of commissions' decisions exclusively within the jurisdiction of the federal courts rather than permitting the various States' courts to review the State commissions' determinations. See 47 U.S.C. § 252(e)(4), (e)(6). Granting deference to the interpretations of federal law promulgated by up to fifty state commissions would undermine a uniform construction of the Act rather than promote it. Finally, deference is given to a federal agency because of its expertise and experience with the relevant statutory provisions. See Chevron, 467 U.S. at 844, 104 S.Ct. at 2782-83; Turner, 869 F.2d at 141; Kenaitze, 860 F.2d at 316. Because the Telecommunications Act was only recently enacted, none of the State commissions have any experience with the statute itself or with the underlying purpose of the statute, the opening up of local phone markets.

Because the reasons for granting deference to federal agencies' interpretations of federal law are logically inapplicable to the MPUC, the Court concludes that the MPUC's interpretation of federal law must be subject to *de novo* review.

ii. Findings of Fact and Application of Law to Fact

Although *de novo* review is appropriate for questions of law, a state agency's determinations as to questions of fact as well as mixed questions of law and fact are entitled to greater deference. See Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519, 529 (8th Cir. 1993). In Arkansas Medical Society, the Eighth Circuit applied the arbitrary and capricious standard as enunciated by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971), when reviewing the Arkansas Department of Human Services' rate-making decision under the federal Medicaid statute. Arkansas Medical Society, 6 F.3d at 529. Principles of judicial discretion are strongest where Congress has entrusted the administrative body with primary jurisdiction over the precise matters the court is asked to decide. See Chevron, 467 U.S. at 844, 104 S.Ct. at 2782. Under the Telecommunications Act, the MPUC has original jurisdiction over negotiated and arbitrated interconnection agreements, including the power to set the prices which may be charged by an incumbent local exchange carrier. See 47 U.S.C. § 252; Iowa Utilities Bd, 120 F.3d at 794. Therefore, as was done with the Arkansas DHS, this Court will apply the arbitrary and capricious standard of review in its analysis of the MPUC's factual determinations as well as its application of law to fact.

"Review under the arbitrary and capricious standard is narrow, and a court may not substitute its judgment for that of the agency." Id. Although the standard is deferential, a court

must still engage in a "substantial inquiry," id. (quoting Overton Park, 401 U.S. at 415, 91 S.Ct. at 823), and insure that the agency articulates a "rational connection between the facts found and the choice made." Id. (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105, 103 S.Ct. 2246, 2256 (1983)). A court must determine whether the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983).

IV. Motion for Preliminary Injunction and Other Motions to Dismiss

As was previously noted in the Court's letter dated April 1, 1998, US WEST's Motion for Preliminary Injunction in 97-913, MFS' Motion to Dismiss in 97-913, and Sprint's Motion to Dismiss in 97-2179 will be denied at this juncture.

V. Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. The MPUC's Motion to Dismiss in 97-901, 97-913, 97-917, 97-919, 97-2179, and 98-914, is DENIED.
2. US WEST's Motion for Preliminary Injunction in 97-913 is DENIED.
3. MFS' Motion to Dismiss in 97-913 is DENIED.
4. Sprint's Motion to Dismiss in 97-2179 is DENIED.

DATED: April 30, 1998.

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

APPENDIX G

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AT&T COMMUNICATIONS OF MICHIGAN, INC.,

Plaintiff,

vs.

Case No. 97-CV-60018-AA
97-CV-60176-AA
HON. BARBARA K. HACKETT

MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN, INC., and THE COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION, in their Official Capacity and not as individuals,

Defendants.
_____/

ORDER DISMISSING CASE NO. 97-60018 AND DENYING DEFENDANT MPSC COMMISSIONERS' MOTION TO DISMISS CASE NO. 97-60176

The above-captioned cases arise under the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6) (the Act), which authorizes this court to determine whether the interconnection agreement between AT&T Communications of Michigan, Inc. (AT&T) and Michigan Bell Telephone Company d/b/a Ameritech Michigan, Inc. (Ameritech) arbitrated and approved by the Commissioners of the Michigan Public Service Commission (MPSC) complies with the Act. Now before the court is the Commissioners' motion to dismiss plaintiff's claims as to the Commissioners. For the following reasons, their motion shall be denied.

I. FACTS

Through the Telecommunications Act of 1996, Congress enacted a new subchapter of the Communications Act of 1934, 47 U.S.C. §§ 251-261, that is designed to foster "rapidly" the development of competition in local telephone markets. However, Congress recognized that incumbent monopolist providers of local telephone service, such as Ameritech, have strong economic incentives to delay and impede the introduction of competition in the local exchange markets. Hence, Congress imposed specific obligations on the incumbents, requiring them to give new competitors immediate access to the facilities they need to enter the market. Specifically, the Act mandates that potential competitors be allowed to "interconnect" with the incumbent's networks, Id. § 251(c)(2); to purchase access to "unbundled elements" of those networks, Id. § 251(c)(3); and, to resell services currently sold by incumbents such as Ameritech. Id. § 251(c)(4).

The Act further directs incumbents to negotiate "interconnection agreements" with new entrants to fulfill their duties under the Act, Id. § 251(c)(1), and § 252 of the Act creates an important, yet voluntary, role for state commissions arbitrating and reviewing those interconnection agreements. If such negotiations are unsuccessful, either party may petition a state commission to arbitrate open issues. Id. § 252(b)(1)-(2). The Act does not require state commissions or their commissioners to participate in this new federal scheme.[1] Rather, if a state commission opts not to conduct the arbitration, the Federal Communications Commission (FCC) must do so. Id. § 252(e)(5). If a state commission

[1]Cf. New York v. United States, 505 U.S. 144, 176 (1992) (invalidating legislative provision "compelling [states] to enact and enforce a federal regulatory program").

conducts the arbitration, it must ensure that the terms and conditions imposed upon the parties comply with the Act and the FCC's rules. Id. § 252(c)(1).

The Act instructs that agreements adopted through arbitration or negotiation be submitted to the state commission for review, and the commission may then approve the agreement or reject it if it is inconsistent with the Act. Id. § 252(e)(1)-(2). If the commission fails to act, the agreement will be deemed approved. Id. § 252(e)(4). Once a state commission has approved or rejected an interconnection agreement, "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section." Id. § 252(e)(6).

In the present case, plaintiff AT&T served defendant Ameritech with a request for negotiation pursuant to the Act on February 27, 1996. For either party to avail itself of the Act's arbitration process before a state commission, a petition for arbitration must be filed after the 135th day but before the 160th day after the date of the original negotiation request. AT&T complied with this provision and filed a petition for arbitration with the Michigan Public Service Commission on August 1, 1996. Ameritech also filed a petition for arbitration on August 2, 1996, and the MPSC subsequently consolidated the separate petitions into a single arbitration proceeding and appointed an arbitration panel to consider the issues raised by the parties.

On October 28, 1996, the arbitration panel issued its first decision and required the parties to submit exceptions to the MPSC by November 7, 1996. On November 26, 1996, the MPSC issued an order approving agreement adopted by arbitration. That order

directed that a complete copy of the interconnection agreement, as adopted by the arbitration panel and as modified by the MPSC, be filed within 10 days. On December 26, 1996, Ameritech filed a disputed version of the interconnection agreement with the MPSC. Because it was uncertain whether the MPSC's November 26, 1996, order constituted final approval of the parties' interconnection agreement, AT&T filed its first complaint in this court on January 24, 1997, which was assigned case number 97-60018.[2]

After the MPSC's November 26, 1996, order, AT&T and Ameritech filed five agreements, each of which contained disputed provisions.[3] Consequently, MPSC staff initiated discussions with AT&T and Ameritech regarding the unresolved issues. The MPSC staff then filed recommendations concerning resolution of the outstanding disagreements. AT&T and Ameritech filed responses to the recommendations, and on February 28, 1997, the MPSC issued an opinion and order adopting staff's recommendations and requiring the parties to submit a signed copy of the interconnection agreement. On March 7, 1997, AT&T and Ameritech jointly submitted a fully executed agreement. On the same date, Ameritech filed a motion for approval of the agreement.

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[2]Case no. 97-60018, however, must be dismissed because it was filed prior to the MPSC's April 4, 1997, order approving the parties' final agreement and seeks the court's premature review of the arbitration process. Although AT&T suggests that the court consolidate the two cases and "proceed on the basis of the second complaint, reviewing the Agreement as approved by the MPSC's April 4, 1997 Approval Order," the court finds no reason to maintain the first case on its docket when there is no agreement at issue in that complaint for the court to review.

[3]The five disputed agreements were submitted on December 6, 1996, December 26, 1996; January 14, 1997; January 16, 1997; and, January 29, 1997. Only the January 29, 1997, agreement was signed by both parties, but even it included disputed language.

On April 4, 1997, the MPSC issued an order approving the interconnection agreement between the parties, and on May 5, 1997, AT&T filed its second complaint, which was assigned case number 97-60176.

In its complaint, AT&T asserts that the interconnection agreement and the MPSC's order violate the Act and FCC regulations by not requiring Ameritech to provide a particular telecommunication service (Counts I and II). Counts III and IV allege a controversy between AT&T and Ameritech and request that the court resolve questions regarding the parties' rights and obligations under the agreement. AT&T named as defendants both Ameritech and the MPSC Commissioners, in their official capacity.

The MPSC Commissioners have filed a motion to dismiss plaintiff's claims against them, arguing that (1) the court lacks subject matter jurisdiction over an action against state officials; and, (2) the complaint fails to state a claim on which relief can be granted against state officials. The court now turns to the Commissioners' motion.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim on an issue of law. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, a court must "accept all of plaintiff's factual allegations as true and determine whether any set of facts consistent with the allegations would entitle the plaintiff to relief." G.M. Eng'r and Assoc., Inc. v. West Bloomfield Tp., 922 F.2d 328, 330 (6th Cir. 1990).

III. DISCUSSION

The Commissioners contend that they should be dismissed as defendants because the Act only authorizes the court to review the agreement between AT&T and Ameritech that the Commissioners arbitrated and approved to see if it complies with the Act, and that such limited authorization does not extend to jurisdiction over an action against the Commissioners. This argument lacks merit. The Act makes no mention about who is a proper party to suit. As long as nothing outside the statute prohibits naming the Commissioners as defendants, they are clearly proper parties to a proceeding which will examine whether an agreement they arbitrated and approved complies with the Act that they undertook to apply. For the reasons stated hereafter, the court finds that nothing outside the Act mandates the Commissioners' dismissal from suit. Furthermore, naming the Commissioners as defendants is essential to ensuring that AT&T receives all of the potential relief to which it is entitled, including that the MPSC properly apply the federal Act in Michigan.

The Commissioners maintain that the Tenth and Eleventh Amendments to the United States Constitution require their dismissal from suit. The specific arguments raised by the Commissioners in support of their motion are not novel. Over the course of the last year, these same arguments have been advanced throughout the nation by various state public utility commissions and rejected every time.[4] Pursuant to the reasoning expressed

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[4]See, e.g., US W. Communications, Inc. v. Public Serv. Comm'n of Utah, No. 2:97-CV-558, 1998 WL 28146 (D. Utah Jan. 23, 1998); US W. Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365 (W.D. Wash. 1997); Michigan Bell Tel. Co. (d/b/a Ameritech Mich.) v. Climax Tel. Co., No. 5:97-CV-197 (W.D. Mich. Feb. 13, 1998); AT&T

in these earlier decisions, this court determines that neither the Tenth nor the Eleventh Amendment bars the action brought by AT&T against the MPSC Commissioners under § 252(e)(6) of the Act.

More specifically, the court first holds that the Commissioners are not protected by the Tenth Amendment because the Act does not mandate their participation in the federal program. Rather, the Act offers states the option of implementing the regulatory scheme or declining to do so. Thus, the MPSC Commissioners voluntarily chose to act here, and absent coercion of a state's legislative processes, there can be no Tenth Amendment violation.

As to the Commissioners' Eleventh Amendment arguments, the court finds that an action for judicial review under § 252(e)(6) of the Act is not a "suit in law or equity" against the state, and therefore does not raise Eleventh Amendment concerns. Moreover, even if this case was a "suit" for purposes of the Eleventh Amendment, jurisdiction over the MPSC Commissioners would nonetheless be proper under Ex parte Young, in which the

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Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 1:97-cv-884-RCF (N.D. Ga. Feb. 11, 1998); BellSouth Telecommunications, Inc. v. Tennessee Regulatory Auth., No. 3:97-0523 (M.D. Tenn. Feb. 11, 1998); US W Communications, Inc. v. MFS Intelenet, Inc., No. 97-857-JE (D. Or. Jan. 30, 1998); AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecommunications, Inc., No. 97-79 (E.D. Ky. Dec. 15, 1997); AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2164-17 (D.S.C. Dec. 11, 1997); AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 4:97cv262-RH (N.D. Fla. Nov. 21, 1997); AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-CV-425-BR (E.D.N.C. Nov. 20, 1997); GTE S., Inc. v. Morrison, No. 3:97CV493 (E.D. Va. Nov. 7, 1997); U.S. W. Communications, Inc. v. Hix, No. 97-D-152 (D. Colo. Oct. 29, 1997); U.S. W. Communications, Inc. v. Thoms, No. 4-97-CV-70062 (S.D. Iowa Aug. 4, 1997); U.S. W. Communications, Inc. v. Reinbold, No. A1-97-25 (D.N.D. July 28, 1997).

Supreme Court recognized that the Eleventh Amendment does not bar lawsuits that seek to enjoin state officials in their official capacity from prospective violations of federal law. 209 U.S. 123 (1908).[5] Contrary to the Commissioners' contention, the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), does not work to avoid the clear-cut application of Ex parte Young. Although the Court in Seminole Tribe held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young," id. at 74, the Act at issue here does not present such a detailed remedial scheme.

Furthermore, the applicability of Ex parte Young in this case is all the more clear in light of Justice Kennedy's Eleventh Amendment analysis in Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997). Affirming the "continuing validity of the Ex parte Young doctrine," Justice Kennedy emphasized that the Young rule has "special significance" when "there is no available state forum." Id. at 2034-35. There is "no state forum available to vindicate" a telecommunication carrier's claim that an interconnection agreement violates the Act. See 47 U.S.C. § 252(e)(4). Therefore, ensuring the MPSC Commissioners' prospective compliance with the Act in this forum is a proper invocation of Ex parte Young.

Moreover, even if the court were to conclude that this action implicates the Eleventh Amendment, and that the doctrine of Ex parte Young does not authorize the court to direct the Commissioners to abide by the requirements of the Act, there is yet a third ground for

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[5]The doctrine espoused in Ex parte Young applies to threatened violations of both constitutional and statutory law. See, e.g., Cory v. White, 457 U.S. 85, 90 (1982).

denying the Commissioners' motion to dismiss: The Commissioners waived the right to invoke any constitutional claims of sovereign immunity by voluntarily choosing to conduct the arbitration and implement the federal scheme set forth in §§ 251 and 252 of the Act. A state waives its Eleventh Amendment immunity by voluntarily participating in a federal program if the waiver arises from "'such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06 (1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985)). Here, the MPSC voluntarily injected itself into a regulatory scheme in the face of clear and unambiguous language that, upon completion of the arbitration and approval process, federal district court review would ensue. The "overwhelming implication" of the MPSC's conduct demonstrates a waiver of any Eleventh Amendment immunity.

The Commissioners' arguments in support of dismissal regarding the doctrines of exhaustion of administrative remedies and primary jurisdiction are equally unavailing. The Commissioners claim that the FCC, pursuant to its authority under 47 U.S.C. § 208(a), can grant the relief requested by AT&T, and that AT&T should thus be required to exhaust that remedy before the FCC, or alternatively, that this court should refer to the FCC's primary jurisdiction. However, the Eighth Circuit recently held that an action under § 252(e)(6) such as this one "is the exclusive means to attain review of state commission determinations under the Act," and that "Congress did not intend to allow the FCC to review the decisions of state commissions," because "nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements." Iowa Util. Bd. v.

FCC, 120 F.3d 753, 804 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (1998). Accordingly, the doctrines of exhaustion of remedies and primary jurisdiction do not apply here.

Finally, the MPSC Commissioners allege that the Johnson Act, 28 U.S.C. § 1342, provides additional support for the proposition that they are not proper parties to this action. The Johnson Act bars federal courts from asserting jurisdiction to "enjoin, suspend or restrain the operation of, or compliance with" state utility rate making orders when all four of the act's conditions are met. The first condition under the Johnson Act requires that jurisdiction be based solely on diversity of citizenship or federal constitutional grounds. However, AT&T's challenge to the MPSC's order arises under a federal statute. Second, the Johnson Act applies only if "[a] plain, speedy and efficient remedy" is available in state court. Here, the Telecommunications Act explicitly bars state courts from determining whether interconnection agreements comply with the Act. 47 U.S.C. § 252(e)(4). Because at least two of its requirements are not satisfied, the Johnson Act has no application to this case.

IV. CONCLUSION

For the reasons stated above, defendant MPSC Commissioners' motion to dismiss hereby is DENIED.

SO ORDERED.

BARBARA K. HACKETT
United States District Judge

Dated: March 19, 1998.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MCI TELECOMMUNICATIONS CORP., :
: CIVIL ACTION NO. 97-1857
Plaintiff :
: (CALDWELL, J.)
V. : (DURKIN, M.J.)
:
BELL ATLANTIC-PENNSYLVANIA, :
INC., et al.,
:
Defendant
:

FILED
SCRANTON
AUG 11 1998
PER
DEPUTY CLERK

REPORT AND RECOMMENDATION

Before the court is a motion by the defendants, Pennsylvania Public Utility Commission and its members, to dismiss the complaint for lack of personal jurisdiction, and a motion by the same defendants to dismiss the crossclaim of defendant Bell Atlantic-Pennsylvania, Inc., against them. (Doc. Nos. 7 and 19).

By way of background, The Telecommunications Act of 1998, 47 U.S.C. §§151, et seq., (hereinafter "The Act" or "TA-1996")(Attached as Appendix B) seeks to promote telecommunications services throughout the nation by competition. Interexchange Carriers ("IXCs"), such as MCI, are expected to enter the local markets of Local Exchange Carriers ("LECs") as Competitive Local Exchange Carriers ("CLECs"). Interconnection agreements, arrived at through negotiation and arbitration, play an important part in promoting that competition. These agreements generally govern the prices, terms, and conditions under which a specific CLEC accesses an ILEC's network.

Sections 252(a)(2) and (b))(1)-(4) of the Act authorize state

commissions to conduct negotiations, mediations, and arbitration proceedings to facilitate and to resolve any terms, prices, or conditions that a specific CLEC and an ILEC are unable to resolve themselves. Thereafter, the CLEC and ILEC are required to submit the final interconnection agreement (contract) to the state commission for approval under Section 252(e). Section 252(e)(6) authorizes the judicial review of state commission actions approving any interconnection agreement.

Throughout 1996, plaintiff MCI Communications Corporation and MCI Metro Access Transmission Services, Inc. ("MCI") and Bell Atlantic-Pennsylvania, Inc. ("Bell-Atlantic") engaged in a lengthy, negotiation in an attempt to reach an interconnection agreement. On August 30, 1996, MCI sought compulsory arbitration of unresolved issues before the Pennsylvania Public Utility Commission (PUC). Hearings were held in October 1997 and briefs were submitted by MCI and Bell Atlantic.

On December 20, 1996, the PUC issued a final opinion and order disposing of the arbitration proceedings (December 1996 Order). The December 1996 Order required the submission of an interconnection agreement reflecting the PUC's determinations in the December Order. The December Order also required incorporation of the Commission's determinations in the related proceeding at PaPUC Docket No. A-310203F0002 (the "MFS Phase III" proceeding) concerning the prices for unbundled network elements ("UNEs")[1] under litigation in that proceeding.[2]

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[1]The three methods to attain some of the goals of the Act are, generally, interconnection, resale, and facilities-based competition. Under interconnection, a CLEC negotiates with an ILEC to obtain the UNEs needed to provide competitive local

The parties later filed a Joint Application for Approval of an interconnection agreement using the MFS Phase III Interim Rate Order rates. However, the parties could not agree on the appropriate Interconnection Point (IP) for the Philadelphia and Pittsburgh LATAs.[3] The parties requested the Commission to approve the interconnection agreement and determine the number of Ips for the LATAs.

On September 3, 1997, the PUC entered an Order (September 1997 Order) approving the interconnection agreement on the condition that the final rates would be those established by the MFS Phase III Proceeding. The September 1997 Order also adopted Bell's proposed language on the number of IPs. A Secretarial Letter issued on November 14, 1997 deeming the September 1997 Order to be final.

On December 8, 1997, MCI filed this action against the PUC and its commissioners in their official capacities, and against Bell Atlantic challenging a number of the PUC's determinations which the

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exchange service to end-user customers through a combination of CLEC-owned components and those secured from the ILEC. Under resale, the CLEC purchases the retail services of an ILEC, at a pre-determined discount established by a state commission, for resale to an end-user customer. Under facilities-based competition, a competitor builds the telephone network needed to provide competitive services to end-users.

[2]MCI and Bell were parties to the MFS Phase III proceeding. On April 10, 1997, the PUC issued an order establishing interim rates (MFS Phase III Interim Order). On August 7, 1997, the PUC issued a final order establishing final rates (MFS Phase III Final Order).

[3]Interconnection Point (IP) is a term of art that refers to the physical connection between two competing carriers. In this case, MCI and Bell disputed the number of points serving the Philadelphia and Pittsburgh areas. MCI thought one point was sufficient whereas Bell wanted at least two.

PUC ordered MCI and Bell Atlantic to include in the interconnection agreement which MCI contends are violative of the Act. The PUC defendants filed a motion to dismiss the complaint for lack of personal jurisdiction. Bell Atlantic filed an answer to the complaint which included a counterclaim against MCI and also filed a crossclaim against the other defendants, also contending that certain actions of the PUC violated the Act. MCI then moved to dismiss Bell Atlantic's crossclaim.

Turning first to the PUC's motion to dismiss the complaint, the documents related to that motion are the PUC's supporting brief and exhibits (Doc. Nos. 8 and 9); MCI's opposing brief (Doc. No. 18), the PUC's reply brief related to both the motion to dismiss the complaint as well as the motion to dismiss Bell Atlantic's crossclaim (Doc. No. 25); an opposing brief by Intervenor United States in opposition to PUC's motion to dismiss the complaint on constitutional grounds (Doc. No. 35); MCI's surreply in opposition to defendant's motion to dismiss which addresses the constitutional arguments raised in the PUC's reply brief (Doc. No. 42) and MCI's notice of supplemental authority. (Doc. No. 52).

A central element of the 1996 Act is the introduction of competition into local service markets pursuant to agreements negotiated in accordance Sections 251 and 252 of the Act. Section 251 of the Act imposes a variety of obligations upon incumbent local telephone companies requiring them to provide access to their facilities to new entrants with the aim of hastening the growth of competition in their markets, by permitting other telecommunications carriers to interconnect with the incumbent, thereby allowing calls to carry between an incumbent's network

facility and those of a competitor; by providing other carriers access to elements of the incumbent's local network on an "unbundled" basis, thereby permitting a prospective competitor to repackage elements to be offered to the public as a competitive service; and by selling to other carriers, at wholesale rates, any telecommunications service that the incumbent provides to its retail customers. 47 U.S.C. §251(c). Section 251 also requires incumbent exchange carriers to provide physical access to their poles, ducts, conduits and rights of way to allow other carriers to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. §251(b)(4) and 251(c)(6).

Sections 251 and 252 impose a duty on incumbent local exchange carriers to negotiate in good faith with new entrants to arrive at the terms and conditions of agreements regarding facilities' access, interconnection, resale of services, or any of the other arrangements contemplated by the Act. 47 U.S.C. §251(c), 252. Section 252 provides that the parties may enter into voluntary agreements that become effective upon approval by the responsible state public service commission, or, failing negotiation of a voluntary agreement, that any party to such a negotiation "may petition a state commission to arbitrate any other issues." 47 U.S.C. §252(c). The 1996 Act permits any party "aggrieved" by a determination of a state commission to bring an action in federal district court to determine whether the agreement or statement meets the requirements of Section 251 and Section 252. 47 U.S.C. §252(e)(6).

Although Congress might have preempted the regulatory role

under the Act, it gave the states, through their commissions, the right to participate in this regulatory role, perhaps on the basis that the states had traditionally participated in the regulation of facilities. However, the Act plainly permits state commissioners to opt out of their regulatory role. If a state declines to accept the regulatory role contemplated by the statutes, its duties are assumed by the FCC, 47 U.S.C. §252(e)(5), and there is no judicial relief against the state commissioners' decision to opt out. 47 U.S.C. §252(e)(6). Review of the FCC's actions in such cases would constitute the sole avenue of judicial redress. See Id., 47 U.S.C. §402(a); 28 U.S.C. §2342(2). However, if the commission decides to accept the regulatory role, then as noted above, any party aggrieved by a decision of a state commission may bring an action in federal district court to determine whether the agreement or statement meets the requirements of the Act.

It is this provision for review in a federal court of the commission's actions which forms the basis for the PUC's contention that a federal court lacks jurisdiction to review the commission's actions. The PUC argues that the Eleventh Amendment bars suits against an unconsenting state, and an arm of that state such as the PUC, by its own citizens as well as those citizens of another state. The PUC argues that Pennsylvania has not consented to this suit by MCI, a citizen of Delaware and doing business in Pennsylvania and thus the action should be dismissed. In its reply brief, the PUC argues that Section 252(e)(4) to (e)(6) of the Act are unconstitutional because they exceed Congress' powers under the Commerce Clause and also that the Tenth Amendment which reserves to the states the powers not delegated to the United

States by the Constitution prohibits Congress' attempt to "commandeer the Commonwealth's legislative and executive functions" by forcing it to waive its sovereignty in order to implement the federal regulatory program of the Act.

However, as the briefs of MCI, the United States and indeed Bell Atlantic in connection with a identical attack on the crossclaim, clearly demonstrate, all of the courts that have addressed the Eleventh Amendment issue have held that the Eleventh Amendment does not bar district court review of state decisions under Section 252 of the Telecommunications Act either because suit can properly be brought against state officials, such as the commissioners here, for prospective injunctive relief without regard to the Eleventh Amendment, ex Parte Young, 209 U.S. 123 (1908), or because the Act does not impose an obligation on the states, the performance of which is subject to federal court review, but rather offers state regulatory bodies the option of participating in the federal system for regulation of private conduct and only then subjects their determinations to review in the district court, and that in accepting regulatory authority under the Act in full knowledge of the attendant judicial review provisions, Pennsylvania has waived any Eleventh Amendment protections. The briefs of MCI, the United States and indeed, Bell Atlantic, also contain a host of authority that Sections 252 (e)(4) to 252(e)(6) of the Act do not exceed Congress' commerce power nor do they violate the Tenth Amendment. Although PUC also argues that the complaint against the individual commissioners should also be dismissed pursuant to the Eleventh Amendment, the opposing briefs clearly establish that any relief here would be

prospective injunctive relief, directing the individual commissioners to implement properly the Telecommunications Act in approving the interconnection agreement at issue, and that therefore relief of the nature contemplated against individual officials is wholly consistent with the ex Parte Young exception to Eleventh Amendment immunity.

The PUC attempts to avoid this host of authority set forth in the opposing briefs, which have considered and rejected the PUC's various arguments, by culling from various cases language which it feels would support its position or by attempting to distinguish the authorities. However, the briefs of the parties demonstrate that these attempts are without merit.

At oral argument, the PUC offered brief argument in reply. Although recognizing that every one of a great number of courts when faced with these various issues has rejected the PUC's position, the PUC's reply was that these issues have not been authoritatively decided by the Third Circuit or by the Supreme Court of the United States and therefore the PUC is certainly not precluded from advancing the same arguments. Thus, it appears that the PUC's intent in filing these motions is more to preserve the record so that these issues may be revisited in the future, perhaps by the Third Circuit or the Supreme Court. Under these circumstances, it would only unduly lengthen this report to set forth the many cases that have rejected these very arguments and with which the magistrate judge agrees. Suffice it to say that the opposing briefs establish that the review of the PUC's actions is not barred by the Eleventh Amendment, the Commerce Clause, or the Tenth Amendment. Indeed, subsequent to oral argument, XCI

provided the court with even more authority through May 27, 1998 which supports its position in opposition to the motion of the PUC and its commissioners to dismiss the complaint. (Doc. No. 52).

Since the motion of the PUC to dismiss Bell Atlantic's crossclaim is based on the same arguments directed at the MCI complaint, the motion to dismiss the crossclaim should similarly be denied.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT:

the motion by the defendants PUC and its commissioners to dismiss the complaint be denied and the motion by the same defendants to dismiss the Bell Atlantic crossclaim be denied.

RAYMOND J. DURRIN
United States Magistrate Judge

Dated: August 10, 1998

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.

Plaintiff

v.

TENNESSEE REGULATORY AUTHORITY, et al.

Defendants

and

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,

Counterclaim and Cross-Claim Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

Counterclaim Defendant, and

TENNESSEE REGULATORY AUTHORITY, et al.

Cross-Claim Defendants.

No. 3:97-0523
Chief Judge Nixon

MEMORANDUM

Pending before the Court is the Defendants Tennessee Regulatory Authority, H. Lynn Greer, Melvin J. Malone, and Sara Kyle's Motion to Dismiss (No. 3:97-0616 Doc. No. 10; No. 3:97-0523 Doc. No. 11), to which the Plaintiff BellSouth Telecommunications, Inc. (Doc. No. 16), the Cross-Claim Plaintiff AT&T Communications of the South Central States, Inc. (Doc. No. 17), and the Plaintiff in member case No. 3:97-0616, MCI

Telecommunications Corp. (Doc. No. 15) have filed Responses. The Defendants have in turn filed a Reply (No. 3:97-0616 Doc. No. 20; No. 3:97-0523 Doc. No. 21). In addition, the Court has before it a Motion to Intervene by the United States and the Federal Communications Commission (No. 3:97-0616 Doc. No. 23; No. 3:97-0523 Doc. No. 24), to which the Defendant BellSouth in member case No. 3:97-016 has filed a Response (Doc. No. 27). The proposed intervenors have also filed a Response to the Motion to Dismiss (No. 3:97-0616 Doc. No. 27).

For the reasons expressed below, the Court grants the Motion to Dismiss, and grants the United States' Motion to Intervene, but denies the Federal Communications Commission's Motion to Intervene.

I. BACKGROUND

This is an action under § 252(e)(6) of the Telecommunications Act of 1996 ("Act"), seeking review of two interconnection agreements. The first is between AT&T Communications of the South Central States ("AT&T") and BellSouth Telecommunications ("BellSouth"). The second is between BellSouth and the collective entity of MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. (collectively "MCI"). The Act was enacted to promote competition in local telephone markets. It ends the prior regulated-monopoly era, in which incumbent local exchange carriers ("ILECs") such as BellSouth, exercised exclusive control over the facilities through which consumers place and receive all local and long distance telephone calls. It replaces this with a more competitive system which requires the ILECs to give other carriers access to the facilities they need to

enter the market. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791-92 (8th Cir. 1997). The Act requires ILECs to negotiate in good faith with potential competitors; to provide requesting carriers with "interconnection" to the ILECs' networks, 47 U.S.C. § 251(c)(2) (West Supp. 1997); to provide "unbundled access" to elements of those networks, 47 U.S.C § 251(c)(3); and to "offer for resale at wholesale rates any telecommunications service the carrier provides at retail to subscribers who are not telecommunications carriers," 47 U.S.C. § 251(c)(4).

The Act requires ILECs to negotiate "interconnection agreements" with new entrants, such as AT&T and MCI, and authorizes either party to petition the appropriate state public utility commission, in this case the Tennessee Regulatory Authority ("TRA"), to arbitrate or mediate open issues if those negotiations are unsuccessful. 47 U.S.C. § 252(a)-(b). In addition, all interconnection agreements must be presented to the state agency for approval. 47 U.S.C. § 252(e)(1). The scope of the state agency review is limited to the question of whether the agreement complies with the requirements of the Act and with state law. 47 U.S.C. § 252(e)(2). If the state commission fails to act on an arbitration request, the Federal Communications Commission ("FCC") can remove jurisdiction from the state agency and take over its responsibility. 47 U.S.C. § 252(e)(5).

After a period of unsuccessful negotiations pursuant to the Act between AT&T and BellSouth, AT&T filed a petition for arbitration with the TRA on July 17, 1996. The TRA consolidated this arbitration with a subsequently-filed request for arbitration between BellSouth and MCI. An arbitration hearing was held from October 21 to October 23, 1996, after which the TRA approved arbitration agreements for these parties. BellSouth thereafter instituted an action against the TRA, the TRA directors, and AT&T, claiming that the agreement approved

by the TRA violated the Act. In that action, AT&T has filed a cross-claim against the TRA and a counterclaim against BellSouth, also claiming that the agreement violates the Act. In the member action, MCI filed a claim against BellSouth, TRA, the TRA directors. BellSouth in turn filed a counterclaim against TRA, the TRA directors, and AT&T. The Court consolidated these two cases by Order dated November 10, 1997, finding that the cases presented sufficiently similar questions of law and fact to support consolidation (Doc. No. 36).

This Court has jurisdiction over this matter under 47 U.S.C § 252(e)(6), which provides that review of a state commission's determination under the Act may be brought in a federal district court.

II. DISCUSSION

The TRA and its directors have asked this Court to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1), (6) and (7), claiming that they are immune from suit under the Eleventh Amendment, and that as an indispensable party, the action may not proceed without them. The parties opposing this motion submit that the TRA is amenable to suit because it has waived its immunity, and that the individual directors are subject to suit under the doctrine of Ex parte Young.

A. Eleventh Amendment

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

U.S. Const. amend XI. This language has been interpreted to extend immunity for suits against a State by its own citizens. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). The rationale underlying the existence of the amendment is that inherent in the concept of state sovereignty is the recognition that the State should have a right to not be sued without its consent. Seminole Tribe of Florida v. Florida, -- U.S.--, 116 S. Ct. 1114, 1131 (1996). Here, the TRA and its directors have been made unwilling parties to a suit. The statute which created the TRA explicitly directs that "directors of the authority shall be state officers," and requires that these officers be appointed jointly by the governor, the speaker of the senate, and the speaker of the house of representatives. Tenn. Code Ann. § 65-1-101 (1997). Thus, the TRA and its directors are State entities, and they have properly invoked the Eleventh Amendment as a potential bar to suit. Cf. Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (Eleventh Amendment immunity extends to state entities); Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 463-64 (1945) (state Department of Treasury considered to be an arm of the State for purposes of immunity).

However, Eleventh Amendment protections are not absolute. Specifically, a State may be subject to suit notwithstanding the Eleventh Amendment under two well-recognized principles: waiver and the doctrine of Ex parte Young.[1]

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[1]AT&T's Memorandum in Opposition to the Motion to Dismiss also presents the argument that an action under 47 U.S.C. § 253(e)(6) is not a "suit in law or equity" against the State, such that the dictates of the Eleventh Amendment are not applicable. However, the cases cited by AT&T to support this proposition relate specifically to the review of state court proceedings: "[W]hen a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case 'whoever may be the parties to the original suit, whether private persons, or the state itself.' . . . The Eleventh Amendment does not

1. Waiver

Waiver can be realized in two ways. First, Congress can abrogate a State's immunity without the State's consent. Atascadero, 473 U.S. at 240; see also Tennessee Dep't of Human Serv. v. U.S. Dep't of Educ., 979 F.2d 1162, 1167 (6th Cir. 1996); Seminole Tribe, 116 S. Ct. at 1125. In order to determine whether a waiver has been effectuated in this manner, a court must first consider whether Congress has "unequivocally expressed its intent to abrogate the immunity," Seminole Tribe, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985), and second, whether "Congress has acted 'pursuant to a valid exercise of power.'" Id. In Seminole Tribe, the Supreme Court, overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), determined that Congress may not waive immunity when it is acting pursuant to its powers under Article I, but it may do so when exercising its Fourteenth Amendment powers. 116 S. Ct. at 1128.

With respect to the 1996 Act, it appears Congress may have intended to exercise its power under the Fourteenth Amendment in promulgating it. As specified in Section 151, one of the primary purposes of the 1996 Act was to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race color, religion, national*

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constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." McKesson v. Division of Alcoholic Beverages, 496 U.S. 18, 32 (1990). This doctrine clearly does not directly apply to the facts of the present case, which relates to the review of a state arbitration proceeding where the State was the decision-maker, not a party. Furthermore, the backdrop of the Court's statement was concern that by invoking immunity for the first time at the federal level, the Supreme Court would lose jurisdiction over state decisions. Id. at 28-29. This same concern is not as prominent under the present facts, where the State's first opportunity to assert immunity comes at the federal level.

origin, or sex, a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . ." (emphasis added). While this language does not state in express terms that it was enacted under Congress' Fourteenth Amendment powers, such an explicit declaration is not necessary. Wilson-Jones v. Caviness, 99 F.3d 203, 208, 210 (6th Cir. 1996). It is enough that other language in the statute connects it to the Fourteenth Amendment. Id. at 210. Generally, statutes which have been held to be valid under the Fourteenth Amendment's enforcement clause "concerned discrimination by state actors on the basis of race or gender." Id. The 1996 Act explicitly refers to the desire to prevent discrimination against protected classes in the telecommunications industry. Thus, a valid argument could be made that it was promulgated in part under Congress' Fourteenth Amendment powers. Nevertheless, the Court will refrain from deciding the issue of whether Congress unilaterally abrogated immunity in enacting the Act because the parties have not thoroughly briefed it. Most notably, the parties have failed to specify how the discrimination alleged here is due to state rather than private actors. In any event, it is not necessary for the Court to resolve this issue because it has concluded, as discussed below, that the State has waived its immunity voluntarily by participating in the Act.

The second method under which a State can waive its immunity is by voluntarily taking part in a federal program which conditions such participation on the waiver of immunity. Tennessee Dep't of Human Serv., 979 F.2d at 1166; see also Edelman v. Jordan, 415 U.S. 651, 673-74 (1974). Again, it is necessary that Congress express in clear and unambiguous terms that by participating in the program, States subject themselves to suit. Atascadero, 473 U.S. at 239-240. As noted in Atascadero, "[t]he test for determining whether a State has

waived its immunity from federal-court jurisdiction is a stringent one." Id. at 241. The mere fact that a State participates in a federal program is not sufficient to effectuate a waiver of immunity. Edelman, 415 U.S. at 673. In other words, a State may not "constructively consent" to suit: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." Id. A State's waiver will only be effected "where stated by the most express language or by such overwhelming implication from the text as [to] leave no room for any other reasonable construction." Atascadero, 473 U.S. at 239-240; accord Fitz Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990); Edelman, 415 U.S. at 673. The intent to abrogate immunity must be "unmistakably clear." Seminole Tribe, 116 S. Ct. at 1123-24. Furthermore, a State must specifically agree to be subject to suit in *federal court*: a general waiver of immunity is not sufficient. Atascadero, 473 U.S. at 241.

Although a statute must express unequivocally that a State's participation is contingent on waiver of immunity, the necessary intent can be *implied* from the statutory language. In other words, a statute need not expressly incorporate the word "waiver" in order to effectively abrogate immunity. In Seminole Tribe, for example, the Supreme Court concluded that Congress had "clearly intended to abrogate the States' sovereign immunity" in the Indian Gambling Regulatory Act ("IGRA"), through the provisions of § 710(d)(7) of the Act. 116 S. Ct. at 1124. That section only provided for jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Id. It did not declare abrogation of immunity in express terms. However, the Court noted that any ambiguity over the State's amenability to suit was clarified by other provisions in Section 2710(d)(7)(A)(i), which described the State's

responsibilities as a defendant in an action pursuant to the statute. Id. For example, the statute described the circumstances under which the burden of proof would be on the State, and remedial measures that a court could take if the State failed to negotiate in good faith. Id.

In contrast, a statute that only gives general authority to pursue a claim in federal court cannot be construed to operate as a waiver. For example, in Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), the Court determined that 28 U.S.C. § 1362, which provides that "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States," did not express an intent to abrogate immunity. Id. at 786. Rather, this provision was not more specific than the general grant of federal question jurisdiction of Section 1331. Id. Without any additional language connecting the jurisdictional provision with the authority to sue the States, the Court concluded that waiver could not be implied.

Applying these principles to the case at hand, the Court is satisfied that Congress expressed a clear and unequivocal intent to abrogate immunity for those States that chose to arbitrate interconnection agreements between telecommunications carriers pursuant to the 1996 Act. Under a Section entitled "Review of commission actions," the Act provides:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a commission makes a determination under this section, any party aggrieved by such a determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). This Section clearly authorizes federal courts to review a State

agency's actions regarding an interconnection agreement, as well as the FCC's determination if the state agency fails to act. Thus, this enforcement provision also permits suits to be brought against the state commission and the FCC, who would be necessary parties in an action seeking to review the interconnection agreements approved by these agencies. Accord U.S. West Communications, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc. (AT&T I) Nos. 3:97-2164-17, 3:97-2388-17, slip op. at 4-5 (D.S.C. Dec. 11, 1997); U.S. West Communications, Inc. v. Hix, No. 97-D-152, slip op. at 2 (D. Co. Oct. 29, 1997); U.S. West Communications, Inc. v. Reinbold, No. A1-97-25, slip op. at 8 (D.N.D. July 28, 1997); U.S. West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 5 (S.D. Iowa Aug. 4, 1997). Unlike the enforcement provision in Blatchford, Section 252(e)(6) is more than a provision granting federal courts jurisdiction over causes of action arising from the 1996 Act. Rather, Section 252(e)(6) specifically permits federal courts to review the actions of state agencies taken under the authority of the 1996 Act.

The text of the 1996 Act permits no other reasonable construction. It is possible to construe Section 252(e)(6) as permitting only the parties to the interconnection agreement to bring an action against each other in federal court to determine whether the agreement complied with the Act -- without also joining the state commission. However, such a reading would not be reasonable. Rule 15(a) of the Federal Rules of Appellate Procedure requires that in a "[r]eview of an order of an administrative agency, board, commission or officer . . . the agency must be named respondent." Thus, in order for the parties to the interconnection agreement to receive appellate review, the state commission *must* be made a party. Cf. Ingalls

Shipbuilding v. Director, Office of Workers' Comp. Prog., – U.S. –, 117 S. Ct. 796, 806 (1997) (affirming that Rule 15(a) gives an agency the right to appear as a respondent before courts of appeals reviewing their orders). Moreover, it is well-established that Congress is presumed to know the state of the law "pertinent to the legislation it enacts." Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988); accord, United States v. Sanders, 95 F.3d 449, 456 n.3 (6th Cir. 1996). If Congress is credited with the knowledge that appellate federal judicial review of an agency's order requires the agency to be named as a party, the Court must assume that Congress intended to waive state immunity in enacting the 1996 Act. Otherwise, the enforcement section of the Act, § 252(e)(6) would be rendered ineffective. See IGL Seattle, 971 F. Supp. at 1370 (granting joinder of the state agency under Rule 19(a) in order to facilitate appellate review).

The TRA submits, however, that it could not have waived its sovereign immunity because it was not empowered to do so under the Tennessee state constitution, which provides that "[s]uits may be brought against the State in such manner and in such courts as the legislature may by law direct." Tenn. Const. art. I, § 17. The TRA asserts that under this constitutional provision, only the legislature may waive the state's immunity. The TRA cites as support the case of Ford Motor Co., where the Supreme Court upheld state immunity even though the state attorney general had defended the suit through the Circuit Court of Appeals, and the state only asserted immunity for the first time before the Supreme Court. 323 U.S. at 466-67. In doing so, the Court explained that under the state constitution, the state could waive immunity only by general law. Id. at 468. Thus the state attorney general did not have the authority to waive immunity in that particular instance. Id.

The TRA's reliance on Ford Motor, however, is misguided. Ford Motor related to a claim for immunity where the plaintiffs were invoking a state law procedure for obtaining refunds of illegally collected taxes. Id. at 460-61. However, it is *federal*, not state law which determines waiver under federal causes of action. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278-79 (1959). The rationale behind this rule is evident -- under the Supremacy Clause, states cannot be allowed to circumvent federal law which calls for a waiver of immunity by invoking state law barriers. See AT&T I, Nos. 5:97-CV-405-BR, 5:97-CV-425-BR, slip op. at 6 (State law cannot be used to negate "any legislative scheme, carefully drafted by Congress to be voluntary and to elicit waiver of Eleventh Amendment immunity if the state elects to participate.").

2. *Ex parte Young*

The doctrine of Ex parte Young permits individuals to bring an action against officers of the State to perform a duty which they have neglected or refused to do. Ex parte Young, 209 U.S. 123, 158 (1907). In order to invoke the Ex parte Young exception to sovereign immunity, the action must be brought "against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" Seminole Tribe, 116 S. Ct. at 1132; see also 13 CHARLES A. WRIGHT, ET AL., Federal Practice and Procedure § 3524, at 158 (1984) ("[T]he Eleventh Amendment is no bar to suits seeking prospective relief against state officers who allegedly have violated either federal statutes or the Constitution of the United States, or have acted against the authority of state law."). Furthermore, as explained by Justice Kennedy's opinion (joined by Chief Justice Rehnquist) in

Idaho v. Coeur d'Alene Tribe of Idaho, – U.S. –, 117 S. Ct. 2028 (1997), courts have also extended jurisdiction when "there is no state forum available to vindicate federal interests," and when "the case calls for the interpretation of federal law." Id. at 2035-36.

With respect to the 1996 Telecommunications Act, the Court is convinced that the principles of Ex parte Young permit an action against the TRA directors. First, the Complaints filed in these actions seek to end continuing violations of federal law. The Plaintiffs maintain that the Interconnection Agreements as approved by the TRA do not comply with the mandates of the Act. Since the Interconnection Agreements regulate the ongoing conduct of the affected parties, the Plaintiffs allege that enforcement of the Interconnection Agreements would be a continuing violation of federal law.

Second, the parties seek prospective relief to the extent that they seek to enjoin future enforcement of the Act and a declaration that the TRA's actions were invalid. Injunctions and declaratory judgments are both types of prospective relief. Kroll v. Board of Trustees, 934 F.2d 904, 908 (7th Cir. 1991). Monetary damages against the State are not at issue and have not been requested by the parties. See Thomson v. Harmony, 65 F.3d 1314, 1320 (6th Cir. 1995) (Actions may only proceed on the basis of Ex parte Young when the relief requested does not "impose a liability which must be paid from public funds in the state treasury.") (citation omitted).[2]

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[2]MCI's Complaint at ¶ 81(b) does request "[t]hat the Court reform the Agreement or direct reformation of the Agreement and the inclusion of provisions consistent with the Act, the FCC's regulations, and the decision of this Court." In addition, AT&T also requests "direct reformation of the Agreement" in its Prayer for Relief. (AT&T's Ans. to BellSouth's Compl. and Countercl. and Cross-Cl. for Decl. and Inj. Relief at 29.) Reformation of the Act would constitute retroactive relief, and would thus be inconsistent with Ex parte Young.

Finally, the present action also contains the two characteristics noted by Justice Kennedy in Coeur d'Alene to be relevant to the application of Ex parte Young. Federal court is the exclusive forum to litigate actions pursuant to the 1996 Act, 47 U.S.C. § 252(e)(4)-(6), and the issues at hand concern federal law. See Coeur d'Alene, 117 S. Ct. at 2035-36.

The TRA claims that nevertheless, under the Court's pronouncement in Seminole Tribe, the doctrine of Ex parte Young is inapplicable to an action brought under the 1996 Telecommunications Act. In Seminole Tribe, the Court made it clear that a suit may not be brought against state officers under Ex parte Young when Congress has, in enacting a particular statute, created its own remedial scheme for the enforcement of a federal right. 116 S.Ct. at 1132. As explained by the Court, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Id.

Seminole Tribe involved a statute, the IGRA, which required States to negotiate in good faith with Indian Tribes for the formation of a compact regulating gambling activities. Id. at 1120. If a State failed to perform its duties under the Act, the Act set forth detailed, albeit modest, procedures under which a tribe could seek to enforce its rights. Id. at 1132. First, the tribe and the State were required to negotiate a compact within sixty days. Id. If the parties failed to conclude a compact within this prescribed time, they were required to submit

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However, since the Court has also found that the TRA is also subject to suit under the doctrine of waiver, Ex parte Young does not prevent the Court from ordering retroactive relief in this action.

to mediation. Id. Finally, if the State failed to accept the compact adopted by the mediator, the mediator was required to notify the Secretary of the Interior, who was then obliged to prescribe regulations. Id. at 1132-33. The Court concluded that by enacting such a specific remedial scheme, Congress intended to limit significantly the remedies available to the tribes against the State. Id. at 1133. Thus, the Court concluded that permitting an action to go forth on the basis of Ex parte Young would subject a State to the full enforcement powers of a federal court, and contravene congressional intent. Id.

The 1996 Telecommunications Act, on the other hand, has no comparable specified remedial scheme. Although a State's failure to act on an interconnection agreement permits the FCC to step in and preempt the State's authority, this was not intended as a "sanction," but only as a provision permitting the State to "opt out." This kind of provision is distinct from the one at issue in the IGRA, which required the State itself to be a party to a compact with an Indian tribe, and to submit to arbitration if it failed to comply. The 1996 Act does not force the State to act affirmatively, nor does it punish the State for refusing to do so. Quite to the contrary, the Act gives States the *option* of arbitrating interconnection agreements, but also gives the parties to such an agreement an alternative forum for arbitration if the State chooses not to become involved.

Accordingly, the Court finds that the TRA directors are also subject to suit for their actions associated with the interconnection agreements at issue in this case, under the doctrine of Ex parte Young. It appears that all courts which have decided this limited issue are in agreement. See, e.g., AT&T I, Nos. 3:97-2164-17, 3:97-2388-17, slip op. at 6; Hix, No. 97-D-152, slip op. at 2; Reinhold, No. A1-97-25, slip op. at 7; Thoms, No. 4-97-CV-70032, slip

op. at 4; AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 4-97cv262-RH, slip op. at 5 (N.D. Fla. Nov. 21, 1997). Moreover, both the TRA and the TRA directors are also subject to suit due to their waiver of Eleventh Amendment immunity.

B. Motion to Intervene by the United States and the FCC

The United States and the FCC have petitioned the Court for leave to intervene. The right of the United States to intervene is undisputed by the parties, and clearly permitted under 28 U.S.C. § 2403(a): "In any action, suit or proceeding in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall . . . permit the United States to intervene . . .." Thus, the United States may intervene as of right pursuant to Fed. R. Civ. P. 24(a), which permits intervention when "a statute of the United States confers an unconditional right to intervene."

However, the Court denies the FCC's motion to intervene. The FCC is clearly not entitled to intervene as of right. Intervention as of right requires entitlement to intervene pursuant to a statute, or "an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). The FCC has not presented the Court with any statutory entitlement to intervene, nor has sufficiently proved to the Court that its interests will not be adequately represented by the United States. Thus, it may not intervene in this action as of right.

Furthermore, the FCC cannot intervene in this action under the provisions of permissive intervention. Rule 24(b) states that:

> Upon timely application anyone may be permitted to intervene . . . (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Again, the FCC has not presented the Court with a statute conferring it a conditional right to intervene. Nor can the FCC assert that it has a claim or defense in common with the main action, since the FCC was not actually a party to the interconnection agreements at issue. Furthemore, the FCC's general administrative powers with respect to the 1996 Act appear to be fairly limited. The FCC's authority in relation to the state agencies and the telecommunications carriers are generally prescribed by two statuory sections, 47 U.S.C. §§ 208 and 252(e)(5). Section 208(a) gives the FCC general powers to hear complaints against common carriers. It does not give the FCC specific authority over interconnection agreements. In addition, Section 252(e)(5) only grants the FCC power over interconnection agreements when the state agencies fail to act. Thus, it appears that the FCC's interest over the issues involved in this action is relatively removed. It did not participate in the formation or approval of the agreements at issue, and its authority over these agreements appears to be subrogated to that of the state agencies. Accordingly, the Court will deny the FCC's motion to intervene. Accord TCG Seattle, 971 F. Supp. at 1368.

III. CONCLUSION

In conclusion, the Court finds that although the TRA and its directors are protected from suit under the doctrine of sovereign immunity, these parties voluntarily waived their immunity and are thus proper parties in this action. Moreover, the TRA's directors are also subject to suit under the doctrine of Ex parte Young. The Motion to Dismiss is thus denied. Furthermore, the Court grants the United States' motion to intervene, as it has shown that it has a right to do so and none of the parties object. The FCC, however, has not shown that it is entitled to intervene either as of right, or permissively. Accordingly, the FCC's motion to intervene is denied.

An Order consistent with this Memorandum is filed contemporaneously.

Entered this the 27th day of January, 1998.

JOHN T. NIXON, CHIEF JUDGE
UNITED S DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.

Plaintiff

v.

TENNESSEE REGULATORY AUTHORITY, et al.

Defendants

and

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,

Counterclaim and Cross-Claim Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

Counterclaim Defendant, and

TENNESSEE REGULATORY AUTHORITY, et al.

Cross-Claim Defendants.

No. 3:97-0523
Chief Judge Nixon

ORDER

Pending before the Court is the Defendants Tennessee Regulatory Authority, H. Lynn Greer, Melvin J. Malone, and Sara Kyle's Motion to Dismiss (No. 3:97-0616 Doc. No. 10; No. 3:97-0523 Doc. No. 11), to which the Plaintiff BellSouth Telecommunications, Inc. (Doc. No. 16); the Cross-Claim Plaintiff AT&T Communications of the South Central States, Inc. (Doc. No. 17); and the Plaintiff in member case No. 3:97-0616, MCI

Telecommunications Corp. (Doc. No. 15) have filed a Response. The Defendants' have in turn filed a Reply (No. 3:97-0616 Doc. No. 20; No. 3:97-0523 Doc. No. 21). In addition, the Court has before it a Motion to Intervene by the United States and the Federal Communications Commission (No. 3:97-0616 Doc. No. 23; No. 3:97-0523 Doc. No. 24), to which the Defendant BellSouth in member case No. 3:97-016 has filed a Response (Doc. No. 27) . The proposed intervenors have also filed a Response to the Motion to Dismiss (No. 3:97-0616 Doc. No. 27).

For the reasons expressed in the contemporaneously-filed Memorandum, the Court grants the Motion to Dismiss, and also grants the United States' Motion to Intervene, but denies the Federal Communication Commission's Motion to Intervene.

Entered this the 27th day of January, 1998.

JOHN T. NIXON, CHIEF JUDGE
UNITED S DISTRICT COURT

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GTE FLORIDA INCORPORATED,

Plaintiff,

v. CASE NO. 4:97cv234-RH

JULIA L. JOHNSON, et al.,

Defendants.

ORDER DENYING MOTION TO DISMISS

This action arises under the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252. Defendants include the five members of the Florida Public Service Commission. They have moved to dismiss the complaint under the Eleventh Amendment of the United States Constitution, arguing that the action is, in substance, an action against the State of Florida itself. Because the longstanding doctrine of Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908),

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(Rules 58 & 79(a) FRCP)

Copies mailed to: DeHurley, Smith
Boyd, Murray, Callahan

squarely authorizes this action, I deny the motion to dismiss.

Background - The Statutory Structure

The Telecommunications Act of 1996 ("the Act") requires the incumbent local exchange carrier ("LEC") in any territory to negotiate in good faith with any requesting telecommunications carrier on the terms under which the requesting carrier will be allowed to interconnect with the LEC's facilities and equipment. In effect, the interconnection agreements to be entered pursuant to the Act, together with the related duties created by the Act, would allow competition in the market for local telephone services.

In the event of any disagreement between the requesting carrier and LEC on the terms to be included in such an agreement, the Act provides for binding arbitration before the applicable state regulatory authority. In Florida the applicable regulatory authority is the Florida Public

Service Commission ("the Commission").

The Act provides further that any interconnection agreement adopted by negotiation or arbitration must be submitted to the state regulatory authority for approval. 47 U.S.C. § 252(e)(1). The Act provides standards to be applied and procedures to be followed by the state regulatory authority in determining whether to approve any such agreement. See, e.g., 47 U.S.C. § 252(e)(2) & (4). The Act specifically provides for judicial review of any such state regulatory authority decision:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

Plaintiff's Claims

In this action plaintiff GTE Florida Incorporated ("GTE") asserts that it has been aggrieved by a determination of the Florida Public Service Commission under § 252. GTE seeks review of the Commission's action under § 252(e)(6).

As is undisputed, therefore, this is an action squarely authorized by the plain terms of § 252(e)(6). Indeed, an action such as this is precisely the method Congress provided for an aggrieved party to obtain judicial review of a state regulatory authority determination of this type.[1]

The Eleventh Amendment

The defendant commissioners assert that the Eleventh Amendment deprives Congress of the authority to do what it

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[1] The commissioners nonetheless assert that this action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283, or the Johnson Act, 28 U.S.C. § 1342. These statutes are inapplicable by their terms and, in any event, clearly do not foreclose this action as squarely authorized by Congress in a subsequent, more specific statute.

did. They are wrong.

The Eleventh Amendment bars actions in federal court against the states. This bar applies not only to actions against the states by name but extends also to actions against such state entities as the Florida Public Service Commission and to actions seeking damages against state officers in their official capacities. As has been clear at least since Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, the Eleventh Amendment ordinarily does not bar actions based on the federal Constitution or laws seeking prospective injunctive or declaratory relief against state officers. This is such an action.

In asserting the contrary, the commissioners rely on Seminole Tribe v. Florida, 517 U.S. 609, 116 S.Ct. 114, 134 L.Ed.2d 252 (1996). There the Supreme Court held that, when Congress adopts a specific remedial scheme as part of a federal statute, Ex Parte Young does not provide a different judicial remedy, separate and apart from the remedy Congress provided. That holding affects the case at bar not at all,

here GTE seeks not to pursue a remedy different from the one Congress provided, but instead to pursue precisely the remedy Congress provided in clear and unmistakable language.

Telecommunications of the type at issue here are, beyond doubt, part of interstate commerce. Congress has authority to act in this area and has done so.[3] Congress has provided for jurisdiction in federal court to determine the type of controversy here at issue. Nothing in the Eleventh Amendment prevents Congress from taking this approach.

Accordingly,

IT IS ORDERED:

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[3] This case involves none of the special state sovereignty issues that precluded plaintiffs from invoking Ex Parte Young as a basis to go forward in Idaho v. Coeur d'Alene Tribe of Idaho, __ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

The motion to dismiss (document 10) is DENIED.

SO ORDERED this 21st day of November, 1997.

Robert L. Hinkle
United States District Judge

APPENDIX K

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U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

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GARY D. MORAILLO
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GTE MIDWEST INCORPORATED, Plaintiff, vs. ROD JOHNSON, Chairman; LOWELL C. JOHNSON, Commissioner; FRANK E. LANDIS, Commissioner; ANNE C. BOYLE, Commissioner; and DANIEL G. URWILLER, Commissioner; (In Their Official Capacities as Commissioners of the Nebraska Public Service Commission), and AT&T COMMUNICATIONS OF THE MIDWEST, INC., Defendants.	)	4:97CV3219 MEMORANDUM AND ORDER

AT&T COMMUNICATIONS OF THE MIDWEST, INC., Plaintiff, vs. GTE MIDWEST INCORPORATED; THE NEBRASKA PUBLIC SERVICE COMMISSION; AND ROD JOHNSON, CHAIRMAN; LOWELL JOHNSON; FRANK E. LANDIS; ANNE E. BOYLE; and DANIEL G. URWILLER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NEBRASKA PUBLIC SERVICE COMMISSION, Defendants.	)	4:97CV3221 MEMORANDUM AND ORDER

GTE MIDWEST INCORPORATED, Plaintiff, vs. ROD JOHNSON, Chairman; LOWELL C. JOHNSON, Commissioner; FRANK E. LANDIS, Commissioner; ANNE C. BOYLE, Commissioner; and DANIEL G. URWILLER, Commissioner; (In Their Official Capacities as Commissioners of the Nebraska Public Service Commission), and WESTERN WIRELESS CORPORATION, Defendants.	)	4:97CV3224 MEMORANDUM AND ORDER

AT&T COMMUNICATIONS OF THE MIDWEST, INC., Plaintiff, vs. U S WEST COMMUNICATIONS, INC., THE NEBRASKA PUBLIC SERVICE COMMISSION and THE COMMISSIONERS OF THE NEBRASKA PUBLIC SERVICE COMMISSION in their Official Capacity, Defendants.	)	4:97CV3286 MEMORANDUM AND ORDER

The plaintiffs in the above-captioned cases seek review of various interconnection agreements approved by the Nebraska Public Service Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"). Specifically, the plaintiffs seek a declaration that various provisions of the agreements violate the Act and Federal Communications Commission

("FCC") regulations and request that this court enjoin the defendants from enforcing any portions of the agreements that are inconsistent with the declaratory relief sought.

Pending before the court in each of the above cases are motions to dismiss filed by the Nebraska Public Service Commission and its Commissioners ("state defendants") which challenge this court's jurisdiction over the subject matter of this action and the state defendants under the Eleventh Amendment to the United States Constitution. (Filings 18 & 20 in 4:97CV3218; Filings 15 & 16 in 4:97CV3221; Filing 13 in 4:97CV3224; Filings 12 & 27 in 4:97CV3286.) On January 26, 1998, this court allowed the United States of America and the FCC to intervene for the limited purpose of addressing the state defendants' challenge to this court's jurisdiction over these actions. (Filing 34 in 4:97CV3218; Filing 32 in 4:97CV3221; Filing 25 in 4:97CV3224; Filing 19 in 4:97CV3286.) After receipt of the intervenors' briefs and supplemental indexes regarding the pending motions to dismiss, such motions are now ripe for the court's consideration.

For the reasons articulated by Chief Judge William G. Cambridge in US West Communications, Inc. v. Boyle, et al., No. 8:97CV448, Memorandum and Order (D. Neb. Feb. 19, 1998), I shall deny the state defendants' motions to dismiss. Id. (Nebraska Public Service Commission and its members not entitled to dismissal on Eleventh Amendment grounds because by participating in the interconnection agreement arbitration and approval process under the Telecommunications Act of 1996, the Commission and its members

consented to review in federal district court; therefore, State of Nebraska waived its Eleventh Amendment immunity). See also U.S. West v. Anderson, et al., No. CV 97-9-H-CCL, Order (D. Mont. Jan. 30, 1998) (defendant members of state public service commission waived claim to sovereign immunity when board members arbitrated disputed issues in interconnection agreement instead of leaving dispute to FCC for resolution); GTE Midwest Inc. v. Thoms, et al., No. 4-97-CV-70118, Memorandum Opinion and Ruling Denying Board Members' Motion to Dismiss (S.D. Iowa Aug. 4, 1997) (court had jurisdiction over members of state utility board--and board itself if it had been sued--because state waived Eleventh Amendment immunity when it chose to arbitrate interconnection agreements that are exclusively reviewable in federal court under the Telecommunications Act of 1996); U.S. West Communications, Inc. v. Reinbold, et al., No. A1-97-25, Memorandum and Order (D.N.D. July 28, 1997) (members of state public service commission waived Eleventh Amendment immunity when its members accepted regulatory authority and approved interconnection agreement under the Telecommunications Act of 1996, which mandates exclusive federal judicial review of interconnection agreements); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., et al., No. 1:97-cv-884-RCF, Order (N.D. Ga. Feb. 11, 1998) (same); BellSouth Telecommunications, Inc. v. Tennessee Regulatory Authority, et al., No. 3:97-0523 Memorandum and subsequent Order (M.D. Tenn. Jan. 27 & Feb. 11, 1998) (same); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., et al., No. 1:97-cv-1318-RCF, Order (N.D. Ga. Feb. 11, 1998) (same); U S West

Communications, Inc. v. MFS Intelenet, Inc., et al., No. 97-857-JE, Opinion and Order (D. Ore. Jan. 30, 1998) (same); US West Communications, Inc. v. Public Service Commission of Utah, et al., 1998 WL 28146 (D. Utah Jan. 23, 1998) (same); AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., et al., Civil Action No. 97-79, Memorandum Opinion and Order (E.D. Ky. Dec. 15, 1997) (same); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., et al., Nos. 3:97-2164-17 & 3:97-2388-17 (D.S.C. Dec. 11, 1997) (same); AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., et al., No. 5:97-CV-405-BR, Order (E.D.N.C. Nov. 20, 1997) (same); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., et al., No. 5:97-CV-425-BR, Order (E.D.N.C. Nov. 20, 1997) (same); GTE South, Inc. v. Morrison, et al., No. 3:97CV493, Order (E.D. Va. Nov. 7, 1997) (same); U.S. West Communications, Inc. v. Hix, et al., No. 97-D-152 (D. Colo. Oct. 29, 1997) (same); US West Communications, Inc. v. TCG Seattle, et al., 971 F. Supp. 1365 (W.D. Wash. July 24, 1997) (same).

Accordingly,

IT IS ORDERED:

1. The motions to dismiss filed by the Nebraska Public Service Commission and its commissioners based on the Eleventh Amendment (Filings 18 & 20 in 4:97CV3218; Filings 15 & 16 in 4:97CV3221; Filing 13 in 4:97CV3224; Filings 12 & 27 in 4:97CV3286) are denied;

2. In light of the amended answer, counterclaim, and cross-claim filed by U S WEST Communications, Inc., in 4:97CV3286, the

motion to dismiss (Filing 11) the cross-claim contained in U S WEST's original answer, counterclaim, and cross-claim is denied as moot;

3. All motions for oral argument on the pending motions to dismiss (Filing 23 in 4:97CV3218; Filing 15 in 4:97CV3224) are denied as moot.

DATED this 30th day of March, 1998.

BY THE COURT:

Richard G. Kopf
United States District Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
NOV - 7
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

GTE South, Inc.

Plaintiff.

v.

Civil Action Number 3:97CV493

Theodore V. Morrison, et al.

Defendant.

ORDER

THIS MATTER comes before the Court as a Motion to Dismiss which Defendants Theodore V. Morrison, Jr., Hullihen Williams Moore, and I. Clinton Miller, sued in their official capacities as Commissioners of the Commonwealth of Virginia State Corporation Commission, have submitted. The Court will also consider intervenor Defendant Virginia Attorney General Richard Cullen's Motion to Dismiss. For the reasons stated below, the Court shall DENY Defendants' Motion to Dismiss.

THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. To find a violation of the Tenth Amendment the following must be true: (1) the challenged statute regulates "States as States;" (2) the federal regulation addresses matters which are indisputably "attributes of state sovereignty;" and (3) the State's compliance with the federal law would directly impair its ability to "structure integral operations in the areas of traditional governmental functions." Hodel v. Virginia Surface Min. & Reclam. Ass'n., 452 U.S. 264, 287-88 (1981).

A literal, if not substantive, conflict exists between the Telecommunications Act of 1996, ("the 1996 Act") and the Virginia State Constitution as it pertains to judicial review of State commission decisions. The 1996 Act provides: "In any case in which a State Commission makes a determination under this section, any party aggrieved . . . may bring an action in the appropriate Federal district court." The 1996 Act, 47 U.S.C. § 252 (e)(6). The Virginia Constitution requires, "All appeals from the Commission shall be to the Supreme Court only." Va. Const. Article IX, §4. Herein lies the heart of the Tenth Amendment conflict.

1. Regulation of the Commonwealth of Virginia

The Federal government does not have the authority to compel a State to administer a federal regulatory program. Printz v. U.S., 117 S.Ct. 2365, 2383 (1997); New York v. U.S., 505 U.S. 144, 188 (1992). Congress may not conscript the state governments as its agents. New York, 505 U.S. at 178. Congress may, however, offer States a choice. When Congress regulates a private activity which falls under the Commerce Clause, a State may regulate that activity pursuant to federal standards. Id. at 173. In the alternative, a State may forgo federally mandated regulation and have its state laws pre-empted by federal regulation. Id. at 173-74 (citing Hodel, *supra*, at 288; FERC v. Mississippi, 456 U.S. 742, 764-765 (1982)).

Contrary to Defendant Commissioners' argument, the 1996 Act does not force regulation on the Commission or the State. Instead, the 1996 Act offers aggrieved parties two forums in which they may secure approval of their agreement or resolution of any disputes. The first forum is the State commission which shall approve or reject submitted agreements. See The 1996 Act, *supra*, § 252(e)(1). In the event the State commission abdicates its authority under the 1996 Act, a second forum is available. The Federal Communications Commission ("FCC") shall issue a notice of

preemption and assume responsibility for the matter. See id. §252(e)(5). Therefore, the 1996 Act does not compel the Commission to act because any burden which results from their refusal would fall on the FCC. Cf. New York, *supra*, at 174 (holding that States were not compelled to act on regulating the disposal of radioactive waste because the burden would fall on those producing the waste and not the State as a sovereign). The Commissioners may decline to administer the federal program.

Congress passed the 1996 Act pursuant to its authority under the Commerce Clause. The Court FINDS that the 1996 Act offers States a choice; therefore, the 1996 Act does not violate the Tenth Amendment. Having concluded the 1996 Act does not regulate "States as States," the Court does not reach issues relating to State sovereignty or the 1996 Act's impact on integral state operations.

THE ELEVENTH AMENDMENT

The Eleventh Amendment to the United States Constitution reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. In effect, the Eleventh Amendment affords immunity to States from certain suits. However, a state and its officers are not entitled to Eleventh Amendment protection where the plaintiff seeks only prospective, injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 664-68 (1974) (interpreting Ex Parte Young, 209 U.S. 123 (1908)). An Ex Parte Young action enables an individual to bring suit against a state officer in federal court to ensure the officer's conduct is in compliance with federal law. See Seminole Tribe of Florida v. Florida, 116 S.Ct 1114, 1131 n. 14 (1996)(internal citations omitted). Moreover, where a state has waived its immunity, a case against it may go forward. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). In considering the facts of this case, the Court must resolve (1) whether Ex Parte Young applies and (2) whether the Commissioners waived their sovereign immunity.

1. Application of Ex Parte Young

Ex Parte Young applies to the case at bar. Plaintiff GTE South has sued the Commonwealth of Virginia or the State Corporation Commission. GTE South seeks prospective injunctive relief from the Commissioners who have been named in their official capacity.[1] The doctrine of Young permits "a federal court, consistent with the Eleventh Amendment, [to] enjoin state officials to conform their future conduct to the requirements of federal law." Quern v. Jordan, 440 U.S. 332, 337 (1979). However, the Defendant Commissioners' view of Young would serve as a complete evisceration.

The Court categorically rejects the Commissioners' arguments. They are proper Defendants in this case because Young authorizes suits against state officers in their official capacity. The 1996 Act's reference to review of "Commission" actions as opposed to the individual Commissioners is immaterial. See Pugh v. Alabama , 438 U.S. 781 (1978)(permitting suit against state officers although suit could not be brought against the state agency). Section 252(e)(6) does not interfere with the public administration because it also falls within the Ex Parte Young exception. See Ex Parte Young, 465 U.S. at 102.

2. Waiver of Immunity

A state may waive its immunity in the context of a particular federal regulatory program. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n. 1 (1985). The Supreme Court requires an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Id. Again, the Commission voluntarily undertook review pursuant to the 1996 Act which plainly indicates that review of any State commission decision would

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[1] "A Young suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2043, 2046 (1997)(O'Connor, J., concurring in part).

occur in Federal district court. See, The 1996 Act, *supra*, §252(e)(4-6). Such voluntary review amounts to constructive waiver of any Eleventh Amendment immunity the Commissioners may have enjoyed. See Atascadero, 473 U.S. at 246-47; Premo v. Martin, 119 F.3d 764, 770-71 (9th Cir. 1997)(a state may waive Eleventh Amendment Immunity by agreeing to participate in a federal program).

While not controlling, other district courts have similarly held that voluntary participation in the federal telecommunications regulatory program amounts to a waiver of Eleventh Amendment immunity. See, GTE Midwest, Inc. v. Thoms, Civil No. 4-97-CV-70118, slip op. at 4-5; U.S. West Communications, Inc. v. Reinbold, Civil No. A1-97-25, slip op. at 7-8; U.S. West Communications, Inc., v. TCG Seattle, 971 F.Supp. 1365, 1369 (W.D.Wash. 1997)("The statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court."). Having waived its Eleventh Amendment immunity, granting the Defendants' Motions to Dismiss on this issue would not be appropriate.

For the reasons hereinbefore stated, the Court shall DENY Defendants' Motion to Dismiss.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

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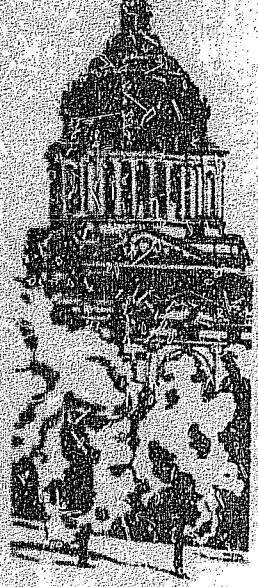

South Dakota Public Utilities Commission

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Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
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June 24, 1999

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Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

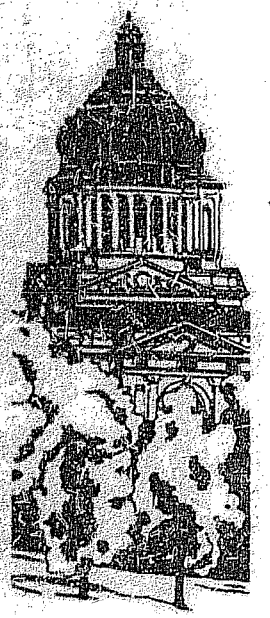
Enclosed each of you will find a copy of Commissioners' Answer to Complaint in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.



South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

June 24, 1999

Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find a courtesy copy of Commissioners' Answer to Complaint in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Rolayne Ailts Wiest

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation Defendants.	)	Civ. No. 99-5024 COMMISSIONERS' ANSWER TO COMPLAINT

COME NOW, Defendants James A. Burg, Chairman of the Public Utilities Commission of the State of South Dakota, Pam Nelson, Commissioner of the Public Utilities Commission of the State of South Dakota, and Laska Schoenfelder, Commissioner of the Public Utilities Commission of the State of South Dakota (Commissioners), and for their Answer to the Complaint filed herein, allege as follows:

1. Commissioners assert that the Complaint fails to state a cause of action or claim of relief against Commissioners for which relief may be granted and accordingly, the Complaint should be dismissed.

2. The Commissioners deny each and every allegation of the Complaint except as otherwise specifically admitted.

3. Commissioners admit on information and belief the allegations in Paragraph 1.

4. Commissioners admit that James A. Burg, Pam Nelson, and Laska Schoenfelder are the duly elected Commissioners of the Public Utilities Commission of the State of South Dakota as alleged in Paragraph 2. To the extent that the remaining allegations in Paragraph 2 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 2.

5. Commissioners admit the allegations in the first two sentences of Paragraph 3. To the extent that the remaining allegations in Paragraph 3 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required.

6. Commissioners admit on information and belief the allegations in the first two sentences of Paragraph 4. To the extent that the remaining allegations in Paragraph 4 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is require.

7. Commissioners deny Paragraph 5.

8. To the extent that the allegations in Paragraph 6 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. Commissioners admit the individual defendants reside in this district as alleged in Paragraph 6. Commissioners admit on information and belief that the corporate defendants conduct business in this district and the events giving rise to U S WEST's claims occurred in this district as alleged Paragraph 6. The Commissioners deny any remaining allegations in Paragraph 6.

9. Commissioners admit the Telecommunications Act of 1996 was enacted in February 1996, as alleged in Paragraph 7. To the extent that the remaining allegations in Paragraph 7 purport to characterize the Act and Congress' legislative purpose and intent, Commissioners respectfully refer the Court to the Act as the best available evidence of congressional purpose and intent and for its content and terms and deny all allegations in Paragraph 7 inconsistent with the Act. Commissioners deny any remaining allegations of Paragraph 7.

10. To the extent the allegations in Paragraph 8 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 8 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 8.

11. To the extent the allegations in Paragraph 9 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 9 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 9.

12. The Commissioners admit Paragraph 10.

13. To the extent the allegations in Paragraph 11 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 11 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 11.

14. To the extent the allegations in Paragraph 12 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny

all allegations in Paragraph 12 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 12.

15. The Commissioners admit the allegations in sentence 2 of Paragraph 13. To the extent the remaining allegations in Paragraph 13 purport to characterize the Act and the Commission's Order, the Commissioners respectfully refer the Court to the Act and the Order for their contents and terms and deny all allegations in Paragraph 13 inconsistent with the Act and the Order. To the extent that the remaining allegations in Paragraph 13 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. Commissioners deny any remaining allegations in Paragraph 13.

16. To the extent the allegations in Paragraph 14 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 14 inconsistent with the Act. To the extent that the remaining allegations in Paragraph 14 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 14.

17. To the extent the allegations in Paragraph 15 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 15 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 15.

18. Commissioners admit that the FCC issued its First Report and Order on August 8, 1996, as alleged in Paragraph 16. The Commissioners admit that the Eighth Circuit issued its decision on the appeal of the FCC's First Report and Order on July 18, 1997 and a subsequent order on October 14, 1997. To the extent that the remaining allegations in Paragraph 16 purport to characterize the FCC's Order and the Eighth Circuit's Orders, the Commissioners respectfully refer the Court to the FCC's Order and the Eighth Circuit's Orders for their content and terms and deny all allegations in Paragraph 16 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 16.

19. Commissioners admit that the Supreme Court issued a decision on January 25, 1999, as alleged in Paragraph 17. To the extent that the remaining allegations in Paragraph 17 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 17 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 17.

20. To the extent that the allegations in Paragraph 18 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 18 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 18.

21. To the extent that the allegations in Paragraph 19 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 19 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 19.

22. To the extent that the allegations in Paragraph 20 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 20 inconsistent therewith. To the extent that the allegations in Paragraph 20 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 20.

23. To the extent that the allegations in Paragraph 21 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 21 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 21.

24. To the extent that the allegations in Paragraph 22 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 22 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 22.

25. Commissioners admit on information and belief the allegations in Paragraph 23.

26. Commissioners admit the allegations of Paragraph 24.

27. Commissioners admit the allegations of Paragraph 25.

28. Commissioners admit the allegations of Paragraph 26.

29. Commissioners admit the allegations of Paragraph 27.

30. Commissioners deny the allegations of Paragraph 28.

31. Commissioners deny the allegations of Paragraph 29.

32. To the extent that the allegations in Paragraph 30 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 30 inconsistent therewith. To the extent that the remaining allegations in Paragraph 30 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 30 inconsistent

therewith. To the extent that the remaining allegations in Paragraph 30 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 30.

33. To the extent that the allegations in Paragraph 31 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 31 inconsistent therewith. To the extent that the remaining allegations in Paragraph 31 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 31 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 31.

34. To the extent that the allegations in Paragraph 32 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 32 inconsistent therewith. To the extent that the remaining allegations in Paragraph 32 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 32 inconsistent therewith. To the extent that the remaining allegations in Paragraph 32 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 32.

35. To the extent that the allegations in Paragraph 33 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 33 inconsistent therewith. To the extent that the remaining allegations in Paragraph 33 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 33 inconsistent therewith. To the extent that the remaining allegations in Paragraph 33 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 33.

36. To the extent that the allegations in Paragraph 34 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 34 inconsistent therewith. To the extent that the remaining allegations in Paragraph 34 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 34 inconsistent therewith. To the extent that the remaining allegations in Paragraph 34 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no

response is required. The Commissioners deny any remaining allegations in Paragraph 34.

37. To the extent that the allegations in Paragraph 35 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 35 inconsistent therewith. To the extent that the remaining allegations in Paragraph 35 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 35 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 35.

38. To the extent that the allegations in Paragraph 36 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 36 inconsistent therewith. To the extent that the allegations in Paragraph 36 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 36 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 36.

39. To the extent that the allegations in Paragraph 37 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 37 inconsistent therewith. To the extent that the remaining allegations in Paragraph 37 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 37 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 37.

40. To the extent that the allegations in Paragraph 38 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 38 inconsistent therewith. To the extent that the remaining allegations in Paragraph 38 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 38 inconsistent therewith. To the extent that the remaining allegations in Paragraph 38 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 38.

41. To the extent that the allegations in Paragraph 39 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 39 inconsistent therewith. To the extent that the allegations in Paragraph 39 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the

record for its contents and terms and deny all allegations in Paragraph 39 inconsistent therewith. The Commissioners deny any remaining allegations of Paragraph 39.

42. To the extent that the allegations in Paragraph 40 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 40 inconsistent therewith. To the extent that the remaining allegations in Paragraph 40 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 40.

43. To the extent that the allegations in Paragraph 41 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 41 inconsistent therewith. To the extent that the allegations in Paragraph 41 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 41 inconsistent therewith. To the extent that the remaining allegations in Paragraph 41 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 41.

44. To the extent that the allegations in Paragraph 42 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 42 inconsistent therewith. To the extent that the allegations in Paragraph 42 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 42 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 42.

45. To the extent that the allegations in Paragraph 43 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 43 inconsistent therewith. To the extent that the allegations in Paragraph 43 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 43 inconsistent therewith. To the extent that the remaining allegations in Paragraph 43 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 43.

46. As to Paragraph 44, the Commissioners incorporate Paragraphs 1 though 45 of this Answer by reference as if set forth fully herein.

47. To the extent the allegations in Paragraph 45 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 45 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 45.

48. To the extent the allegations in Paragraph 46 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 46 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 46.

49. To the extent that the allegations in Paragraph 47 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. To the extent that the remaining allegations in Paragraph 47 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 47.

50. As to Paragraph 48, the Commissioners incorporate Paragraphs 1 though 49 of this Answer by reference as if set forth fully herein.

51. To the extent the allegations in Paragraph 49 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 49 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 49.

52. To the extent the allegations in Paragraph 50 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 50 inconsistent with the Interconnection Agreement. To the extent that the remaining allegations are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 50.

53. To the extent that the allegations in Paragraph 51 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 51.

54. As to Paragraph 52, the Commissioners incorporate Paragraphs 1 though 53 of this Answer by reference as if set forth fully herein.

55. To the extent the allegations in Paragraph 53 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the

Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 53 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 53 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 53 inconsistent with the Act. To the extent that the allegations in Paragraph 53 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 53.

56. To the extent the allegations in Paragraph 54 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 54 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 54 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 54 inconsistent with the Act. To the extent that the allegations in Paragraph 54 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 54.

57. To the extent that the allegations in Paragraph 55 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 55.

58. As to Paragraph 56, the Commissioners incorporate Paragraphs 1 though 57 of this Answer by reference as if set forth fully herein.

59. To the extent the allegations in Paragraph 57 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and denies all allegations in Paragraph 57 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 57.

60. To the extent that the allegations in Paragraph 58 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 58 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 58.

61. To the extent the allegations in Paragraph 59 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 59 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 59.

62. To the extent that the allegations in Paragraph 60 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 60.

63. As to Paragraph 61, the Commissioners incorporate Paragraphs 1 though 62 of this Answer by reference as if set forth fully herein.

64. To the extent the allegations in Paragraph 62 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 62 inconsistent with the Act. To the extent that the allegations in Paragraph 62 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 62.

65. To the extent the allegations in Paragraph 63 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 63 inconsistent with the Interconnection Agreement. To the extent that the allegations in Paragraph 63 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 63.

66. To the extent that the allegations in Paragraph 64 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 64.

67. As to Paragraph 65, the Commissioners incorporate Paragraphs 1 though 66 of this Answer by reference as if set forth fully herein.

68. To the extent the allegations in Paragraph 66 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 66 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 66.

69. To the extent the allegations in Paragraph 67 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 67 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 67.

70. To the extent the allegations in Paragraph 68 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 68 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 68.

71. To the extent that the allegations in Paragraph 69 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 69.

72. As to Paragraph 70, the Commissioners incorporate Paragraphs 1 though 71 of this Answer by reference as if set forth fully herein.

73. To the extent the allegations in Paragraph 71 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 71 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 71.

74. To the extent the allegations in Paragraph 72 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 72 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 72 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 72 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 72.

75. To the extent the allegations in Paragraph 73 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 73 inconsistent with the Interconnection Agreement. To the extent that the allegations in Paragraph 73 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 73.

76. As to Paragraph 74, the Commissioners incorporate Paragraphs 1 though 75 of this Answer by reference as if set forth fully herein.

77. To the extent the allegations in Paragraph 75 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and denies all allegations in Paragraph 75 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 75.

78. To the extent that the allegations in Paragraph 76 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 76.

79. To the extent that the allegations in Paragraph 77 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 77.

80. As to Paragraph 78, the Commissioners incorporate Paragraphs 1 through 79 of this Answer by reference as if set forth fully herein.

81. To the extent the allegations in Paragraph 79 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 79 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 79 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 79 inconsistent with the Act. To the extent that the allegations in Paragraph 79 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegation in Paragraph 79 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 79.

82. As to Paragraph 80, the Commissioners incorporate Paragraphs 1 through 81 of this Answer by reference as if set forth fully herein.

83. To the extent the allegations in Paragraph 81 purport to characterize the United States Constitution, the Commissioners respectfully refer the Court to the Constitution for its contents and terms and deny all allegations in Paragraph 81 inconsistent with the Constitution. The Commissioners deny any remaining allegations in Paragraph 81.

84. The Commissioners deny the allegations of Paragraph 82.

85. The Commission deny the allegations of Paragraph 83.

86. The Commission deny the allegations of Paragraph 84.

87. The Commissioners deny that U S WEST is entitled to any of the relief it requests.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. U S WEST is not entitled to relief under 42 U.S.C. § 1983.

3. The Commissioners are entitled to absolute or qualified immunity.

4. This action is barred in whole, or in part, by the Eleventh Amendment to the United States Constitution.

5. The Commissioners acted under the regulatory scheme established by the United States Congress and the Federal Communications Commission in approving the Interconnection Agreement.

6. To the extent that U S WEST's Complaint raises constitutional claims, those claims are not ripe for adjudication.

7. The individual Commissioners cannot effect a taking.

8. U S WEST's claims for injunctive relief are barred by the doctrine of waiver, estoppel and laches.

WHEREFORE, the Commissioners pray for the following relief:

1. That this action be dismissed with prejudice;

2. That the Court award the Commissioners their costs and disbursements in this action including reasonable attorney fees in addition to other and further relief as is just and equitable.

Dated at Pierre, South Dakota, this 24th day of June, 1999.

Robayne Mills West
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Commissioners' Answer to Complaint were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 24th day of June, 1999.

Mr. Todd L. Lundy
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June 24, 1999

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Clerk of Courts
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and LaskA Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of U S WEST Communications, Inc.'s Response to United States of America's Motion to Intervene and Certificate of Service.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

COPY
Thomas J. Welk

TJW/vjj
Enclosure
cc: Rolayne Ailts Wiest
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Larry Toll
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June 24, 1999

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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST Communications, Inc.'s Response to United States of America's Motion to Intervene and Certificate of Service. This is intended as service by mail upon you.

Sincerely yours,
BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosures
cc: Alex Duarte
Larry Toll
Jon Lehner

RECE
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SOUTH DAKOTA
UTILITIES COM

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

U S WEST COMMUNICATIONS, INC.'S RESPONSE TO UNITED STATES OF AMERICA'S MOTION TO INTERVENE

U S WEST Communications, Inc., through the undersigned attorneys, does not object to the granting of the United States of America's Motion to Intervene dated June 14, 1999.

Dated this 24th day of June, 1999.

Thomas Welk
Tamara A. Wilka
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& GREENFIELD
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1801 California, Suite 5100
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Telephone: (303) 672-2700
Attorneys for U S WEST Communications, Inc.

CERTIFICATE OF SERVICE

I, Thomas J. Welk, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 24th day of June, 1999, true and correct copies of the foregoing U S WEST Communications, Inc.'s Response to the United States of America's Motion to Intervene were sent by U S mail, postage paid, to the following at the following addresses:

Rolayne Ailts Wiest, General Counsel
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June 30, 1999

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and two copies of Motion for Admission Pro Hac Vice and Order for Michael Thompson together with a check for $100 for filing fee. Please file stamp the second copy and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosure
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5024

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

STATEMENT OF MOVANT

I, Thomas J. Welk, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Michael Thompson, attorney admitted to practice in the District of Colorado, but not admitted to the Bar of the Court, who will be counsel for Plaintiff U S WEST Communications, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: June 30, 1999

By: _____
Thomas J. Welk

STATEMENTS OF PROPOSED ADMITTEES

I, Michael C. Thompson, am currently a member in good standing of the U.S. District Court for the District of Colorado, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

6/24/99
Date

Michael C. Thompson
Type/Print Name

Michael C. Thompson
Signature

U S WEST Communications, Inc.
1801 California Street
Suite 1500
Denver, CO 80202

ORDER

It is hereby ORDERED that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Court, Room 220, Federal Building, 400 South Phillips Avenue, Sioux Falls, SD 57104-6851.

Dated this _____ day of June, 1999

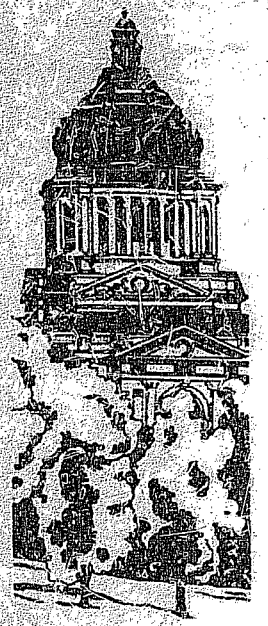
BY THE COURT:

_____
United States District Judge

ATTEST:

Joseph Haas, Clerk
U.S. District Court

By:_____
Deputy



South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

July 6, 1999

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Mr. Haas:

Enclosed for filing you will find original and copy of Commissioners' Response to the United States of America's Motion to Intervene with reference to the above captioned matter.

Very truly yours,

Jeffrey J. Koerselman
Legal Intern

JJK:dk
Enc.

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
FAX (605)773-3225

Consumer Hotline
1-800-332-1782

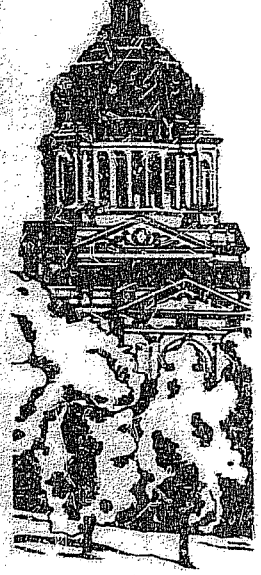
TTY Through
Relay South Dakota
1-800-877-1113

Internet Website
www.puc.state.sd.us/puc/

Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Michele M. Farris
Marlette Fischbach
Shirleen Fugin
Lewis Hammond
Leni Healy
Camron Hoseck
Lisa Hull
Dave Jacobson
Katie Johnson
Bob Knadle
Delaine Kolbo
Jeffrey P. Lorenzen
Charlene Lund
Terry Morum
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

July 6, 1999

Mr. Alex Duarte
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
P. O. Box 66
Pierre, SD 57501-0066

Mr. Thomas J. Welk
Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Ms. Maria Arias Chapleau
Ms. Rebecca B. DeCook
Attorneys at Law
AT&T
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Mr. Michael D. Warden
Mr. Christopher D. Moore
Attorneys at Law
Sidley & Austin
1722 Eye Street N.W.
Washington, D.C. 20006

Ms. Bonnie P. Ulrich
Assistant United States Attorney
United States Department of Justice
P. O. Box 5073
Sioux Falls, SD 57117-5073

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

Enclosed each of you will find a copy of Commissioners' Response to the United States of America's Motion to Intervene in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Jeffrey J. Koerselman
Legal Intern

JJK:dk
Enc

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
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Jim Burg
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Shirleen Fugitt
Lewis Hammond
Leni Healy
Camron Hoseck
Lisa Hull
Dave Jacobson
Kazie Johnson
Bob Knadle
Delaine Kolbo
Jeffrey P. Lorensen
Charlene Lund
Terry Norum
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

June 24, 1999

Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 310
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find a courtesy copy of Commissioners' Response to the United States of America's Motion to Intervene in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Jeffrey J. Koerselman
Legal Intern

JJK:dk
Enc.

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5024

COMMISSIONERS' RESPONSE TO THE UNITED STATES OF AMERICA'S MOTION TO INTERVENE

Defendants James A. Burg, Chairman of the Public Utilities Commission of the State of South Dakota, Pam Nelson, Commissioner of the Public Utilities Commission of the State of South Dakota, and Laska Schoenfelder, Commissioner of the Public Utilities Commission of the State of South Dakota, through the undersigned representative, do not object to the granting of the United States of America's Motion to Intervene dated June 14, 1999.

Dated at Pierre, South Dakota, this 6th day of July, 1999.

Jeffrey J. Koenselman
Legal Intern
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Commissioners' Response to the United States of America's Motion to Intervene were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 6th day of July, 1999.

Mr. Alex Duarte
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

Mr. Thomas J. Welk
Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Mr. Michael D. Warden
Mr. Christopher D. Moore
Attorneys at Law
Sidley & Austin
1722 Eye Street N.W.
Washington, D.C. 20006

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
P. O. Box 66
Pierre, SD 57501-0066

Ms. Maria Arias-Chapleau
Ms. Rebecca B. DeCook
Attorneys at Law
AT&T Communications of the Midwest, Inc.
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Ms. Bonnie P. Ulrich
Assistant United States Attorney
United States Department of Justice
P. O. Box 5073
Sioux Falls, SD 57117-5073

Jeffrey J. Hoersehman
Legal Intern

FILED
JUL 15
RECEIVED
JUL 15 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5014

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

STATEMENT OF MOVANT

I, Thomas J. Welk, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Michael Thompson, attorney admitted to practice in the District of Colorado, but not admitted to the Bar of the Court, who will be counsel for Plaintiff U S WEST Communications, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: June 30, 1999

By: Thomas J. Welk

STATEMENTS OF PROPOSED ADMITTEES

I, Michael C. Thompson, am currently a member in good standing of the U.S. District Court for the District of Colorado, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

6/24/99
Date

Michael C. Thompson
Type/Print Name

Signature

U S WEST Communications, Inc.
1801 California Street
Suite 1500
Denver, CO 80202

ORDER

It is hereby ORDERED that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Court, Room 220, Federal Building, 400 South Phillips Avenue, Sioux Falls, SD 57104-6851.

Dated this 12th day of July, 1999

BY THE COURT:

United States District Judge

ATTEST:

Joseph Haas, Clerk
U.S. District Court

By Patricia [illegible]
Deputy

[illegible]
7-13-99

FILED
JUL 12 1999

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

RECEIVED
JUL 13 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC.,	)	CIV. 99-5024
Plaintiff,	)	
vs.	)	
JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC.,	)	ORDER GRANTING MOTION TO INTERVENE
Defendants.	)	

On June 14, 1999, the United States of America moved to intervene in this action. No party has objected to this motion. Having reviewed the record and authority presented by the United States, the Court finds that intervention is proper. Accordingly, it is hereby

ORDERED that the United States' motion to intervene is granted.

Dated July 12, 1999.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES SENIOR DISTRICT JUDGE

NOTICE OF ENTRY
The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 7-13-99

U.S. Department of Justice

Civil Division, Federal Programs Branch
901 E St., N.W., Room 927, P.O. Box [illegible]
Washington, DC 20044

David T. Zaring
Trial Attorney

Telephone: (202) [illegible]
Facsimile: (202) [illegible]

August 4, 1999

BY FEDERAL EXPRESS

RECEIVED
AUG 06 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Clerk of the Court
United States District Court for the
District of South Dakota
Federal Building
515 Ninth Street
Rapid City, SD 57701

Re: US West Communications, Inc. v. Hays, et al., CIV 99-5023

Dear Sir or Madam:

Please find enclosed for filing in the above captioned cases an ORIGINAL and COPY of the following document: FCC's & United States' Notice of Appearance of Counsel.

I have also enclosed an extra copy of each document to please be file-stamped and returned to me in the attached self-addressed, postage paid envelope.

Sincerely,

David T. Zaring

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U.S. WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

vs.

JAMES A. BURG, et al.,

Defendants.

CIV99-5014

FCC's & UNITED STATES' NOTICE OF APPEARANCE OF COUNSEL

PLEASE TAKE NOTICE of the following appearance of counsel for Intervenor United States of America and for the Federal Communications Commission.

David T. Zaring, Trial Attorney, U.S. Department of Justice, will be counsel for the United States and the FCC. Pleadings and correspondence may be directed to Mr. Zaring at:

Mailing address:
Trial Attorney
USDOJ Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-4964
fax: (202) 616-8202

Federal Express Address:
Trial Attorney
USDOJ Civil Division
Federal Programs Branch
901 E Street, N.W., Rm. 907
Washington, D.C. 20004

Respectfully submitted,

PHILIP D. BARTZ
Acting Assistant Attorney General

KAREN E. SCHREIER
United States Attorney

BONNIE P. ULRICH
Assistant United States Attorney
P.O. Box 5073
Sioux Falls, South Dakota 57117-5073
(605)330-4400

DENNIS G. LINDER
Director, Federal Programs Branch
THEODORE C. HUNT
Assistant Branch Director
DAVID ZARING
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883, Room 907
Washington, D.C. 20044
Telephone: (202) 514-4964
Facsimile: (202) 616-8202

Attorneys for the United States of America & FCC

Date: August 4, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing FCC's & United States' Notice of Appearance of Counsel were served this 4th day of August, 1999, by first-class mail upon the following:

Thomas J. Welk
Tamara A. Wilka
Boyce, Murphy McDowell & Greenfield
P.O. Box 5015
Sioux Falls, SD 57117-5015

Roylane Wiest
Public Utilities Commission General Counsel
500 E. Capitol
Pierre, SD 57501

Norton Cutler
Todd Lundy
Blair A. Rosenthal
U S West Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

John S. Lovald
Oligner, Lovald, Robbennolt & McCahren
P.O. Box 66
Pierre, SD 57501

Michael D. Warden
Christopher D. Moore
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Bonnie P. Ulrich
Assistant United States Attorney
P.O. Box 5073
Sioux Falls, South Dakota 57117-5073

DAVID T. EARING

FILED
AUG 13 1999

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

vs.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC.,

Defendants.

CIV. 99-5024

RECEIVED
AUG 13 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

ORDER APPROVING STIPULATION

On June 4, 1999, the parties filed a Joint Case Management Statement. Accordingly, it is hereby

ORDERED that the stipulation is approved.

IT IS FURTHERED ORDERED that U S WEST shall file its initial brief on the merits of its affirmative claims, not to exceed 50 pages, on or before September 14, 1999. The Commissioners and AT&T will then file response briefs, again not to exceed 50 pages, on or before November 2, 1999. U S WEST may file an optional reply brief limited to 25 pages on or before December 7, 1999.

Dated August 12, 1999.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES SENIOR DISTRICT JUDGE

NOTICE OF ENTRY

The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 8-13-99

CLERK

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell R. Greenfield
David J. Vickers
Gary J. Pashby
Vance R.C. Goldammer
Thomas J. Welk
Terry N. Prendergast
James E. McMahon
Michael S. McKnight
Gregg S. Greenfield
Roger A. Sudbeck

101 North Phillips Avenue, Suite 601
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

September 8, 1999

RECEIVED
SEP 10
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

The Honorable Karen Schreier
515 9th Street #318
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and [illegible] Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest
United States Dist. Ct. - Western Div. Civ. No. 99-5024
Our File No. 2104.007

Dear Judge Schreier:

It is our understanding that you have recently been assigned to this case. We are in the process of preparing our opening brief, which will be filed next Tuesday. In checking with Judge Battey's law clerk (who we understand spoke with you), it is our understanding that the 50-page limitation applies only to our brief and not the appendix. If this is incorrect, please let us know as soon as possible.

Thank you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Welk

TAW/vjj
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner
Kara Sacilotto

UNITED STATES DISTRICT COURT
District of South Dakota
515 Ninth Street, Room 317
Rapid City, South Dakota 57701

RICHARD H. BATTEY
United States Senior District Judge

RECEIVED
SEP 1 4
SOUTH DAKOTA
UNITED STATES DISTRICT COURT

September 13, 1999

FILED
SEP 13 1999

Tamara A. Wilka
Boyce, Murphy, McDowell & Greenfield, L.L.P.
101 North Phillips Avenue, Suite 600
Sioux Falls, SD 57104

Re: U S West Communications, Inc. v. Burg, et al.
CIV99-5024

Dear Ms. Wilka:

In response to your letter to Judge Schreier, the appendix does not count in the page limitation.

Very truly yours,

Richard H. Battey
United States Senior District Judge

RHB:kj
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner
Kara Sacilotto

UNITED STATES DISTRICT COURT
District of South Dakota
515 Ninth Street, Room 318
Rapid City, South Dakota 57701

RECEIVED
SEP 14 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

KAREN E. SCHREIER
United States District Judge

Phone 605-341-3764
Fax 605-341-6473
karen_schreier@sdd.uscourts.gov

September 13, 1999

FILED
SEP 13 1999

Ms. Tamara A. Wilka
Boyce, Murphy, McDowell & Greenfield, L.L.P.
101 North Phillips Avenue, Suite 600
Sioux Falls, SD 57104

Re: US West Communications, Inc. v. James A. Burg, Pam Nelson, and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest, and Intervenor United States of America
Civ. 99-5024

Dear Ms. Wilka:

I am in receipt of your letter dated September 8, 1999. This matter is still assigned to the Honorable Richard Battey and was not reassigned to me. I will refer your letter to Senior Judge Battey for response.

Very truly yours,

Karen E. Schreier
United States District Judge

cc: Senior Judge Richard H. Battey
All Counsel of Record

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell R. Greenfield
David J. Vickers
Gary J. Pashby
Vance R.C. Goldammer
Thomas J. Welk
Terry N. Prendergast
James S. McMahon
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101 North Phillips Avenue, Suite 600
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

[illegible]

Tamara A. Wilka
[illegible]
[illegible]
[illegible]

Of Counsel
[illegible]

[illegible]
[illegible]

September 13, 1999

Michael Meyers, General Counsel
S.D. Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

John S. Lovald
Olinger, Lovald, Robbennolt & McCahren
117 East Capitol
P.O. Box 66
Pierre, SD 57501-0066

Maria Arias-Chapleau
Rebecca B. DeCook
AT&T Law Department
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Denver, CO 80202

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Christopher D. Moore
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Bonnie P. Ulrich
Assistant United States Attorney
United States Dept. of Justice
P.O. Box 5073
Sioux Falls, SD 57117-5073

RECEIVED
SEP 1[illegible]
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST Communications, Inc.'s Opening Brief on the Merits of its Affirmative Claims and Certificate of Service. This is intended as service upon you by mail.

Sincerely yours,
BOYCE, MURPHY, McDOWELL &
GREENFIELD, L.L.P.

Tamara A. Wilka

Tamara A. Wilka

TAW/vjj
Enclosures
cc: Alex Duarte
Larry Toll
Jon Lehner

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell B. Greenfield
David J. Vickers
Gary J. Pashby
Vince R.C. Goldammer
Thomas J. Welk
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James E. McMahon
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Roger A. Sudbeck

101 North Phillips Avenue, Suite 600
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

September 13, 1999

VIA UPS OVERNIGHT

RECEIVED
SEP 14 1999
SOUTH DAKOTA PUBLIC UTILITIES COMM.

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and two copies of the U S WEST Communications, Inc.'s Opening Brief on the Merits of its Affirmative Claims. Please file stamp the second copy and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Wilka

TAW/vjj
Enclosure
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner

RECEIVED
SEP 16 99
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

JAMES A. BURG, et al.,

Defendants.

CIV NO. 99-5024

U S WEST'S COMMUNICATIONS, INC.'S OPENING BRIEF ON THE MERITS OF ITS AFFIRMATIVE CLAIMS

Thomas J. Welk
Tamara A. Wilka
BOYCE, MURPHY, McDOWELL & GREENFIELD
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

Russell P. Rowe
Michael C. Thompson
U S WEST Law Department
U S WEST, Inc.
1801 California Street, Suite 5100
Denver, CO 80202
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I. INTRODUCTION

U S WEST Communications, Inc. ("U S WEST"), submits this Opening Brief on its claims arising out of the Findings of Fact and Conclusions of Law and Order in Docket No. TC96-184 dated March 20, 1997 (the "Decision"), Order Approving Interconnection Agreement dated March 4, 1999 (the "Order"), Order on Reconsideration, Notice of Entry of Order dated August 13, 1997 (the "Reconsideration Order"), Second Arbitration Order, Notice of Entry of Order dated December 30, 1998 (the "Second Arbitration Order"), and the Interconnection Agreement approved by the Public Utilities Commission of South Dakota ("Commission") on March 4, 1999 (the "Agreement") between U S WEST and AT&T Communications of the Midwest, Inc. ("AT&T").[1] These orders and the Agreement were attached as Exhibits A through E, respectively, to U S WEST's Complaint.[2]

This case arises under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. ("the Act"), which amended the Communications Act of 1934. The Act is designed to promote competition in both the local and long distance telephone markets. To promote competition in the local telephone market, the Act permits new entrants in the local market to obtain "interconnection" of their networks with the network of an incumbent local exchange carrier ("incumbent LEC"),[3] such as U S WEST, on rates that are just, reasonable and

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[1] In its Complaint, U S WEST raised challenges regarding the Commission's Decision implementing 47 U.S.C. § 252(i), requiring U S WEST to permit collocation at "premises" other than its central offices without going through a bona fide request process, and relating to pricing of network features. U S WEST has not briefed those issues and hereby withdraws them.

[2] In this brief, citations to materials in the record will include the number assigned to the document by the Commission in the Chronological Index filed with the Court. Citations to pages of pre-filed testimony are to the internal page citations, not the three stamped page number. The Commission's March 20, 1997 Decision is No. 133 in the record, the August 13, 1997 Reconsideration Order is No. 134, the December 30, 1998 Second Arbitration Order is No. 174, the March 4, 1999 Order is No. 179, and the Agreement is included in No. 176.

[3] "Local exchange carriers" are defined in 47 U.S.C. § 153(26), and an incumbent local exchange carrier is defined in 47 U.S.C. § 251(h). Local exchange carriers provide telephone

nondiscriminatory. By "interconnecting" their networks, or linking them, customers of one carrier can call the customers of the other carrier. In addition, requesting carriers can purchase from U S WEST individual unbundled elements of U S WEST's network at cost-based rates that the requesting carrier can combine together themselves or combine with elements of their own networks to provide telecommunications service. Network elements are defined in 47 U.S.C. § 153(29), and are basically individual components or features of the incumbent's network used to provide telecommunications service.

Furthermore, the Act permits requesting carriers to purchase U S WEST's assembled finished telecommunications services, such as residential or business telephone service, at a discount for resale. The rights and obligations under the local competition provisions of the Act are implemented through interconnection agreements. The Act encourages parties to negotiate such agreements, and permits state commissions to arbitrate disputes if the parties are unable to resolve all issues.

This action involves U S WEST's challenge to several terms of the Agreement between U S WEST and AT&T that the Commission dictated in its arbitration orders. First, U S WEST challenges the Commission's Decision that U S WEST must combine unbundled elements of its network for AT&T. This ruling conflicts directly with the holding of the United States Court of Appeals for the Eighth Circuit that requesting carriers, not incumbent LECs, are required to combine elements of the incumbent's network into new configurations or to combine the incumbent's network elements with the facilities of the requesting carrier.

Second, U S WEST challenges the Commission's determination that U S WEST must provide interconnection to AT&T at a level higher than what U S WEST ordinarily provides to itself and other carriers and that U S WEST must provide access to unbundled elements

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exchange and exchange access (i.e., basic telephone service) as well as other telecommunications service.

that exceeds the nondiscrimination standards in the Act. This determination, too, conflicts with federal law.

Third, U S WEST challenges the Commission's requirement that U S WEST permit AT&T to collocate its remote switching units in U S WEST central offices. Section 251(c)(6) of the Act addresses collocation, or the ability of requesting carriers to place equipment that is necessary for interconnection and access to network elements in the central offices of the incumbent LEC. In reaching this determination, the Commission applied an unlawful standard to determine what equipment is "necessary" for interconnection or access to unbundled network elements under 47 U.S.C. § 251(c)(6).

Fourth, the Commission erred in requiring U S WEST to provide access to or to "light" its dark fiber and to provide vertical features of its switch to AT&T.[4] As with its collocation determination, the Commission failed to make critical findings required under the Act and otherwise misapplied the law.

Fifth, the Commission erroneously denied U S WEST up front recovery of its full costs of constructing facilities for AT&T. The Act does not require incumbent LECs to construct facilities on demand for their competitors. When U S WEST agrees to do so, it is free to set the terms of that undertaking. AT&T, of course, can reject those terms. The Commission, however, should not control them.

Sixth, the Commission erred in requiring U S WEST to exercise its powers of eminent domain on AT&T's behalf. The Act imposes no such requirement, and AT&T is fully capable of seeking access to rights-of-way on its own. The Commission also erred in refusing to permit U S WEST to reserve space on its poles, ducts, conduits, and rights-of-way for its own administrative and maintenance purposes.

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[4] Vertical features of the switch include such services as call waiting, caller ID, and call forwarding. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 808 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

Seventh, the Commission erroneously permitted AT&T to establish only one interconnection point in a Local Access and Transport Area ("LATA").[5] The Act requires AT&T to establish an interconnection point in each local calling area of U S WEST's South Dakota network. In addition, the Commission's decision encourages expensive and inefficient interconnection.

Finally, the Commission imposed numerous terms that either exceed its authority under the Act or that were simply inconsistent with the evidence presented. As set forth in Section I of Part III, below, each of these determinations is wrong, and the Court should overturn them. In interpreting all of the Commission's orders, the Act and the Agreement, the Court should seek to avoid a taking of U S WEST's property without just compensation, which is prohibited by the Fifth and Fourteenth Amendments to the Constitution.

For the reasons set forth below, the Court should grant U S WEST the relief requested here and in its Complaint.

II. STATEMENT OF FACTS

The background of the arbitration between U S WEST and AT&T and the proceedings before the Commission is set forth in U S WEST's Complaint. Complaint ¶¶ 23-27. In addition, U S WEST's Complaint sets forth the procedural history of the Federal Communications Commission ("FCC") rulemaking implementing the Act, referred to in this Brief as the First Report and Order,[6] the judicial review of the First Report and Order before the United States Court of Appeals of the Eighth Circuit, and the United States Supreme

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[5] LATAs are defined in 47 U.S.C. § 153(25). Generally, unless modified, LATAs are the geographic areas established pursuant to the consent decree in which AT&T Corp. divested itself of the (then) seven regional Bell operating companies. Regional Bell operating companies are permitted to provide service within LATAs. Until they are granted permission to do so under Section 271 of the Act, Bell operating companies are not permitted to provide service between LATAs.

[6] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC Docket No. 96-98, 11 FCC Rcd 15499, 1996 FCC LEXIS 4312 (Aug. 8, 1996) ("First Report and Order").

Court's review of the Eighth Circuit decision. See id. ¶¶ 16-22; Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

III. ARGUMENT

A. Standard of Review

The Court should follow the standard of review set forth in U S WEST Communications, Inc. v. Hix, 986 F. Supp. 13 (D. Colo. 1997). Under the Hix standard, the Court is to determine, first, whether the Agreement is procedurally and substantively in compliance with the Act. This is a determination the Court makes de novo. Id. at 19. Only then, if the Agreement is found to be in compliance with the Act, is the Agreement further examined to determine whether its provisions meet the arbitrary and capricious standard. Id.

B. The Commission's Decision Requiring U S WEST to Combine Network Elements Violates the Act.

In its Second Claim for Relief in its Complaint, U S WEST challenges the Commission's Decision purporting to require U S WEST to combine network elements for AT&T. See Decision at 12 ¶ 83. In the Agreement, however, U S WEST and AT&T "parked" this issue, Agreement, Part A, Recitals, Agreement, Attachment 2 §§ 2.2, 2.4, 9, which means that the Agreement currently imposes no obligation on U S WEST to combine network elements. Because the Agreement does not impose this combination obligation, the Court need not address this issue at this time. However, U S WEST disagrees with the Commission's determination on this issue, and to preserve its rights in the event either AT&T or the Commission contends that U S WEST must combine network elements for AT&T, U S WEST has briefed this issue for the Court.

Under Section 251(c)(3) of the Act, incumbent local exchange carriers (such as U S WEST) must provide requesting carriers access to unbundled network elements. 47 U.S.C. § 251(c)(3). The Act further provides that the requesting carrier, not the incumbent, will actually perform the combining of network elements. Id. Notwithstanding these

statutory requirements, the Commission ordered U S WEST to combine unbundled network elements for AT&T unless U S WEST proves to the Commission that the request to combine network elements is not technically feasible or the request would undermine the ability of other carriers to obtain access to unbundled elements and to interconnect with U S WEST's network. Decision at 12, ¶ 83. The Commission relied solely on the FCC's reasoning in the First Report and Order. Id.

The Commission unlawfully required U S WEST to combine network elements in violation of the Act and disregard of the Eighth Circuit's decision in Iowa Utils. Bd. v. FCC, 120 F.3d at 813 & n. 39. Accordingly, the Commission's Decision violates the Act.

1. **The Commission Cannot Order Combinations Until the FCC Issues Valid Unbundling Rules.**

In AT&T Corp., the Supreme Court made two critical holdings with respect to unbundling and combination of unbundled network elements. First, the Court struck down 47 C.F.R. § 51.319, the rule that established the network elements incumbent LECs must provide under Sections 251(c)(3) and 251(d)(2), holding that the FCC improperly gave requesting carriers "blanket access" to incumbent LEC networks by failing to consider the "necessary" and "impair" standards in 47 U.S.C. § 251(d)(2)[7] in determining which network elements incumbent LECs must unbundle. AT&T Corp., 119 S. Ct. at 714-16. Second, the Court

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[7] Section 251(d)(2) provides

> Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether –
>
> (A) access to such network elements as are proprietary is necessary, and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2).

upheld 47 C.F.R. § 51.315(b), which prohibits incumbent LECs from separating elements of their networks that they currently combine. Id. at 736. The Supreme Court did not reverse, nor did it even address, the Eighth Circuit decision that Rules 315(c)-(f), 47 C.F.R. § 51.315(c)-(f), requiring incumbent LECs to combine elements, violate the Act.

a. Rule 319 and the FCC's erroneous interpretation of Section 251(d)(2).

The Supreme Court held that the FCC's approach to determining which network elements incumbent LECs must provide under 47 U.S.C. § 251(c)(3) was fundamentally flawed and provided requesting carriers with "blanket access" to incumbent LEC networks. AT&T Corp., 119 S. Ct. at 734-36. First, the Court held that the FCC started with the unlawful presumption that incumbent LECs must provide any network element that is technically feasible to unbundle, and that this erroneous presumption tainted the FCC's interpretation of Section 251(d)(2). Id. at 736.[8]

Second, the FCC wholly failed to consider the "necessary" and "impair" standards in Section 251(d)(2) by failing to consider self-provisioning or the availability of elements outside the incumbent LEC's network. In particular, the Court rejected the FCC's interpretation of "necessary" that would require incumbent LECs to unbundle network elements, even if the requesting carrier could obtain the elements elsewhere. Id. at 735-36. The Court forcefully stated that the FCC "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." Id. at 735. The Court also rejected the FCC's interpretation that any increase in cost or decrease in quality means a requesting carrier is "impaired" in its ability to offer service. Id. at 735-36. The Court reasoned: "Since any new entrant will request the most efficient network elements that the

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[8] No party petitioned for review of the Eighth Circuit's determination that "technical feasibility" determines only where requesting carriers may obtain access to unbundled network elements, not which elements must be provided. Iowa Utils. Bd. v. FCC, 120 F.3d at 813. The Supreme Court endorsed the Eighth Circuit's decision on this issue, stating that the FCC's position was "undoubtedly wrong." AT&T Corp., 119 S. Ct. at 734.

incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute 'impairment' under [the FCC's] standard." Id. at 735. The FCC's overly generous interpretation of the "necessary" and "impair" standards, the Court held, "is simply not in accord with the ordinary and fair meaning of those terms." Id.

Concluding, the Court stated:

> We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

Id.

b. Rules 315(b)-(f).

The Court held that Rule 315(b) was not unreasonable. Id. at 735. It also affirmed the Eighth Circuit determination that requesting carriers did not have to provide some of their own facilities to obtain access to unbundled network elements -- the "all elements" rule. Id. at 736.[9] The Court left intact, however, the Eighth Circuit decision to invalidate Rules 315(c)-(f), purporting to require incumbent LECs to combine network elements in a manner different than their current configurations and to combine incumbent LEC elements with the facilities of the requesting carrier. Because the Eighth Circuit held that the Act does not

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[9] The Supreme Court decision upholding the "all elements" interpretation does not mean that requesting carriers are entitled to access every element that comprises a finished service. As the Supreme Court explained, this holding means only that requesting carriers do not have to provide their own facilities to gain access to an incumbent LEC's unbundled elements under Section 251(c)(3). AT&T Corp., 119 S. Ct. at 736 (there is no "facilities ownership requirement"). The Supreme Court expressly stated that its decision to vacate Rule 315 could mean that requesting carriers would not be able to obtain all the elements that comprise a finished service. Id. ("The all elements issue may be largely academic in light of our disposition of Rule 319. If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network"). Thus, for example, if the FCC on remand finds that switching does not meet the "necessary" and "impair" standards in Section 251(d)(2), requesting carriers will not be able to obtain access to every element that comprises a finished service under Section 251(c)(3).

require incumbent LECs to perform these combinations, and that holding stands, the Commission cannot require U S WEST to combine elements of its network that are not currently combined or to combine elements of its network with requesting carrier facilities. Several courts have recently addressed the effect of AT&T Corp. on the purported obligation to combine network elements and have held that Rules 315(c)-(f) remain invalid. See, e.g., U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 46 F. Supp. 2d 1068, 1076 (D. Or. 1999); U S WEST Communications, Inc. v. Thomas, Civ. No. 4-97-CV-70082, Memorandum Opinion Ruling Granting AT&T's and MCI's Motion for Reconsideration and Order Amending Judgment at 10-11 (S.D. Iowa Apr. 19, 1999); U S WEST Communications, Inc. v. Garvey, File No. Civ. 97-913 ADM/AJB, slip op. at 19 (D. Minn. Mar. 31, 1999) (recognizing that Rules 315(c)-(f) remain invalid).[10]

c. Rules 319 and 315(b) are intrinsically linked.

The Supreme Court's decision to vacate Rule 319 and the FCC's interpretation of Section 251(d)(2) has far-reaching implications. Most significantly, there is no current FCC rule that establishes which network elements incumbent LECs must unbundle and which elements requesting carriers can access. There is also no valid standard for making this determination. Indeed, until the FCC adopts rules consistent with the Act and the Supreme Court's decision, it is not possible for the Commission or this Court to identify which previously assembled elements U S WEST must provide. If, for example, the FCC determines on remand that switching does not meet the unbundling standard in Section 251(d)(2) as

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[10] On remand, the Eighth Circuit permitted parties to brief whether it should revisit its holding with respect to Rules 315(c)-(f). It did not, however, lift that part of its previous decision vacating those rules. Iowa Utils. Bd. v. FCC, No. 96-3321, Order on Remand from the Supreme Court of the United States at 2-3 (8th Cir. June 10, 1999).

articulated by the Supreme Court, then AT&T could not obtain the so-called "UNE platform."[11]

Because Rules 319 and 315(b) are intrinsically related, the Court cannot apply the Supreme Court's decision in pieces. If the Court orders U S WEST to provide currently combined elements or its assembled platform of elements -- the UNE platform -- under Rule 315(b), it must also accept and implement the Supreme Court's unambiguous decision to vacate the entirety of Rule 319 and the FCC's interpretation of Section 251(d)(2). Under these circumstances, AT&T would be entitled to no elements at all, and as a result, no assembled or combined elements. Indeed, without a valid unbundling rule, the Court cannot even determine which assembled elements U S WEST would have to provide. Enforcing Rule 315(b) at this time would dictate enforcing the elimination of Rule 319 and the elimination of all clauses in the contract requiring the sale of unbundled network elements.

This Court should not attempt to predict how the FCC will address the Supreme Court's decision.[12] A new unbundling standard that complies with the Supreme Court's decision will likely impose different conditions on access to unbundled network elements, or require incumbent LECs to unbundle a different set of elements. At that time, the parties and the Commission can address the FCC's revised rules.

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[11] An incumbent LEC's fully assembled platform of elements is often referred to as the "UNE platform." "Sham unbundling" is the fiction that requesting carriers can obtain the UNE platform, or all of the network elements that comprise a finished service under 47 U.S.C. § 251(c)(3) on a combined basis, at cost-based rates under 47 U.S.C. § 252(d)(1). This practice is termed "sham unbundling" because no "unbundling" ever takes place: the requesting carrier obtains the same finished service that incumbent LECs make available under the resale provisions of the Act, 47 U.S.C. §§ 251(c)(4) and 252(d)(3), but at cost-based rates as opposed to a discount off the retail rate.

[12] The FCC has issued a notice of proposed rulemaking to address the Supreme Court's decision and final rules are expected this fall. See Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, FCC 96-29 (rel. Apr. 16, 1996).

2. The Commission Cannot Independently Order U S WEST to Provide Assembled or Combined Elements.

State commissions have no authority to issue unbundling requirements at this time. The Supreme Court's rejection of 47 C.F.R. § 51.319 and the FCC's interpretation of 47 U.S.C. § 251(d)(2) necessarily require invalidation of 47 C.F.R. § 51.317. Rule 317 provided that state commissions could adopt additional unbundling requirements, beyond the elements set forth in now-vacated Rule 319, and set forth the standards state commissions must consider when determining the additional elements incumbent LECs should provide. Rule 317(a) stated:

> In determining what network elements should be made available for purposes of section 251(c)(3) of the Act, beyond those identified in § 51.319, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

47 C.F.R. § 51.317(a). The Eighth Circuit invalidated this rule to the extent it contained a "technical feasibility" presumption. See Iowa Utils. Board, 120 F.3d at 810 n.19. The Supreme Court did not overturn that determination. AT&T Corp., 119 S. Ct. at 736. Accordingly, this aspect of Rule 317 is invalid.

Moreover, under Rule 317(b)(2), if a state commission finds that it is technically feasible to unbundle an element, it may refuse to require unbundling only if the element is proprietary and a nonproprietary alternative exists or:

> the state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC's network

47 C.F.R. § 51.317(b)(2). This is the same unlawful "requirement" the Supreme Court struck down.

Consistent with this analysis, several courts have held that the Supreme Court's decision mandates that the FCC readdress Rule 317. See U S WEST Communications, Inc., 46 F. Supp. 2d at 1080; MCI Telecomm. Corp. v. GTE Northwest, 41 F. Supp. 2d 1157, 1180 (D. Or. 1999); MCI Telecomm. Corp. v. Bell Atlantic, 36 F. Supp. 2d 419, 425 n.4 (D.D.C. 1999); see also U S WEST Communications, Inc. v. Garney, slip op. at 27-28 (remanding dark fiber and subloop unbundling issues because state commission applied FCC's invalid interpretation of Section 251(d)(2)). In addition, the FCC has voluntarily requested the Eighth Circuit to remand Rule 317 in light of the Supreme Court's decision. As a result, there is no valid FCC rule permitting state commissions to order unbundling. With no rule permitting them to order unbundling, state commissions cannot require incumbent LECs to provide specific assembled or combined elements. Accordingly, the Commission's Decision on combinations violates the Act.

C. **The Agreement Imposes Unlawful Performance Standards in Violation of Section 251(c) of the Act.**

The Commission's orders and approved Agreement unlawfully require U S WEST to provide interconnection that exceeds the "equal in quality" standard contained in Section 251(c)(2) of the Act. In its Decision, the Commission ordered U S WEST to "perform its obligations under the Agreement at no less than the highest level which U S WEST uses for its own operations or those of its affiliates." Decision at 4, ¶ 17. The orders and Agreement also unlawfully require U S WEST to provide access to unbundled network elements that exceeds the "nondiscriminatory" access standard contained in Section 251(c)(3) of the Act. As set forth below, the standards for interconnection and access contained in the order and Agreement are unlawful.

In Iowa Utils. Bd., the Eighth Circuit held that requesting carriers are not entitled to "superior" quality interconnection or "superior" access to unbundled network elements on demand. Iowa Utils. Bd., 120 F.3d at 812. The Eighth Circuit also held that the Act requires incumbent LECs to provide requesting carriers with access to their "existing" network only

Id. at 813. No party petitioned for review of the Eighth Circuit's holding in this regard. See AT&T Corp., 119 S. Ct. at 729 (describing the issues for which parties sought review). Accordingly, the Supreme Court did not reverse this aspect of Iowa Utils. Bd., and the FCC's "superior quality" rules, 47 C.F.R. §§ 51.305(a)(4) and 51.311(c), remain invalid.[13]

Consistent with the Eighth Circuit's decision, AT&T is entitled only to interconnection that is "equal in quality" to what U S WEST provides to itself, as set forth in 47 U.S.C. § 251(c)(2), and to "nondiscriminatory" access to unbundled network elements under 47 U.S.C. § 251(c)(3). See Iowa Utils. Bd., 120 F.3d at 812 (interpreting the interconnection and access standards in Sections 251(c)(2) and (c)(3)).

1. **Interconnection That Is "Equal in Quality"**

The Commission's Decision unlawfully requires U S WEST to guarantee that AT&T will receive the "highest level" of interconnection that U S WEST uses for its own operations or those of its affiliates. See Decision at 4, ¶ 17. However, U S WEST does not guarantee itself or any other carrier that it will consistently provide interconnection at the highest possible levels at all times. Interconnection is not a static concept. By definition, a "highest" level means there is a lower level and thus a range of interconnection quality. U S WEST does not and cannot consistently provide itself the highest level of interconnection. But instead seeks to provide interconnection in an acceptable range in accordance with industry standards. U S WEST is obligated to provide requesting carriers, including AT&T, interconnection equal to what U S WEST provides itself, even when that interconnection level is not the "highest" level within the acceptable range. U S WEST cannot and does not commit to any carrier to provide its highest possible level of service at all times because there are numerous factors beyond U S WEST's control, including unusually busy calling days, the forecast and common

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[13] In its June 1999 Order on Remand from the Supreme Court of the United States, the Eighth Circuit permitted parties to brief whether it should revise its holding on these rules, but it did not reinstate them.

provided by AT&T, and AT&T's own ordering behavior, that affect the quality of interconnection U S WEST provides. It is unreasonable to penalize U S WEST for failing to meet a service standard for reasons beyond its control. Accordingly, the Commission's insistence on U S WEST providing its highest level of service at all times is unreasonable and would require U S WEST to provide discriminatory, "superior" quality interconnection to AT&T.

2. **Nondiscriminatory Access to Network Elements**

During the proceedings before the Commission, AT&T contended that the "at least equal to" or "equality" standard for interconnection should apply to access to unbundled network elements as well. As a result, it sought adoption of language in the Agreement that effectively applied the standard for interconnection to the provision of access to unbundled elements, and the Commission agreed with AT&T's proposal. Second Arbitration Order at 4-5, ¶¶ 4-6. This result is plainly unlawful.

In contrast to the "equal in quality" standard that applies to interconnection under Section 251(c)(2), the Act requires access to unbundled network elements on a nondiscriminatory basis. See 47 U.S.C. § 251(c)(3) (requiring incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. . . ."). Interpreting the term "nondiscriminatory" -- the only term that applies to access to unbundled network elements under Section 251(c)(3) -- the Eighth Circuit held that the term "merely prevents an incumbent LEC from arbitrarily treating some of its competitors differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier." Iowa Utils. Bd., 120 F.3d at 813. Thus, when providing access to unbundled network elements, U S WEST only must ensure that it treats all requesting carriers equally; it is not required to provide access that is in all respects equal to what it provides itself. Clearly, by use of different language in these provisions, subsections

Congress intended to provide different access standards. Bates v. United States, 522 U.S. 23, 29-30 (1997); INS v. Cardoza-Fonseca, 480 U.S. 421, 431-32 (1987); Russello v. United States, 464 U.S. 16, 23 (1983). The Commission's Order is inconsistent with this important distinction in access standards that Congress established.

Like the Act and the Eighth Circuit's decision, the FCC recognizes that U S WEST is not required to provide "equal" access to unbundled network elements. In discussing the type of access to unbundled elements that incumbent LECs must provide, the FCC stated that an incumbent LEC must provide network elements to all requesting carriers equally, but that the incumbent LEC must provide access equal to what it provides itself only "where applicable." First Report and Order ¶ 315. The FCC's use of "where applicable" is an important qualifier and demonstrates that there are circumstances in which an incumbent LEC cannot reasonably be expected to provide requesting carriers with the identical access to its network.

Other provisions of the First Report and Order confirm that incumbent LECs are not required to provide access to unbundled network elements that is in every way identical to the access they enjoy and that incumbent LECs should not be required to cede control over their networks by giving requesting carriers the same control and access that incumbent LECs have. Furthermore, nothing in the Act or the FCC's rules requires requesting carriers to have direct access to U S WEST's main distribution frame where doing so would compromise services to customers of U S WEST, AT&T, or any other requesting carriers that obtain network elements from U S WEST. See First Report and Order ¶¶ 203, 312-13 (threats to network reliability and security must be evaluated in determining access to network elements).

Instead, the FCC established that incumbent LECs must give access to unbundled network elements that allows the requesting carriers "a meaningful opportunity to compete." The FCC stated:

> We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits

> inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.

First Report and Order ¶ 315; see also id. ¶ 203 (carriers must be able to retain control over their own networks).

The FCC reiterated this "meaningful opportunity to compete" standard in its decisions on Bell operating company applications to provide in-region interLATA service pursuant to Section 271 of the Act. Specifically, the FCC contrasted the type of access incumbent LECs must provide when providing requesting carriers with resold services, on the one hand, and unbundled network elements, on the other. With respect to resale, which for incumbent LECs have a retail analogue, the FCC has stated that incumbent LECs must provide service to requesting carriers in the same time and manner as they provide services to themselves and their customers. E.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan, CC Docket No 97-137, 12 FCC Rcd 20543, Memorandum Opinion and Order ¶ 140 (rel. Aug. 19, 1997). For access to unbundled network elements, however, there is no retail analogue. See Application of BellSouth Corp., BellSouth Telecomm., Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, 13 FCC Rcd 20599, Memorandum Opinion and Order ¶ 198 (rel. Oct. 13, 1998). Accordingly, an incumbent LEC is not required to provide unbundled loops in the same manner and under the identical circumstances as it provides loops to itself. Instead, it must provide unbundled loops in a manner that provides an efficient requesting carrier "a meaningful opportunity to compete." Id. As the FCC clearly stated:

> Because the provisioning of unbundled local loops has no retail analogue, BellSouth must demonstrate that it provides unbundled loops in a manner that offers an efficient carrier a meaningful opportunity to compete.

Id. (emphasis added). See also MCI Telecomm. Corp. v. Illinois Bell Tel. Co., No. 97 C 2225, 1999 U.S. Dist. LEXIS 11418 at *27-28 (N.D. Ill. June 28, 1999) (recognizing that the process of providing access to unbundled network elements to competing carriers that operate on a different network is different than providing facilities to the incumbent LEC itself).

Thus, U S WEST must provide unbundled network elements to requesting carriers in a manner that does not discriminate between carriers and offers requesting carriers a meaningful opportunity to compete. U S WEST must also provide unbundled network elements so that requesting carriers can combine them with their own facilities or other U S WEST unbundled network elements to provide service of the same quality as U S WEST.

U S WEST proposed language for Part A, § 52.3 of the Agreement taken directly from the FCC's First Report and Order ¶ 315. See Interconnection Agreement submitted September 4, 1998 (No. 143) at 79. AT&T, by contrast, claimed that it was entitled not only to network elements that are equal in quality to those U S WEST provides to itself, but also that it was entitled to an "equal level of access" to those elements. It demanded language stating that "[f]or purposes of this Agreement, 'equal in quality' shall mean, among other things, equal in the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself."

Notwithstanding the language of the Act and the FCC's orders, the Commission adopted AT&T's proposed language for § 52.3 of Part A of the Agreement. Second Arbitration Order at 4-5, ¶ 6. The Commission did not cite any provision of the Act or of the FCC's regulations in support its interpretation. The Commission stated only that AT&T's language "is reasonable and adds needed specificity to the Interconnection Agreement." Id.[14]

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[14] Thus, consistent with the Commission's Second Arbitration Order, § 52.3 of Part A of the Agreement now states:

> For purposes of this Agreement, "equal in quality" shall mean, among other things, equal to the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself.

A comparison of Sections 251(c)(2) and (c)(3) of the Act and the FCC orders discussed above makes clear that an incumbent LEC has no obligation to provide access to network elements that is "equal in quality" to the access it provides to itself or its affiliates. Because the Commission's Second Arbitration Order and the Agreement impose a standard for the provision of access to network elements that is inconsistent with the Act and the FCC's regulations, the Court should strike that standard from the Agreement.

D. The Commission's Decision To Permit Collocation of Remote Switching Units ("RSUs") Violates Section 251(c)(6) of the Act.

Section 251(c)(6) of the Act requires U S WEST to permit collocation of equipment "necessary" for interconnection or access to unbundled network elements at U S WEST's premises, except where physical collocation is not practical for technical reasons or because of space limitations. 47 U.S.C. § 251(c)(6).

The Commission found that AT&T may collocate RSUs on U S WEST's premises. Decision at 9, ¶ 55. This requirement is incorporated in Part A, §§ 40.1.5 and 40.1.6 of the Agreement. However, collocation of RSUs is not "necessary" for interconnection or access to unbundled network elements within the meaning of Section 251(c)(6).[15] Because collocation of RSUs is unnecessary for interconnection and access, the Commission lacked authority under the Act to impose this requirement upon U S WEST.

In ordering the collocation of RSUs, the Commission relied upon the FCC's interpretation of the word "necessary" in Section 251(c)(6) of the Act. Decision at 9, ¶ 55. According to the FCC, "necessary," for purposes of Section 251(c)(6), means that the

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and equal in the quality of design, performance, features, functions, capabilities and other characteristics, including, but not limited to, levels and types of redundant equipment and facilities for power, diversity and security, that U S WEST provides to itself.

[15] U S WEST demonstrated that the functions RSUs perform are not necessary for interconnection. See Transcript (Vol. IV) at 476-77, 488; Wilcoxon Rebuttal (Vol. VI) at 5.

collocated equipment is "used or useful" for interconnection or access to unbundled elements. First Report and Order ¶ 579.[16]

The FCC's interpretation of "necessary," however, is inconsistent with the Act; accordingly, the Commission erred as a matter of law in applying it. The Supreme Court rejected the FCC's interpretation of the term "necessary" in 47 U.S.C. § 251(d)(2), which had provided that any increase in cost or decrease in quality rendered a network element "necessary." AT&T Corp., 119 S. Ct. at 735; see also First Report and Order ¶ 280. As the Court explained, the FCC's interpretation "is simply not in accord with the ordinary and fair meaning" of that term. Id. The Supreme Court's rejection of the FCC's erroneous definition of "necessary" must also apply to 47 U.S.C. § 251(c)(6) and the FCC's even more expansive "used or useful" interpretation. United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, 508 U.S. 439, 460 (1993) (identical words in different parts of statute are presumed to have same meaning). Thus, as several federal district courts have held, AT&T Corp. seriously undermines the FCC's interpretation of Section 251(c)(6). See U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1068, 1076 (D. Ariz. 1999); Garvey, slip op. at 46; see also Bell Atlantic-Washington, 36 F. Supp. 2d at 473 n.10. In GTE North-west, for example, the court held that the word "necessary" in Section 251(c)(6) "suggests a stricter standard" than the FCC applied: "Anyone who has ever packed for a trip knows the difference between items that might be 'used and useful' versus items that are truly 'necessary.'" 41 F. Supp. 2d at 1182. Thus, the court held that in light of AT&T Corp., "the FCC's interpretation of the word 'necessary' in 47 U.S.C. § 251(c)(6) is no longer tenable." Id.

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[16] Despite specific requests to do so, the FCC did not order LECs to permit the collocation of switching equipment "since it does not appear that [switching equipment] is used for the actual interconnection or access to unbundled elements." First Report and Order ¶ 581.

Moreover, Section 251(c)(6) must be read narrowly because it implicates a physical taking of an incumbent LEC's property. U.S. Const. amend. V, cl. 4; Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). The court in GTE Northwest agreed, stating that the FCC's "loose interpretation" of Section 251(c)(6) "seems especially inappropriate when authorizing a physical occupation of an ILEC's property." 41 F. Supp. 2d at 1182.

The FCC's recent order on deployment of advanced wireline services and associated collocation issues does not change this result. Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, CC Docket No. 98-147, FCC 99-48, 1999 FCC LEXIS 1327 (rel. Mar. 31, 1999) (the "706 Order"). In that order, the FCC ruled that requesting carriers can collocate equipment "used or useful" for interconnection or access to unbundled network elements even if that equipment performs switching functions. Id. ¶ 38. However, the FCC ignored that its "used or useful" interpretation of "necessary" cannot stand in light of the Supreme Court's rejection of the FCC's interpretation of Section 251(d)(2). Indeed, the FCC's "used and useful" interpretation of "necessary" is even more lax than the definition the Supreme Court struck down.[17]

The Supreme Court has now added teeth to the term "necessary." The Commission, however, applied the wrong standard. For this reason alone, the ICM collocation provisions of the Agreement violate the Act.

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[17] The FCC noted that its interpretation of Section 251(c)(6) was not challenged before the Supreme Court and remains in effect. 706 Order ¶ 38 n. 82. This is irrelevant. AT&T Corp. has now undermined that interpretation. Furthermore, as the FCC expressly notes, the First Report and Order did not require incumbent LECs to permit collocation of switching equipment, so there was no reason or basis to appeal the First Report and Order on this issue. See id. ¶ 38. U S WEST has appealed the 706 Order.

E. The Commission's Decision Requiring U S WEST to Unbundle Dark Fiber and the Vertical Features of the Switch Violates Sections 251(c)(3) and (d)(2) of the Act.

The unbundling obligations of incumbent LECs are circumscribed by Section 251(c)(3) of the Act, which requires incumbent LECs to unbundle only "network elements" and by Section 251(d)(2) of the Act, which provides that in determining what network elements must be unbundled, the FCC must consider (at a minimum) whether access to such elements that are proprietary in nature is necessary and whether the failure to provide access to such network elements would impair the ability of the requesting carrier to provide the services that it seeks to offer. 47 U.S.C. § 251(d)(2). The Commission's findings regarding dark fiber and unbundling the vertical features of the switch are inconsistent with these statutory requirements.

1. Dark Fiber

The Commission determined that dark fiber is excess fiber optic cable that has been placed in a network and is not currently being lit by electronics from any carrier. Decision at 10, ¶ 69. The Commission correctly found that dark fiber is not a "network element," within the meaning of 47 U.S.C. § 153(29),[18] but nevertheless ordered that U S WEST may not refuse a request for fiber "based on lack of spare fiber if it has installed dark fiber that is not in use."

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[18] The Commission's determination on this threshold issue was correct: dark fiber is not a "network element" under 47 U.S.C. § 153(29). It is neither "used" to provide telecommunications service, nor is it capable of providing telecommunications service without attaching additional equipment to it. MCI Telecomms. Corp. v. Pacific Bell, No. C 97-0674 SI, 1998 U.S. Dist. LEXIS 17356 at *72-73 (N.D. Cal. Sept. 29, 1998) (dark fiber is "fiber optic cable that is installed in a telephone network but is not connected to the necessary electronic equipment to enable it to transmit telecommunications"); MCI Telecomms. Corp. v. BellSouth Telecomms. Corp., 7 F. Supp.2d 674, 679 (E.D.N.C. 1998) (dark fiber is not "lit" by electronics at the ends that are routing digital impulses onto the fiber and is consequently carries no information"). See also Transcript (No. 79) at 426-28. Only "lit" fiber is "used" to provide telecommunications service. Thus, dark fiber is not just "currently" not in use, it is never used to provide telecommunications service. Furthermore, the FCC declined to define dark fiber as a network element and thus U S WEST is never required to unbundle because requesting carriers intend to provide it with a sufficient record to make that determination. First Report and Order ¶ 439.

functional in order to meet the capacity request." Decision at 10, ¶ 72. In such circumstances, U S WEST may only refuse a request for dark fiber if it can show the Commission that the dark fiber is needed for its own customers. Id. Although the Commission's Decision is not clear, it appears to have the effect of requiring U S WEST to "light" its fiber for AT&T, notwithstanding the Commission's determination that dark fiber is not a network element. Sections 51.1.2 and 51.3 of Part A of the Agreement incorporate the Commission's rulings nearly verbatim.

a. Because dark fiber is not a "network element," the Commission could impose no obligations regarding it.

Given the Commission's determination that dark fiber is not a network element, it could not require U S WEST to provide or "light" dark fiber by attaching electronics to it for AT&T because Section 251(c)(3) only requires incumbent LECs to unbundle "network elements." See 47 U.S.C. § 251(c)(3). This determination, in itself, relieves U S WEST of any obligation to provide dark fiber to AT&T or to "light" its dark fiber.[19]

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[19] In addition, the Commission wholly failed to consider whether access to U S WEST's dark fiber is "necessary" or would "impair" AT&T's ability to provide service within the meaning of Section 251(d)(2). See Decision at 10-11, ¶ 72. As the Supreme Court made clear, under Section 251(c)(3) incumbent LECs are only required to unbundle, and to price at cost-based rates, "network elements" that meet the unbundling standard contained in Section 251(d)(2). AT&T Corp., 119 S. Ct. at 734-35. The Act does not entitle requesting carriers to "blanket access" to an incumbent's network. Id. at 735.

Dark fiber was not included on the list of elements incumbent LECs were required to unbundle in Rule 319. As a result of the invalidation of the FCC interpretation of Section 251(d)(2), there is no valid FCC rule requiring unbundling or permitting state commissions to order additional unbundling. More important, there is no standard against which to judge any state law unbundling requirement. Thus, there is no way to determine whether a requirement that U S WEST provide dark fiber conforms with or is consistent with the Act. Accordingly, since issuance of AT&T Corp., several courts have overturned state commission decisions requiring incumbent LECs to provide dark fiber because of the invalidity of Rule 317 and the state commission's erroneous application of the FCC interpretation of Section 251(d)(2). See MCI Telecomm. Corp., 1999 U.S. Dist. LEXIS 11418 at *45-46; U S WEST Communications, Inc. v. Thoms, Memorandum on Reconsideration at 6-7; U S WEST Communications, Inc. v. Garvey, slip op. at 27-28; GTE Northwest, 41 F. Supp. 2d at 1141. Overturning the Commission's dark fiber decision is even more compelling here, as the Commission did not even attempt to apply the unbundling standard in Section 251(d)(2) or the erroneous Rule 317.

b. The Commission cannot require U S WEST to "light" its dark fiber.

The Commission's Decision that dark fiber is not a network element ends any inquiry into U S WEST's obligation to provide dark fiber to AT&T. Nevertheless, the Commission's Decision has the effect of requiring U S WEST to "light" its dark fiber for AT&T if U S WEST does not have sufficient "lit" fiber available. As set forth above, AT&T is entitled to access unbundled elements of U S WEST's "existing network – not to a yet unbuilt superior one." Iowa Utils. Bd., 120 F.3d at 813 (emphasis in original). Under the Act, U S WEST is not required to "create" network elements for AT&T. Id. Thus, if U S WEST has no "lit" fiber to make available to AT&T, AT&T must seek an alternative source or provide the fiber itself. The Commission's decision requiring U S WEST to convert its dark fiber, which is not even a network element, into "lit" fiber violates the Act. Accordingly, the Court should strike this requirement from the Agreement.

2. Vertical Features of the Switch

The Commission also found that vertical features must be unbundled as part of the local switching element. Decision at 11, ¶ 78. This ruling is inconsistent with the requirements of the Act.

Although FCC Rule 319 required incumbent LECs to unbundle switching, the Eighth Circuit held that vertical features are network elements in their own right, and the Supreme Court affirmed that determination. AT&T Corp., 119 S. Ct. at 734; Iowa Utils. Bd. v. FCC, 120 F.3d at 809. Like dark fiber, this vertical features "element" was not separately listed in the Rule 319 list of elements incumbent LECs must unbundle. Thus, before U S WEST may be required to provide vertical features, the Commission or the FCC must establish that the vertical features "element" meets the unbundling standards in Section 251(d)(2). See also First Report and Order ¶ 244 (state commissions may order additional unbundling only if they

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standard. In MCI Telecomm. Corp., this failure alone was sufficient to overturn the state commission's decision. 1999 U.S. Dist. LEXIS 11418 at *48-50.

determinations are consistent with the Act and FCC regulations). 47 U.S.C. § 252(e)(1) (in resolving disputes in arbitrations, state commissions must ensure that their determinations meet the requirements of FCC rules).

However, because the FCC's interpretation of Section 251(c)(3) has been overturned by the Supreme Court and Rule 317 is invalid, the Commission cannot now require U S WEST to provide vertical features to AT&T. Moreover, to the extent that vertical features are considered part of the switching element, the rule requiring incumbent LECs to unbundle switching (47 C.F.R. § 51.319(c)) is also invalid. Because the Commission cannot require U S WEST to provide its vertical switching features to AT&T, U S WEST is entitled to a declaration that the Agreement's language obligating U S WEST to do so is invalid.

F. The Commission's Denial of Full Construction Cost Recovery Violates Section 252(d)(1) of the Act.

The issue of construction charges arises when U S WEST agrees to construct new facilities to provide a resold service to a particular customer. The Commission found that, if AT&T were required to pay such special construction charges up front, AT&T could pay twice for a portion of the construction charges. Based on this premise, the Commission limited U S WEST's recovery of construction costs to "those nonrecurring charges of construction that U S WEST charges to an end user." Decision at 33, ¶ 178. The Agreement incorporates this ruling at Attachment 1, § 3.2 ("AT&T shall pay only those nonrecurring charges of construction that U S WEST charges an end user").

The Eighth Circuit held that requesting carriers are entitled to access to incumbent LEC's "existing" network only. Iowa Utils. Bd., 120 F.3d at 813. Thus, except to the limited extent necessary to accommodate interconnection and access to existing unbundled network elements, id. at 813 n.33, incumbent LECs are not required to construct or modify new facilities on behalf of requesting carriers. As the Eighth Circuit implicitly confirmed, if facilities are not yet built, there is no reason why a new entrant, rather than the incumbent, should build them; the decision to build rests with the incumbent. The Supreme Court did not reverse this

holding. Accordingly, AT&T is not "entitled" to have U S WEST construct facilities for it on demand. Since the Act does not require U S WEST to construct facilities for AT&T, if AT&T chooses to provide service through facilities that are not yet built and wants U S WEST to build them, U S WEST can freely negotiate the terms of that undertaking. If AT&T does not like those terms, it can build the facilities itself or hire another carrier to do it. Cf. AT&T Corp., 119 S. Ct. at 735-36. Since the Act does not require U S WEST to construct facilities on demand for AT&T, the Commission cannot control the terms of that construction. Moreover, U S WEST should not bear the expense and risk of new investments made solely to benefit its competitors. When U S WEST constructs facilities for AT&T without advance payment, it is essentially bankrolling AT&T's construction.

Even if an incumbent LEC were to agree to upgrade its facilities to accommodate the requests of a requesting carrier, both the Act and the FCC's rules mandate that the requesting carrier compensate the incumbent LEC fully for its costs. See 47 U.S.C. § 252(d)(1); First Report and Order ¶ 382 (if the incumbent LEC conditions a loop for a requesting carrier, the requesting carrier must compensate the incumbent LEC). Accordingly, to the extent that U S WEST agrees to construct facilities for a requesting carrier, it must be permitted to recover its full construction charges from that requesting carrier. Lehman Direct (Oct. 31) at 117-18.

The Act's requirement that incumbent LECs provide interconnection on rates, terms and conditions that are just, reasonable, and nondiscriminatory "does not mandate that incumbent LECs cater to every desire of every requesting carrier." Iowa Utils. Bd., 119 F.3d at 813. U S WEST contends that since it is not required to construct facilities for AT&T on demand, when U S WEST agrees to do so, it should be permitted to control the terms of the recovery of its construction costs, including requiring AT&T to pay for U S WEST's efforts up front. AT&T, of course, is free to reject those terms and construct facilities itself. The Commission and AT&T ignore that U S WEST is not in the business of constructing facilities for its competitors. It has its own construction obligations under state law. Thus, when

U S WEST constructs facilities for AT&T, without advance compensation. It is diverting funds it could use to construct facilities under its own network plans.

The Agreement impermissibly limits U S WEST's assessment of construction charges to those charges that are assessed to its end users. AT&T, however, is not a retail customer; it is a telecommunications carrier that is a competitor of U S WEST. Under the present Agreement, for example, AT&T could order one thousand lines at a single wire center without having to make up front payments. Indeed, the costs that U S WEST incurs to construct facilities for AT&T are entirely different than the costs U S WEST incurs to provide retail service. See MCI Telecomm. Corp., 1996 U.S. Dist. LEXIS 11448 at *9-11 ("The process of providing access to unbundled network elements to competing carriers that also operate on a different network is different, and presumably more time consuming, than the process of provisioning network elements for the incumbent's own use"). Moreover, the evidence shows that the only way U S WEST is assured of full cost recovery is through the assessment of construction charges to the reseller. Lifner Direct (No. 34) at 11.

The Commission cites no authority for the proposition that AT&T is entitled to be treated like a retail customer for construction purposes. The reason is simple: there is no such requirement. Under the Act, the terms and conditions under which U S WEST agrees to construct facilities for AT&T is a matter for private negotiation between the parties. 47 U.S.C. § 252(a). Accordingly, the Act requires this Court to strike the Agreement's limitation on the recovery of construction charges.

G. The Commission's Requirement that U S WEST Exercise Eminent Domain Powers on Behalf of AT&T, and its Prohibition Against Reserving Space on U S WEST's Own Poles, Ducts, Conduits, and Rights-Of-Way, Violate Sections 251(b)(4) and 224 of the Act.

Section 251(b)(4) of the Act requires all local exchange carriers ("LECs"), including AT&T, to provide access to poles, ducts, conduits and rights of way on rates, terms and conditions that are consistent with Section 224 of the Act. 47 U.S.C. §§ 251(b)(4), 224. Section 224 requires that a "local exchange carrier or an electric, gas, water, steam, or other

public utility," 47 U.S.C. § 224(a)(1), provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Thus, the Act requires that a LEC provide access to existing poles, ducts, conduits, or rights-of-way that are "owned or controlled by it." There is no authority in the Act, however, for a state commission to require an incumbent LEC to exercise eminent domain authority or otherwise take any action to expand an existing pole, duct, conduit, or right-of-way. Indeed, this is inconsistent with the Eighth Circuit's interpretation of the Act that a requesting carrier may only obtain access to the incumbent LEC's "existing network -- not to a yet unbuilt superior one." Iowa Utils. Bd., 120 F.3d at 813 (emphasis in original).

Notwithstanding this absence of authority, the Commission's Decision requires U S WEST to exercise eminent domain powers to expand existing rights-of-way to accommodate requests for access by AT&T. Decision at 23, ¶ 215. The Agreement incorporates this requirement in Part A at § 47.4.4.). Because the Act does not require U S WEST to exercise its eminent domain powers on behalf of AT&T, the Commission's requirement that it do so exceeds its authority under the Act.

As the FCC itself acknowledges, the scope of U S WEST's authority over rights-of-way and easements is largely a matter of state law and specific contractual arrangements. First Report and Order ¶ 1179. Indeed, the FCC has found that the access obligations of Section 224(f) apply only when, "as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." Id. The right to use a public right of way normally is conveyed through specific permits, licenses, or easements, which are typically restricted to a given carrier, such as U S WEST. See Schenck Rebuttal Exh. T-1 at 13. Because a carrier has little or no authority to provide other carriers with access to rights-of-way, a new entrant desiring such access must obtain the authority to do so directly from the grantor or licensor. Id. at 14. The Commission cites no authority under Iowa Utilities law that permits or requires U S WEST to serve as an agent for AT&T in exercising any eminent

domain powers or otherwise negotiating access to a right-of-way for AT&T. In fact, under South Dakota law, "every corporation" formed under the laws of South Dakota or another state, "owning or operating lines of telegraph or telephone within [South Dakota] shall have power to acquire such real property as may be necessary for the construction and maintenance of its lines of telephone or telegraph by condemnation . . . " SDCL § 49-16-12. Thus, AT&T can exercise eminent domain rights on its own.

In its Decision, the Commission relies upon paragraphs 1179 and 1181 of the First Report and Order. These paragraphs do not support the Commission's conclusion. The court in U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004, addressed this issue and expressly rejected the Arizona commission's reliance upon the First Report and Order. The court concluded that the state commission had not justified mandating that an incumbent LEC exercise any powers of eminent domain on behalf of requesting carriers. The Court noted that "U S WEST is AT&T's competitor, not its broker" and stated that Section 224 of the Act, which the FCC had cited in the First Report and Order, provided no support for the proposition that incumbent LECs must routinely exercise eminent domain authority on behalf of requesting carriers. Jennings, 46 F. Supp. 2d at 1018 (remanding the issue to the state commission for reconsideration).

In its Decision, the Commission also limited U S WEST's ability to reserve space in its own poles, ducts, conduits, and rights-of-way. Decision at 27, ¶ 52. Citing paragraph 1179 of the First Report and Order, the Commission stated that U S WEST "may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business. . . . U S WEST shall provide nondiscriminatory access on a first come, first served basis." Id. The Agreement incorporates the Commission's requirement at Part A, § 11.2. The Court should declare that this ruling, too, exceeds the Commission's authority. The prohibition against reserving space for its own needs ignores the fact that U S WEST must keep a certain level of spare capacity available for maintenance and administrative purposes. Lehner Direct (No. 34) at 254. In order to ensure uninterrupted service to its customers,

U S WEST must have spare facilities available to serve as a "backup" should a given facility become inoperative. Id.

Because the Commission imposed obligations beyond its authority and ignored U S WEST's own network planning requirements, the Commission's Decision violates the Act.

H. The Commission's Decision Permitting AT&T to Establish Only One Point of Interconnection Per LATA Violates the Act.

The Commission found that AT&T may not be required to establish one point of interconnection for exchange of traffic within each local calling area. Decision at 71, ¶ 38; Agreement, Attach. 4, § 2.2.

Consistent with paragraph 553 of the First Report and Order, U S WEST generally agreed to mid-span meet point arrangements for the purposes of interconnection. Lehner Direct (No. 34) at 126. However, the FCC did not address the question of the distance an incumbent LEC may be required to build to a meet point. As a reasonable limitation on that obligation, a carrier should be required to build no more than one mile of facilities to the meet point, and in no case more than one-half the distance to the jointly provided facilities. Id.

In addition, an incumbent LEC's duty to interconnect requires that it provide "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A) (emphasis added). Thus, an incumbent LEC's duty to interconnect is not limitless; rather, it need only provide interconnection to allow the requesting carrier to either provide "telephone exchange service" or "exchange access."

The Eighth Circuit has defined telephone exchange service as "local service, that is, 'service within a telephone exchange, or within a system of exchanges within the same area that operates as a single exchange, or a comparable service.'" Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068, 1072 n.3 (8th Cir. 1997) (quoting 47 U.S.C. § 153(47)) (emphasis added). Similarly, the FCC has determined that a requesting carrier "may obtain

interconnection pursuant to Section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange." First Report and Order ¶ 191. Thus, a requesting carrier may interconnect in a given local exchange for the purpose of providing exchange service in that same exchange (i.e., for the purpose of terminating calls originating from the requesting carrier's customers that reside in the same exchange in which the requesting carrier has interconnected). There is nothing in the Act to suggest that a requesting carrier may interconnect in one local exchange area for the purpose of providing exchange service in other local exchanges.

Requesting carriers may also obtain interconnection under Section 251(c) for exchange access. Exchange access is "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services,' that is, 'service between stations in different exchange areas for which there is made a separate charge.'" Competitive Telecommunications Ass'n, 117 F.3d at 1071 n.3 (citing 47 U.S.C. §§ 153(16), (48)). However, the FCC has determined in the context of interconnection for toll traffic that a requesting carrier "may not obtain interconnection pursuant to Section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if [the carrier] does not offer exchange access services to others." First Report and Order ¶ 191. Thus, in order to interconnect for the purpose of originating or terminating toll calls (i.e., to provide exchange access), a requesting carrier must interconnect in the very local exchange in which it intends to originate or terminate such calls, regardless of whether the requesting carrier is providing local service in a different local exchange.

Despite these limitations, the Agreement does not require that AT&T have a point of interconnection ("POI") in each local calling area in which it offers facilities-based local telecommunications service. Instead, it permits AT&T to have a single POI for an entire local access and transport area ("LATA"). Agreement, Attach. 4, § 2.2.

Nothing in the Act allows a requesting carrier to establish a single point of interconnection in a given LATA and thereby provide local service throughout that LATA, regardless of how many local calling areas exist within the LATA. A given LATA will typically encompass many local calling areas. An agreement that permits a requesting carrier to establish a single POI per LATA for the purpose of providing "local" service throughout the LATA therefore violates Section 251(c)(2)(A) of the Act.[20] The Court should declare this provision unlawful.

I. The Agreement Imposes Additional Obligations That Are Contrary to the Act.

1. Liability for Lost Profits and Punitive Damages

The Commission determined that under the Agreement there should be "no liability to either party for indirect, incidental, special, or consequential damages." Decision at 4, ¶ 18. Notwithstanding this ruling, the Commission also found, in the same paragraph, that "parties shall be liable for lost profits." Id. These two findings are internally inconsistent because lost profits are consequential damages. See e.g. Diamond Surface v. State Cement Plant, 541 NW2d 155, 161 (SD 1996); Hagen v. Triple U Enterprises, Inc., 388 NW2d 523, 526 (SD 1986). The Commission correctly ruled that the parties are not liable for consequential damages. Consistency requires that the proposed liability for lost profits be stricken.

The Commission also found that an arbitrator may award punitive damages under the Agreement. Reconsideration Order at 5. Under the Act, however, the Commission has no authority to even address this issue. Congress designed the Act to encourage new entrants and incumbent LECs to reach interconnection agreements through negotiations. Accordingly,

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[20] U S WEST also presented substantial evidence that permitting AT&T to establish only one POI per LATA would impose additional unwarranted costs on U S WEST, primarily those related to intraoffice traffic to traffic that uses tandem switching, and would require U S WEST to augment its tandem network and backhaul AT&T's traffic across its network. See Wiseman Direct (No. 51) at 11; Wiseman Rebuttal (No. 58) at 12; Transcript (No. 79) at 493-95.

the Act requires incumbent LECs and requesting carriers to negotiate interconnection agreements in good faith, 47 U.S.C. § 251(c)(1), and requires parties first to attempt to negotiate their agreements before resorting to mediation or arbitration. 47 U.S.C. § 252(a). Further, the Act significantly restricts state commission authority to disapprove negotiated agreements. Compare 47 U.S.C. § 252(e)(2)(A) with 47 U.S.C. § 252(e)(2)(B) (standards that apply to negotiated and arbitrated agreements). Consistent with this goal of encouraging negotiation of as many terms of an agreement as possible, the Act expressly limits the issues that state commissions can impose upon parties in arbitration.

The Act provides that a state commission "shall limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and the response . . . ." 47 U.S.C. § 252(b)(4)(A). In resolving those "open" issues identified in the petition and response, the state commission has authority to impose only those "conditions as required to implement" Section 252(c). 47 U.S.C. § 252(b)(4)(C). A state commission cannot impose any condition it believes may be desirable or beneficial to a new entrant for some competitive reason, or that a new entrant may desire because it is easier for them or saves them money. A state commission may only impose those conditions that are necessary to implement Section 252(c).

Section 252(c), in turn, carefully limits the types of conditions a state commission may impose. First, a state commission shall "ensure that [its] resolution and conditions meet the requirements of section 251," including valid FCC regulations. 47 U.S.C. § 252(c)(1). This authority is quite restricted: a state commission may only ensure that its resolution of open issues and any conditions it imposes do not conflict with the requirements of Section 251 and valid FCC regulations. Section 251 contains the obligations with which telecommunications carriers, local exchange carriers, and incumbent LECs must comply. The relevant obligations of an incumbent LEC are to provide (1) interconnection to its network on rates, terms and conditions that are just, reasonable and non-discriminatory, (2) access to unbundled elements of its network on rates, terms and conditions that are just, reasonable and non-discriminatory,

(3) resale of its retail services at wholesale rates, and (4) collocation of equipment necessary to interconnect or access unbundled network elements. Thus, Section 252(c)(1) does not give a state commission carte blanche to impose any contractual provisions it desires. It may only ensure that its resolution of open issues does not conflict with these core requirements of the Act. Thus, just as negotiations need only cover the incumbent LEC's statutory duties under Section 251, the Commission's power to impose conditions through arbitration is likewise limited.

Second, Section 252(c)(2) authorizes a state commission to perform its final essential task in arbitrations under the Act: to establish rates for interconnection, services, or network elements that comply with Section 252(d). 47 U.S.C. § 252(c)(2). Third, Section 252(c)(3) requires a state commission to establish an implementation schedule for the agreement, or a schedule for when various obligations in the agreement will be performed. In approving interconnection agreements, state commissions also may establish or enforce other requirements of existing state law. 47 U.S.C. § 252(e)(3).

This is the full extent of the Commission's arbitration authority to resolve "open" issues.[21] Tellingly, the Act provides no authority for a state commission to permit a punitive damages award.[22] Accordingly, the provisions of the Agreement permitting punitive damages violate the Act.

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[21] Sound policy arguments support this limited delegation of authority. First, Congress struck a delicate balance in the Act between the competing interests of new entrants and the incumbent LECs. New entrants are provided the means of entering the local telephone market without any barriers. Incumbent LECs, in turn, must comply with the obligations of Section 251(c). The Act does not permit new entrants to impose any contractual term they desire, nor does it require incumbent LECs to turn every aspect of their business over to new entrants. Second, state commissions, unlike the FCC, are not subject to congressional oversight. Thus, Congress clearly limited their role in this federal scheme to ensure that federal rights are preserved.

[22] Moreover, South Dakota law prohibits punitive damages arising from a breach of contract and provides that only a jury may award such damages. SDCL 21-3-2.

2. Aggregation of the Avoided Cost Discount Among All Resold Services

Section 251(c)(4) of the Act requires incumbent LECs to offer for resale at wholesale rates any telecommunications service the carrier provides at retail to subscribers who are not telecommunications carriers. 47 U.S.C. § 251(c)(4). Section 252(d)(3) of the Act provides that the state commission shall determine wholesale rates on the basis of the retail rates charged to subscribers for the telecommunications service requested, excluding the costs the incumbent avoids by reselling the service. 47 U.S.C. § 252(d)(3). The Commission found that the avoided cost discount (for purposes of pricing resold services) should be applied on an aggregate basis to all resold services, as opposed to establishing a separate discount for each relevant service. Decision at 24, ¶ 195. The Commission stated that U S WEST failed to provide a discount for all services that are subject to resale and to show that its disaggregated discounts were based on individual data collected by product or service. Id. The Commission's findings are clearly erroneous. U S WEST witnesses presented detailed cost information, including service-specific discounts, regarding each of the disaggregated discounts it proposed. Gude Direct (No. 39) at 13-15.

A composite discount rate fails to take into account the unique cost characteristics of each of the services U S WEST will provide for resale. As acknowledged by AT&T's own witness on avoided costs, "[t]he costs that will be avoided could vary and be different from service to service." Transcript (No. 79) at 944. Because that is the case, a proper avoided cost study must calculate discounts on a service-by-service basis. Indeed, the FCC rules specifically endorse separate discounts for services subject to resale. First Report and Order ¶ 916.

A primary danger of using a composite discount rate is that U S WEST may be prevented from recovering its costs for a service whose individual discount rate is below the composite rate. For example, before the Commission both parties agreed that the avoided costs of residential service would be below the 27.14% composite discount AT&T had

proposed. Applying the composite discount rate to residential service requires U S WEST to sell that service far below its actual costs. Moreover, the record fails to show that U S WEST will sell enough services with avoided costs above the composite rate to compensate for the shortfall it will suffer selling other services with avoided costs below the composite rate. In those instances in which services have avoided costs above the composite rate, it is unreasonable to assume that competitors will still purchase that service at resale, as opposed to self-provisioning it.

Accordingly, the Commission should not have imposed a composite (or aggregate) avoided cost discount rate. Only service-by-service discounts take into account the unique cost characteristics of each service. Because the aggregate discount the Commission imposed fails to reflect the actual avoided costs of different retail services for resale, the Agreement violates the Act.

3. Remedies Under the Agreement

The Commission ordered that the Agreement contain a provision that all remedies in the Agreement "shall be cumulative and not exclusive." Decision at 4, ¶ 18. This determination undermines the primacy of interconnection agreements. The Act itself is not self-executing. Rather, Congress established a detailed scheme to implement the Act's new rights and obligations. As Section 252 makes evident, the rights and obligations of the Act arise only after carriers have negotiated or arbitrated an interconnection agreement, and the state commission has approved that agreement under Section 252(e). Accordingly, as set forth above, the Act strongly favors negotiation of interconnection agreements, and requires incumbent LECs and requesting carriers to negotiate in good faith. See 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(a)-(b). The Act also limits the issues state commissions can decide in arbitrations. See 47 U.S.C. § 252(c).

Because the parties' agreement reflects their rights and obligations, a carrier's remedies must be confined to those set forth in the agreement, remedies that were either negotiated or

arbitrated. See Goldwasser v. Ameritech Corp., No. 97 C 6738, 1998 U.S. Dist. LEXIS 1467 at *32-33 (N.D. Ill. Feb. 3, 1998) ("Sections 251 and 252 require Ameritech to provide certain access to its facilities, but only when 'any requesting telecommunications carrier' seeks to enter their local market. These duties exist, therefore, only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition"). Because the parties' agreement controls their relationship, a state commission has no authority to permit any extra-contractual remedies. Accordingly, the Commission's Decision that remedies in the Agreement would be "cumulative" and not exclusive to the Agreement, Decision at 4, ¶ 18, violates the Act.

4. Negotiation of Third-Party Licenses on Behalf of AT&T

The Commission found that U S WEST may be required to negotiate third-party intellectual property rights on behalf of AT&T. Second Arbitration Order at 5, ¶¶ 8-9. As directed by the Commission, the parties incorporated this obligation in their Agreement. Part A, § 5.2.

If AT&T requests access to or use of a third-party's intellectual property, AT&T and not U S WEST should bear the burden of obtaining the permission. The Commission failed to recognize that U S WEST is not in a position to mandate that a third-party sell its property to anyone. AT&T should bear the responsibility of negotiating arrangements with third-party providers if it wishes to use the property of a third-party. As the Iowa Utilities court aptly noted, U S WEST is AT&T's competitor, "not its butler." Iowa Utils., 46 F. Supp. 2d at 1011. There is no legal authority for placing that responsibility upon U S WEST. Furthermore, as set forth above, the Commission has no authority to impose this condition under the Act. Accordingly, the Part A, § 5.2 of the Agreement violates the Act.

5. Customer Transfer Charge Limited to $5.00

The Commission ruled that when any resale customer is transferred to another carrier, a customer transfer charge of $5.00 applies. Decision at 22, ¶ 102. The Agreement

incorporates this requirement at Attachment 1, § 2.1. A customer transfer charge of $5.00 is plainly insufficient and is inconsistent with the record established before the Commission.

U S WEST's customer transfer charge is a nonrecurring charge that applies whenever a U S WEST end user account is transferred to a reseller. Lehner Direct (No. 34) at 120. If the reseller accesses U S WEST's Operational Support Systems in order to effect the transfer, the applicable charge reflects the cost of the use of the systems. Id. at 121. Because system development costs are recovered elsewhere, the charge only covers the costs incurred to transfer the service, including the costs to handle orders that "drop out" of the order system for a variety of reasons, such as incomplete or incorrect information provided by the carrier. Where the order drops out of the system, it must be handled manually, and the customer transfer charge covers this cost. Id.

Accordingly, U S WEST proposed a nonrecurring charge of $13.64 for a mechanized transfer and $22.20 for a manual transfer, which costs were supported by cost information provided by U S WEST. Decision at 22, ¶ 100 (citing Lehner Direct (No. 34) Ex. C at 5).

The Commission's Decision fails to distinguish between mechanized and manual transfer operations. In addition, there is no evidence that the "primary interexchange carrier" (or "PIC") transfer charge, upon which the Commission based its $5.00 charge, is related to the costs of customer transfer for local exchange carriers -- or even that the PIC is cost-based, as required by the Act. Accordingly, the Court should vacate the Commission's decision to limit the customer transfer charge to $5.00.

J. The Court Should Construe the Act and the Agreement to Avoid a Taking of U S WEST's Property Without Just Compensation.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. Amend. V. The Takings Clause applies to states through the Fourteenth Amendment of the United States Constitution. The Takings Clause prohibits taking private property for private use, regardless of just compensation. The challenged Commission orders will, if allowed to stand, effect an

uncompensated taking of U S WEST's property. The principle of constitutional avoidance therefore requires that the Court interpret the Act to prevent this result.

Courts must interpret statutes to avoid uncompensated takings to the extent possible. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 78-80, 80-82 (1982); Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1444-46 (D.C. Cir. 1994); TCI of North Dakota, Inc. v. Schriock Holding Co., 11 F.3d 812, 815 (8th Cir. 1993). To constitute "just" compensation for purposes of the Fifth Amendment, compensation must represent "the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." United States v. Miller, 317 U.S. 369, 373 (1943); United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002, 1006 (8th Cir. 1976).

If the Commission has effected an unauthorized taking of U S WEST's property by its interpretation of the Act, then this Court has the power to interpret that Act to avoid that result and declare such terms and conditions of the Agreement and Commission Decisions invalid. See Bell Atlantic, 24 F.3d at 1444; see also GTE Northwest Inc. v. Public Util. Comm'n of Ore., 900 P.2d 495, 504 (Or. 1995), cert. denied, 517 U.S. 1135 (1996). Through the exercise of its power to prevent such a taking, the Court may avoid exposing the public treasury to liability unforeseen by Congress. Bell Atlantic, 24 F.3d at 1444-45. That compensation remedies are available for any authorized takings does not divest this Court of jurisdiction to determine in the first instance "whether the orders under review were indeed duly authorized by law." Id. at 1444 n.1.

In Bell Atlantic, for example, various local telephone exchange carriers challenged FCC orders that required the carriers to "set aside a portion of their central offices" for physical collocation of interconnection-related equipment as demanded by competing access providers ("CAPs"). 24 F.3d at 1444. In response, the FCC claimed authority to order collocation through its authority to require carriers "to establish physical connections with

other carriers.'" Id. at 1444-45. The court held that the collocation rule "went too far" as a taking that exceeded the FCC's authority:

> Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions. The Commission's decision to grant CAPs the right to exclusive use of a portion of the petitioners' central offices directly implicates the Just Compensation Clause of the Fifth Amendment. . . . Of course the Clause prohibits only uncompensated takings, so long as the Tucker Act provides a subsequent action for redress, generally no constitutional question arises and the judicial policy of avoiding such questions may not be applied. But precedent instructs that the policy of avoidance should nonetheless take effect where "there is an identifiable class of cases in which application of a statute will necessarily constitute a taking."
>
> Where administrative interpretation of a statute creates such a class, use of a narrowing construction prevents unnecessary encroachment on Congress's exclusive powers to raise revenue and to appropriate funds

Bell Atlantic, 24 F.3d at 1445-46 (citations and footnotes omitted; emphasis added). Although "the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment," the public treasury remained at risk, compelling the Court to conclude that the FCC had exceeded its authority. Id.; see also GTE Northwest, 901 F.2d at 1551-53 (reversing the Oregon Public Utilities Commission's rule requiring incumbent carrier to permit the collocation of other carriers' equipment on its premises to prevent an uncompensated taking).

Accordingly, this Court should interpret the Act, the Commission's Decisions, and the Agreement to ensure that U S WEST's property is not taken without just compensation.

IV CONCLUSION

For the foregoing reasons, the Court should grant U S WEST the relief requested above and in its Complaint.

Dated: September 13, 1999

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BEFORE THE

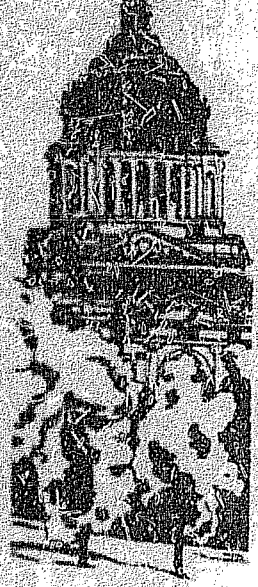
PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

IN THE MATTER OF AT&T'S PETITION FOR ARBITRATION WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.	)	DOCKET NO. TC96-184

DIRECT TESTIMONY OF

JON LEITNER

JANUARY 17, 1997



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Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

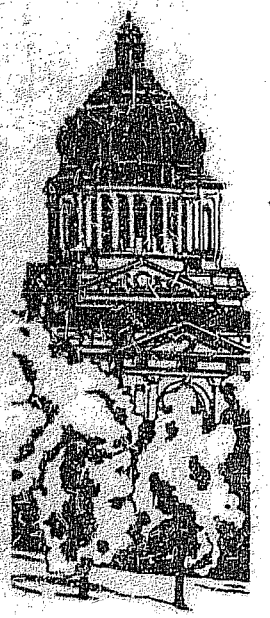
Enclosed each of you will find a copy of Commissioners' Answer to Complaint in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.



South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

June 24, 1999

Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find a courtesy copy of Commissioners' Answer to Complaint in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Rolayne Ailts Wiest

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Special Assistant Attorney General

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Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Michele M. Farris
Marlette Fischbach
Shirleen Fugitt
Lewis Hammond
Leni Healy
Camron Hoseck
Lisa Hull
Dave Jacobson
Katie Johnson
Bob Knadle
Delaine Kolbo
Jeffrey P. Lorensen
Charlene Lund
Terry Norem
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation Defendants.	)	Civ. No. 99-5024 COMMISSIONERS' ANSWER TO COMPLAINT

COME NOW, Defendants James A. Burg, Chairman of the Public Utilities Commission of the State of South Dakota, Pam Nelson, Commissioner of the Public Utilities Commission of the State of South Dakota, and Laska Schoenfelder, Commissioner of the Public Utilities Commission of the State of South Dakota (Commissioners), and for their Answer to the Complaint filed herein, allege as follows:

1. Commissioners assert that the Complaint fails to state a cause of action or claim of relief against Commissioners for which relief may be granted and accordingly, the Complaint should be dismissed.

2. The Commissioners deny each and every allegation of the Complaint except as otherwise specifically admitted.

3. Commissioners admit on information and belief the allegations in Paragraph 1.

4. Commissioners admit that James A. Burg, Pam Nelson, and Laska Schoenfelder are the duly elected Commissioners of the Public Utilities Commission of the State of South Dakota as alleged in Paragraph 2. To the extent that the remaining allegations in Paragraph 2 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 2.

5. Commissioners admit the allegations in the first two sentences of Paragraph 3. To the extent that the remaining allegations in Paragraph 3 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required.

6. Commissioners admit on information and belief the allegations in the first two sentences of Paragraph 4. To the extent that the remaining allegations in Paragraph 4 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is require.

7. Commissioners deny Paragraph 5.

8. To the extent that the allegations in Paragraph 6 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. Commissioners admit the individual defendants reside in this district as alleged in Paragraph 6. Commissioners admit on information and belief that the corporate defendants conduct business in this district and the events giving rise to U S WEST's claims occurred in this district as alleged Paragraph 6. The Commissioners deny any remaining allegations in Paragraph 6.

9. Commissioners admit the Telecommunications Act of 1996 was enacted in February 1996, as alleged in Paragraph 7. To the extent that the remaining allegations in Paragraph 7 purport to characterize the Act and Congress' legislative purpose and intent, Commissioners respectfully refer the Court to the Act as the best available evidence of congressional purpose and intent and for its content and terms and deny all allegations in Paragraph 7 inconsistent with the Act. Commissioners deny any remaining allegations of Paragraph 7.

10. To the extent the allegations in Paragraph 8 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 8 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 8.

11. To the extent the allegations in Paragraph 9 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 9 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 9.

12. The Commissioners admit Paragraph 10.

13. To the extent the allegations in Paragraph 11 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 11 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 11.

14. To the extent the allegations in Paragraph 12 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny

all allegations in Paragraph 12 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 12.

15. The Commissioners admit the allegations in sentence 2 of Paragraph 13. To the extent the remaining allegations in Paragraph 13 purport to characterize the Act and the Commission's Order, the Commissioners respectfully refer the Court to the Act and the Order for their contents and terms and deny all allegations in Paragraph 13 inconsistent with the Act and the Order. To the extent that the remaining allegations in Paragraph 13 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. Commissioners deny any remaining allegations in Paragraph 13.

16. To the extent the allegations in Paragraph 14 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 14 inconsistent with the Act. To the extent that the remaining allegations in Paragraph 14 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 14.

17. To the extent the allegations in Paragraph 15 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 15 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 15.

18. Commissioners admit that the FCC issued its First Report and Order on August 8, 1996, as alleged in Paragraph 16. The Commissioners admit that the Eighth Circuit issued its decision on the appeal of the FCC's First Report and Order on July 18, 1997 and a subsequent order on October 14, 1997. To the extent that the remaining allegations in Paragraph 16 purport to characterize the FCC's Order and the Eighth Circuit's Orders, the Commissioners respectfully refer the Court to the FCC's Order and the Eighth Circuit's Orders for their content and terms and deny all allegations in Paragraph 16 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 16.

19. Commissioners admit that the Supreme Court issued a decision on January 25, 1999, as alleged in Paragraph 17. To the extent that the remaining allegations in Paragraph 17 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 17 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 17.

20. To the extent that the allegations in Paragraph 18 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 18 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 18.

21. To the extent that the allegations in Paragraph 19 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 19 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 19.

22. To the extent that the allegations in Paragraph 20 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 20 inconsistent therewith. To the extent that the allegations in Paragraph 20 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 20.

23. To the extent that the allegations in Paragraph 21 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 21 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 21.

24. To the extent that the allegations in Paragraph 22 purport to characterize the Supreme Court's decision, the Commissioners respectfully refer the Court to the Supreme Court's decision for its content and terms and deny all allegations in Paragraph 22 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 22.

25. Commissioners admit on information and belief the allegations in Paragraph 23.

26. Commissioners admit the allegations of Paragraph 24.

27. Commissioners admit the allegations of Paragraph 25.

28. Commissioners admit the allegations of Paragraph 26.

29. Commissioners admit the allegations of Paragraph 27.

30. Commissioners deny the allegations of Paragraph 28.

31. Commissioners deny the allegations of Paragraph 29.

32. To the extent that the allegations in Paragraph 30 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 30 inconsistent therewith. To the extent that the remaining allegations in Paragraph 30 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 30 inconsistent

therewith. To the extent that the remaining allegations in Paragraph 30 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 30.

33. To the extent that the allegations in Paragraph 31 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 31 inconsistent therewith. To the extent that the remaining allegations in Paragraph 31 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 31 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 31.

34. To the extent that the allegations in Paragraph 32 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 32 inconsistent therewith. To the extent that the remaining allegations in Paragraph 32 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 32 inconsistent therewith. To the extent that the remaining allegations in Paragraph 32 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 32.

35. To the extent that the allegations in Paragraph 33 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 33 inconsistent therewith. To the extent that the remaining allegations in Paragraph 33 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 33 inconsistent therewith. To the extent that the remaining allegations in Paragraph 33 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 33.

36. To the extent that the allegations in Paragraph 34 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 34 inconsistent therewith. To the extent that the remaining allegations in Paragraph 34 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 34 inconsistent therewith. To the extent that the remaining allegations in Paragraph 34 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no

response is required. The Commissioners deny any remaining allegations in Paragraph 34.

37. To the extent that the allegations in Paragraph 35 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 35 inconsistent therewith. To the extent that the remaining allegations in Paragraph 35 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 35 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 35.

38. To the extent that the allegations in Paragraph 36 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 36 inconsistent therewith. To the extent that the allegations in Paragraph 36 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 36 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 36.

39. To the extent that the allegations in Paragraph 37 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 37 inconsistent therewith. To the extent that the remaining allegations in Paragraph 37 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 37 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 37.

40. To the extent that the allegations in Paragraph 38 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 38 inconsistent therewith. To the extent that the remaining allegations in Paragraph 38 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 38 inconsistent therewith. To the extent that the remaining allegations in Paragraph 38 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 38.

41. To the extent that the allegations in Paragraph 39 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 39 inconsistent therewith. To the extent that the allegations in Paragraph 39 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the

record for its contents and terms and deny all allegations in Paragraph 39 inconsistent therewith. The Commissioners deny any remaining allegations of Paragraph 39.

42. To the extent that the allegations in Paragraph 40 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 40 inconsistent therewith. To the extent that the remaining allegations in Paragraph 40 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 40.

43. To the extent that the allegations in Paragraph 41 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 41 inconsistent therewith. To the extent that the allegations in Paragraph 41 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 41 inconsistent therewith. To the extent that the remaining allegations in Paragraph 41 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 41.

44. To the extent that the allegations in Paragraph 42 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 42 inconsistent therewith. To the extent that the allegations in Paragraph 42 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 42 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 42.

45. To the extent that the allegations in Paragraph 43 purport to characterize the Commission's Order, the Commissioners respectfully refer the Court to the Commission's Order for its content and terms and deny all allegations in Paragraph 43 inconsistent therewith. To the extent that the allegations in Paragraph 43 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 43 inconsistent therewith. To the extent that the remaining allegations in Paragraph 43 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 43.

46. As to Paragraph 44, the Commissioners incorporate Paragraphs 1 though 45 of this Answer by reference as if set forth fully herein.

47. To the extent the allegations in Paragraph 45 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 45 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 45.

48. To the extent the allegations in Paragraph 46 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 46 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 46.

49. To the extent that the allegations in Paragraph 47 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. To the extent that the remaining allegations in Paragraph 47 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 47.

50. As to Paragraph 48, the Commissioners incorporate Paragraphs 1 though 49 of this Answer by reference as if set forth fully herein.

51. To the extent the allegations in Paragraph 49 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 49 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 49.

52. To the extent the allegations in Paragraph 50 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 50 inconsistent with the Interconnection Agreement. To the extent that the remaining allegations are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 50.

53. To the extent that the allegations in Paragraph 51 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 51.

54. As to Paragraph 52, the Commissioners incorporate Paragraphs 1 though 53 of this Answer by reference as if set forth fully herein.

55. To the extent the allegations in Paragraph 53 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the

Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 53 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 53 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 53 inconsistent with the Act. To the extent that the allegations in Paragraph 53 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 53.

56. To the extent the allegations in Paragraph 54 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 54 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 54 purport to quote from or characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 54 inconsistent with the Act. To the extent that the allegations in Paragraph 54 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 54.

57. To the extent that the allegations in Paragraph 55 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 55.

58. As to Paragraph 56, the Commissioners incorporate Paragraphs 1 though 57 of this Answer by reference as if set forth fully herein.

59. To the extent the allegations in Paragraph 57 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and denies all allegations in Paragraph 57 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 57.

60. To the extent that the allegations in Paragraph 58 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegations in Paragraph 58 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 58.

61. To the extent the allegations in Paragraph 59 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 59 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 59.

62. To the extent that the allegations in Paragraph 60 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 60.

63. As to Paragraph 61, the Commissioners incorporate Paragraphs 1 though 62 of this Answer by reference as if set forth fully herein.

64. To the extent the allegations in Paragraph 62 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 62 inconsistent with the Act. To the extent that the allegations in Paragraph 62 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 62.

65. To the extent the allegations in Paragraph 63 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 63 inconsistent with the Interconnection Agreement. To the extent that the allegations in Paragraph 63 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 63.

66. To the extent that the allegations in Paragraph 64 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 64.

67. As to Paragraph 65, the Commissioners incorporate Paragraphs 1 though 66 of this Answer by reference as if set forth fully herein.

68. To the extent the allegations in Paragraph 66 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 66 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 66.

69. To the extent the allegations in Paragraph 67 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 67 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 67.

70. To the extent the allegations in Paragraph 68 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 68 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 68.

71. To the extent that the allegations in Paragraph 69 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 69.

72. As to Paragraph 70, the Commissioners incorporate Paragraphs 1 though 71 of this Answer by reference as if set forth fully herein.

73. To the extent the allegations in Paragraph 71 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 71 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 71.

74. To the extent the allegations in Paragraph 72 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 72 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 72 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 72 inconsistent with the Act. The Commissioners deny any remaining allegations in Paragraph 72.

75. To the extent the allegations in Paragraph 73 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 73 inconsistent with the Interconnection Agreement. To the extent that the allegations in Paragraph 73 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 73.

76. As to Paragraph 74, the Commissioners incorporate Paragraphs 1 though 75 of this Answer by reference as if set forth fully herein.

77. To the extent the allegations in Paragraph 75 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and denies all allegations in Paragraph 75 inconsistent with the Interconnection Agreement. The Commissioners deny any remaining allegations in Paragraph 75.

78. To the extent that the allegations in Paragraph 76 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 76.

79. To the extent that the allegations in Paragraph 77 are conclusions of law, the Commissioners respectfully refer all questions of law to the Court, and no response is required. The Commissioners deny any remaining allegations in Paragraph 77.

80. As to Paragraph 78, the Commissioners incorporate Paragraphs 1 through 79 of this Answer by reference as if set forth fully herein.

81. To the extent the allegations in Paragraph 79 purport to characterize the Interconnection Agreement, the Commissioners respectfully refer the Court to the Interconnection Agreement for its contents and terms and deny all allegations in Paragraph 79 inconsistent with the Interconnection Agreement. To the extent the allegations in Paragraph 79 purport to characterize the Act, the Commissioners respectfully refer the Court to the Act for its contents and terms and deny all allegations in Paragraph 79 inconsistent with the Act. To the extent that the allegations in Paragraph 79 purport to characterize the record before the Commission, the Commissioners respectfully refer the Court to the record for its contents and terms and deny all allegation in Paragraph 79 inconsistent therewith. The Commissioners deny any remaining allegations in Paragraph 79.

82. As to Paragraph 80, the Commissioners incorporate Paragraphs 1 through 81 of this Answer by reference as if set forth fully herein.

83. To the extent the allegations in Paragraph 81 purport to characterize the United States Constitution, the Commissioners respectfully refer the Court to the Constitution for its contents and terms and deny all allegations in Paragraph 81 inconsistent with the Constitution. The Commissioners deny any remaining allegations in Paragraph 81.

84. The Commissioners deny the allegations of Paragraph 82.

85. The Commission deny the allegations of Paragraph 83.

86. The Commission deny the allegations of Paragraph 84.

87. The Commissioners deny that U S WEST is entitled to any of the relief it requests.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. U S WEST is not entitled to relief under 42 U.S.C. § 1983.

3. The Commissioners are entitled to absolute or qualified immunity.

4. This action is barred in whole, or in part, by the Eleventh Amendment to the United States Constitution.

5. The Commissioners acted under the regulatory scheme established by the United States Congress and the Federal Communications Commission in approving the Interconnection Agreement.

6. To the extent that U S WEST's Complaint raises constitutional claims, those claims are not ripe for adjudication.

7. The individual Commissioners cannot effect a taking.

8. U S WEST's claims for injunctive relief are barred by the doctrine of waiver, estoppel and laches.

WHEREFORE, the Commissioners pray for the following relief:

1. That this action be dismissed with prejudice;

2. That the Court award the Commissioners their costs and disbursements in this action including reasonable attorney fees in addition to other and further relief as is just and equitable.

Dated at Pierre, South Dakota, this 24th day of June, 1999.

Robayne Mills West
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Commissioners' Answer to Complaint were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 24th day of June, 1999.

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June 24, 1999

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Clerk of Courts
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and LaskA Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of U S WEST Communications, Inc.'s Response to United States of America's Motion to Intervene and Certificate of Service.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

COPY
Thomas J. Welk

TJW/vjj
Enclosure
cc: Rolayne Ailts Wiest
John Lovald
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1875 Lawrence St., Suite 1575
Denver, CO 80202

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST Communications, Inc.'s Response to United States of America's Motion to Intervene and Certificate of Service. This is intended as service by mail upon you.

Sincerely yours,
BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosures
cc: Alex Duarte
Larry Toll
Jon Lehner

RECE
JUL 0 1
SOUTH DAKOTA
UTILITIES COM

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

U S WEST COMMUNICATIONS, INC.'S RESPONSE TO UNITED STATES OF AMERICA'S MOTION TO INTERVENE

U S WEST Communications, Inc., through the undersigned attorneys, does not object to the granting of the United States of America's Motion to Intervene dated June 14, 1999.

Dated this 24th day of June, 1999.

Thomas Welk
Tamara A. Wilka
BOYCE, MURPHY, MCDOWELL
& GREENFIELD
P.O. Box 5015
Sioux Falls, SD 57117-5015
Telephone: (605) 336-2424

Michael C. Thompson
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, Colorado 80202
Telephone: (303) 672-2700
Attorneys for U S WEST Communications, Inc.

CERTIFICATE OF SERVICE

I, Thomas J. Welk, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 24th day of June, 1999, true and correct copies of the foregoing U S WEST Communications, Inc.'s Response to the United States of America's Motion to Intervene were sent by U S mail, postage paid, to the following at the following addresses:

Rolayne Ailts Wiest, General Counsel
S.D. Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

John S. Lovald
Olinger, Lovald, Robbennolt & McCahren
117 East Capitol
P.O. Box 66
Pierre, SD 57501-0066

Maria Arias-Chapleau
Rebecca B. DeCook
AT&T Law Department
1875 Lawrence St., Suite 1575
Denver, CO 80202

Michael D. Warden
Christopher D. Moore
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Bonnie P. Ulrich
Assistant United States Attorney
United States Dept. of Justice
P.O. Box 5073
Sioux Falls, SD 57117-5073

Thomas J. Welk

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell R. Greenfield
David J. Vickers
Gary J. Pashby
Vance R.C. Goldammer
Thomas J. Welk
Terry N. Prendergast
James E. McMahon
Michael S. McKnight
Gregg S. Greenfield
Roger A. Sudbeck

101 North Phillips Avenue, Suite 600
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

[illegible]

June 30, 1999

RECEIVED

JUL 0 6 1999

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and two copies of Motion for Admission Pro Hac Vice and Order for Michael Thompson together with a check for $100 for filing fee. Please file stamp the second copy and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosure
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5024

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

STATEMENT OF MOVANT

I, Thomas J. Welk, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Michael Thompson, attorney admitted to practice in the District of Colorado, but not admitted to the Bar of the Court, who will be counsel for Plaintiff U S WEST Communications, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: June 30, 1999

By: _____
Thomas J. Welk

STATEMENTS OF PROPOSED ADMITTEES

I, Michael C. Thompson, am currently a member in good standing of the U.S. District Court for the District of Colorado, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

6/24/99
Date

Michael C. Thompson
Type/Print Name

Michael C. Thompson
Signature

U S WEST Communications, Inc.
1801 California Street
Suite 1500
Denver, CO 80202

ORDER

It is hereby ORDERED that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Court, Room 220, Federal Building, 400 South Phillips Avenue, Sioux Falls, SD 57104-6851.

Dated this _____ day of June, 1999

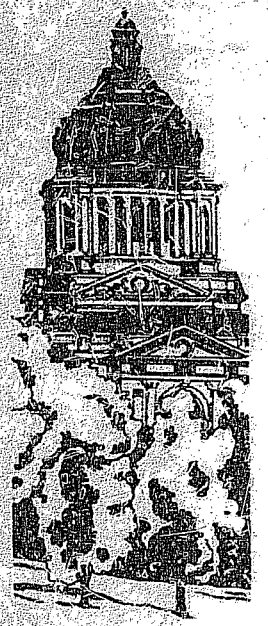
BY THE COURT:

_____
United States District Judge

ATTEST:

Joseph Haas, Clerk
U.S. District Court

By:_____
Deputy



South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

July 6, 1999

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Mr. Haas:

Enclosed for filing you will find original and copy of Commissioners' Response to the United States of America's Motion to Intervene with reference to the above captioned matter.

Very truly yours,

Jeffrey J. Koerselman
Legal Intern

JJK:dk
Enc.

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
FAX (605)773-3225

Consumer Hotline
1-800-332-1782

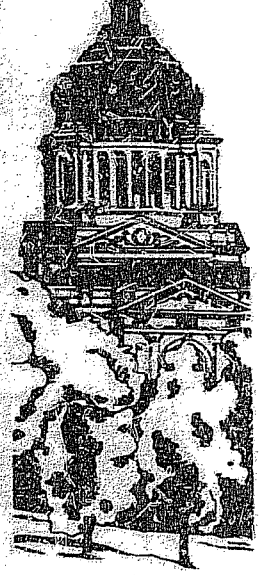
TTY Through
Relay South Dakota
1-800-877-1113

Internet Website
www.puc.state.sd.us/puc/

Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Michele M. Farris
Marlette Fischbach
Shirleen Fugin
Lewis Hammond
Leni Healy
Camron Hoseck
Lisa Hull
Dave Jacobson
Katie Johnson
Bob Knadle
Delaine Kolbo
Jeffrey P. Lorenzen
Charlene Lund
Terry Morum
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

July 6, 1999

Mr. Alex Duarte
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
P. O. Box 66
Pierre, SD 57501-0066

Mr. Thomas J. Welk
Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Ms. Maria Arias Chapleau
Ms. Rebecca B. DeCook
Attorneys at Law
AT&T
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Mr. Michael D. Warden
Mr. Christopher D. Moore
Attorneys at Law
Sidley & Austin
1722 Eye Street N.W.
Washington, D.C. 20006

Ms. Bonnie P. Ulrich
Assistant United States Attorney
United States Department of Justice
P. O. Box 5073
Sioux Falls, SD 57117-5073

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

Enclosed each of you will find a copy of Commissioners' Response to the United States of America's Motion to Intervene in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Jeffrey J. Koerselman
Legal Intern

JJK:dk
Enc

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
FAX (605)773-3225

Consumer Hotline
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Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Michele M. Farris
Mariette Fischbach
Shirleen Fugitt
Lewis Hammond
Leni Healy
Camron Hoseck
Lisa Hull
Dave Jacobson
Kazie Johnson
Bob Knadle
Delaine Kolbo
Jeffrey P. Lorensen
Charlene Lund
Terry Norum
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

June 24, 1999

Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 310
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find a courtesy copy of Commissioners' Response to the United States of America's Motion to Intervene in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Jeffrey J. Koerselman
Legal Intern

JJK:dk
Enc.

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

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Jim Burg
Chairman
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Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5024

COMMISSIONERS' RESPONSE TO THE UNITED STATES OF AMERICA'S MOTION TO INTERVENE

Defendants James A. Burg, Chairman of the Public Utilities Commission of the State of South Dakota, Pam Nelson, Commissioner of the Public Utilities Commission of the State of South Dakota, and Laska Schoenfelder, Commissioner of the Public Utilities Commission of the State of South Dakota, through the undersigned representative, do not object to the granting of the United States of America's Motion to Intervene dated June 14, 1999.

Dated at Pierre, South Dakota, this 6th day of July, 1999.

Jeffrey J. Koenselman
Legal Intern
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Commissioners' Response to the United States of America's Motion to Intervene were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 6th day of July, 1999.

Mr. Alex Duarte
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

Mr. Thomas J. Welk
Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Mr. Michael D. Warden
Mr. Christopher D. Moore
Attorneys at Law
Sidley & Austin
1722 Eye Street N.W.
Washington, D.C. 20006

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
P. O. Box 66
Pierre, SD 57501-0066

Ms. Maria Arias-Chapleau
Ms. Rebecca B. DeCook
Attorneys at Law
AT&T Communications of the Midwest, Inc.
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Ms. Bonnie P. Ulrich
Assistant United States Attorney
United States Department of Justice
P. O. Box 5073
Sioux Falls, SD 57117-5073

Jeffrey J. Hoersehman
Legal Intern

FILED
JUL 15
RECEIVED
JUL 15 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5014

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

STATEMENT OF MOVANT

I, Thomas J. Welk, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Michael Thompson, attorney admitted to practice in the District of Colorado, but not admitted to the Bar of the Court, who will be counsel for Plaintiff U S WEST Communications, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: June 30, 1999

By: Thomas J. Welk

STATEMENTS OF PROPOSED ADMITTEES

I, Michael C. Thompson, am currently a member in good standing of the U.S. District Court for the District of Colorado, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

6/24/99
Date

Michael C. Thompson
Type/Print Name

Signature

U S WEST Communications, Inc.
1801 California Street
Suite 1500
Denver, CO 80202

ORDER

It is hereby ORDERED that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Court, Room 220, Federal Building, 400 South Phillips Avenue, Sioux Falls, SD 57104-6851.

Dated this 12th day of July, 1999

BY THE COURT:

United States District Judge

ATTEST:

Joseph Haas, Clerk
U.S. District Court

By Patricia [illegible]
Deputy

[illegible]
7-13-99

FILED
JUL 12 1999

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

RECEIVED
JUL 13 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC.,	)	CIV. 99-5024
Plaintiff,	)	
vs.	)	
JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC.,	)	ORDER GRANTING MOTION TO INTERVENE
Defendants.	)	

On June 14, 1999, the United States of America moved to intervene in this action. No party has objected to this motion. Having reviewed the record and authority presented by the United States, the Court finds that intervention is proper. Accordingly, it is hereby

ORDERED that the United States' motion to intervene is granted.

Dated July 12, 1999.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES SENIOR DISTRICT JUDGE

NOTICE OF ENTRY
The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 7-13-99

U.S. Department of Justice

Civil Division, Federal Programs Branch
901 E St., N.W., Room 927, P.O. Box [illegible]
Washington, DC 20044

David T. Zaring
Trial Attorney

Telephone: (202) [illegible]
Facsimile: (202) [illegible]

August 4, 1999

BY FEDERAL EXPRESS

RECEIVED
AUG 06 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Clerk of the Court
United States District Court for the
District of South Dakota
Federal Building
515 Ninth Street
Rapid City, SD 57701

Re: US West Communications, Inc. v. Hays, et al., CIV 99-5023

Dear Sir or Madam:

Please find enclosed for filing in the above captioned cases an ORIGINAL and COPY of the following document: FCC's & United States' Notice of Appearance of Counsel.

I have also enclosed an extra copy of each document to please be file-stamped and returned to me in the attached self-addressed, postage paid envelope.

Sincerely,

David T. Zaring

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U.S. WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

vs.

JAMES A. BURG, et al.,

Defendants.

CIV99-5014

FCC's & UNITED STATES' NOTICE OF APPEARANCE OF COUNSEL

PLEASE TAKE NOTICE of the following appearance of counsel for Intervenor United States of America and for the Federal Communications Commission.

David T. Zaring, Trial Attorney, U.S. Department of Justice, will be counsel for the United States and the FCC. Pleadings and correspondence may be directed to Mr. Zaring at:

Mailing address:
Trial Attorney
USDOJ Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-4964
fax: (202) 616-8202

Federal Express Address:
Trial Attorney
USDOJ Civil Division
Federal Programs Branch
901 E Street, N.W., Rm. 907
Washington, D.C. 20004

Respectfully submitted,

PHILIP D. BARTZ
Acting Assistant Attorney General

KAREN E. SCHREIER
United States Attorney

BONNIE P. ULRICH
Assistant United States Attorney
P.O. Box 5073
Sioux Falls, South Dakota 57117-5073
(605)330-4400

DENNIS G. LINDER
Director, Federal Programs Branch
THEODORE C. HUNT
Assistant Branch Director
DAVID ZARING
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883, Room 907
Washington, D.C. 20044
Telephone: (202) 514-4964
Facsimile: (202) 616-8202

Attorneys for the United States of America & FCC

Date: August 4, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing FCC's & United States' Notice of Appearance of Counsel were served this 4th day of August, 1999, by first-class mail upon the following:

Thomas J. Welk
Tamara A. Wilka
Boyce, Murphy McDowell & Greenfield
P.O. Box 5015
Sioux Falls, SD 57117-5015

Roylane Wiest
Public Utilities Commission General Counsel
500 E. Capitol
Pierre, SD 57501

Norton Cutler
Todd Lundy
Blair A. Rosenthal
U S West Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

John S. Lovald
Oligner, Lovald, Robbennolt & McCahren
P.O. Box 66
Pierre, SD 57501

Michael D. Warden
Christopher D. Moore
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Bonnie P. Ulrich
Assistant United States Attorney
P.O. Box 5073
Sioux Falls, South Dakota 57117-5073

DAVID T. EARING

FILED
AUG 13 1999

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

vs.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC.,

Defendants.

CIV. 99-5024

RECEIVED
AUG 13 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

ORDER APPROVING STIPULATION

On June 4, 1999, the parties filed a Joint Case Management Statement. Accordingly, it is hereby

ORDERED that the stipulation is approved.

IT IS FURTHERED ORDERED that U S WEST shall file its initial brief on the merits of its affirmative claims, not to exceed 50 pages, on or before September 14, 1999. The Commissioners and AT&T will then file response briefs, again not to exceed 50 pages, on or before November 2, 1999. U S WEST may file an optional reply brief limited to 25 pages on or before December 7, 1999.

Dated August 12, 1999.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES SENIOR DISTRICT JUDGE

NOTICE OF ENTRY

The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 8-13-99

CLERK

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell R. Greenfield
David J. Vickers
Gary J. Pashby
Vance R.C. Goldammer
Thomas J. Welk
Terry N. Prendergast
James E. McMahon
Michael S. McKnight
Gregg S. Greenfield
Roger A. Sudbeck

101 North Phillips Avenue, Suite 601
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

September 8, 1999

RECEIVED
SEP 10
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

The Honorable Karen Schreier
515 9th Street #318
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and [illegible] Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest
United States Dist. Ct. - Western Div. Civ. No. 99-5024
Our File No. 2104.007

Dear Judge Schreier:

It is our understanding that you have recently been assigned to this case. We are in the process of preparing our opening brief, which will be filed next Tuesday. In checking with Judge Battey's law clerk (who we understand spoke with you), it is our understanding that the 50-page limitation applies only to our brief and not the appendix. If this is incorrect, please let us know as soon as possible.

Thank you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Welk

TAW/vjj
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner
Kara Sacilotto

UNITED STATES DISTRICT COURT
District of South Dakota
515 Ninth Street, Room 317
Rapid City, South Dakota 57701

RICHARD H. BATTEY
United States Senior District Judge

RECEIVED
SEP 1 4
SOUTH DAKOTA
UNITED STATES DISTRICT COURT

September 13, 1999

FILED
SEP 13 1999

Tamara A. Wilka
Boyce, Murphy, McDowell & Greenfield, L.L.P.
101 North Phillips Avenue, Suite 600
Sioux Falls, SD 57104

Re: U S West Communications, Inc. v. Burg, et al.
CIV99-5024

Dear Ms. Wilka:

In response to your letter to Judge Schreier, the appendix does not count in the page limitation.

Very truly yours,

Richard H. Battey
United States Senior District Judge

RHB:kj
cc: Michael Meyers
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
Jon Lehner
Kara Sacilotto

UNITED STATES DISTRICT COURT
District of South Dakota
515 Ninth Street, Room 318
Rapid City, South Dakota 57701

RECEIVED
SEP 14 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

KAREN E. SCHREIER
United States District Judge

Phone 605-341-3764
Fax 605-341-6473
karen_schreier@sdd.uscourts.gov

September 13, 1999

FILED
SEP 13 1999

Ms. Tamara A. Wilka
Boyce, Murphy, McDowell & Greenfield, L.L.P.
101 North Phillips Avenue, Suite 600
Sioux Falls, SD 57104

Re: US West Communications, Inc. v. James A. Burg, Pam Nelson, and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest, and Intervenor United States of America
Civ. 99-5024

Dear Ms. Wilka:

I am in receipt of your letter dated September 8, 1999. This matter is still assigned to the Honorable Richard Battey and was not reassigned to me. I will refer your letter to Senior Judge Battey for response.

Very truly yours,

Karen E. Schreier
United States District Judge

cc: Senior Judge Richard H. Battey
All Counsel of Record

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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST Communications, Inc.'s Opening Brief on the Merits of its Affirmative Claims and Certificate of Service. This is intended as service upon you by mail.

Sincerely yours,
BOYCE, MURPHY, McDOWELL &
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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and two copies of the U S WEST Communications, Inc.'s Opening Brief on the Merits of its Affirmative Claims. Please file stamp the second copy and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

JAMES A. BURG, et al.,

Defendants.

CIV NO. 99-5024

U S WEST'S COMMUNICATIONS, INC.'S OPENING BRIEF ON THE MERITS OF ITS AFFIRMATIVE CLAIMS

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I. INTRODUCTION

U S WEST Communications, Inc. ("U S WEST"), submits this Opening Brief on its claims arising out of the Findings of Fact and Conclusions of Law and Order in Docket No. TC96-184 dated March 20, 1997 (the "Decision"), Order Approving Interconnection Agreement dated March 4, 1999 (the "Order"), Order on Reconsideration, Notice of Entry of Order dated August 13, 1997 (the "Reconsideration Order"), Second Arbitration Order, Notice of Entry of Order dated December 30, 1998 (the "Second Arbitration Order"), and the Interconnection Agreement approved by the Public Utilities Commission of South Dakota ("Commission") on March 4, 1999 (the "Agreement") between U S WEST and AT&T Communications of the Midwest, Inc. ("AT&T").[1] These orders and the Agreement were attached as Exhibits A through E, respectively, to U S WEST's Complaint.[2]

This case arises under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. ("the Act"), which amended the Communications Act of 1934. The Act is designed to promote competition in both the local and long distance telephone markets. To promote competition in the local telephone market, the Act permits new entrants in the local market to obtain "interconnection" of their networks with the network of an incumbent local exchange carrier ("incumbent LEC"),[3] such as U S WEST, on rates that are just, reasonable and

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[1] In its Complaint, U S WEST raised challenges regarding the Commission's Decision implementing 47 U.S.C. § 252(i), requiring U S WEST to permit collocation at "premises" other than its central offices without going through a bona fide request process, and relating to pricing of network features. U S WEST has not briefed those issues and hereby withdraws them.

[2] In this brief, citations to materials in the record will include the number assigned to the document by the Commission in the Chronological Index filed with the Court. Citations to pages of pre-filed testimony are to the internal page citations, not the three stamped page number. The Commission's March 20, 1997 Decision is No. 133 in the record, the August 13, 1997 Reconsideration Order is No. 134, the December 30, 1998 Second Arbitration Order is No. 174, the March 4, 1999 Order is No. 179, and the Agreement is included in No. 176.

[3] "Local exchange carriers" are defined in 47 U.S.C. § 153(26), and an incumbent local exchange carrier is defined in 47 U.S.C. § 251(h). Local exchange carriers provide telephone

nondiscriminatory. By "interconnecting" their networks, or linking them, customers of one carrier can call the customers of the other carrier. In addition, requesting carriers can purchase from U S WEST individual unbundled elements of U S WEST's network at cost-based rates that the requesting carrier can combine together themselves or combine with elements of their own networks to provide telecommunications service. Network elements are defined in 47 U.S.C. § 153(29), and are basically individual components or features of the incumbent's network used to provide telecommunications service.

Furthermore, the Act permits requesting carriers to purchase U S WEST's assembled finished telecommunications services, such as residential or business telephone service, at a discount for resale. The rights and obligations under the local competition provisions of the Act are implemented through interconnection agreements. The Act encourages parties to negotiate such agreements, and permits state commissions to arbitrate disputes if the parties are unable to resolve all issues.

This action involves U S WEST's challenge to several terms of the Agreement between U S WEST and AT&T that the Commission dictated in its arbitration orders. First, U S WEST challenges the Commission's Decision that U S WEST must combine unbundled elements of its network for AT&T. This ruling conflicts directly with the holding of the United States Court of Appeals for the Eighth Circuit that requesting carriers, not incumbent LECs, are required to combine elements of the incumbent's network into new configurations or to combine the incumbent's network elements with the facilities of the requesting carrier.

Second, U S WEST challenges the Commission's determination that U S WEST must provide interconnection to AT&T at a level higher than what U S WEST ordinarily provides to itself and other carriers and that U S WEST must provide access to unbundled elements

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exchange and exchange access (i.e., basic telephone service) as well as other telecommunications service.

that exceeds the nondiscrimination standards in the Act. This determination, too, conflicts with federal law.

Third, U S WEST challenges the Commission's requirement that U S WEST permit AT&T to collocate its remote switching units in U S WEST central offices. Section 251(c)(6) of the Act addresses collocation, or the ability of requesting carriers to place equipment that is necessary for interconnection and access to network elements in the central offices of the incumbent LEC. In reaching this determination, the Commission applied an unlawful standard to determine what equipment is "necessary" for interconnection or access to unbundled network elements under 47 U.S.C. § 251(c)(6).

Fourth, the Commission erred in requiring U S WEST to provide access to or to "light" its dark fiber and to provide vertical features of its switch to AT&T.[4] As with its collocation determination, the Commission failed to make critical findings required under the Act and otherwise misapplied the law.

Fifth, the Commission erroneously denied U S WEST up front recovery of its full costs of constructing facilities for AT&T. The Act does not require incumbent LECs to construct facilities on demand for their competitors. When U S WEST agrees to do so, it is free to set the terms of that undertaking. AT&T, of course, can reject those terms. The Commission, however, should not control them.

Sixth, the Commission erred in requiring U S WEST to exercise its powers of eminent domain on AT&T's behalf. The Act imposes no such requirement, and AT&T is fully capable of seeking access to rights-of-way on its own. The Commission also erred in refusing to permit U S WEST to reserve space on its poles, ducts, conduits, and rights-of-way for its own administrative and maintenance purposes.

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[4] Vertical features of the switch include such services as call waiting, caller ID, and call forwarding. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 808 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

Seventh, the Commission erroneously permitted AT&T to establish only one interconnection point in a Local Access and Transport Area ("LATA").[5] The Act requires AT&T to establish an interconnection point in each local calling area of U S WEST's South Dakota network. In addition, the Commission's decision encourages expensive and inefficient interconnection.

Finally, the Commission imposed numerous terms that either exceed its authority under the Act or that were simply inconsistent with the evidence presented. As set forth in Section I of Part III, below, each of these determinations is wrong, and the Court should overturn them. In interpreting all of the Commission's orders, the Act and the Agreement, the Court should seek to avoid a taking of U S WEST's property without just compensation, which is prohibited by the Fifth and Fourteenth Amendments to the Constitution.

For the reasons set forth below, the Court should grant U S WEST the relief requested here and in its Complaint.

II. STATEMENT OF FACTS

The background of the arbitration between U S WEST and AT&T and the proceedings before the Commission is set forth in U S WEST's Complaint. Complaint ¶¶ 23-27. In addition, U S WEST's Complaint sets forth the procedural history of the Federal Communications Commission ("FCC") rulemaking implementing the Act, referred to in this Brief as the First Report and Order,[6] the judicial review of the First Report and Order before the United States Court of Appeals of the Eighth Circuit, and the United States Supreme

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[5] LATAs are defined in 47 U.S.C. § 153(25). Generally, unless modified, LATAs are the geographic areas established pursuant to the consent decree in which AT&T Corp. divested itself of the (then) seven regional Bell operating companies. Regional Bell operating companies are permitted to provide service within LATAs. Until they are granted permission to do so under Section 271 of the Act, Bell operating companies are not permitted to provide service between LATAs.

[6] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC Docket No. 96-98, 11 FCC Rcd 15499, 1996 FCC LEXIS 4312 (Aug. 8, 1996) ("First Report and Order").

Court's review of the Eighth Circuit decision. See id. ¶¶ 16-22; Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

III. ARGUMENT

A. Standard of Review

The Court should follow the standard of review set forth in U S WEST Communications, Inc. v. Hix, 986 F. Supp. 13 (D. Colo. 1997). Under the Hix standard, the Court is to determine, first, whether the Agreement is procedurally and substantively in compliance with the Act. This is a determination the Court makes de novo. Id. at 19. Only then, if the Agreement is found to be in compliance with the Act, is the Agreement further examined to determine whether its provisions meet the arbitrary and capricious standard. Id.

B. The Commission's Decision Requiring U S WEST to Combine Network Elements Violates the Act.

In its Second Claim for Relief in its Complaint, U S WEST challenges the Commission's Decision purporting to require U S WEST to combine network elements for AT&T. See Decision at 12 ¶ 83. In the Agreement, however, U S WEST and AT&T "parked" this issue, Agreement, Part A, Recitals, Agreement, Attachment 2 §§ 2.2, 2.4, 9, which means that the Agreement currently imposes no obligation on U S WEST to combine network elements. Because the Agreement does not impose this combination obligation, the Court need not address this issue at this time. However, U S WEST disagrees with the Commission's determination on this issue, and to preserve its rights in the event either AT&T or the Commission contends that U S WEST must combine network elements for AT&T, U S WEST has briefed this issue for the Court.

Under Section 251(c)(3) of the Act, incumbent local exchange carriers (such as U S WEST) must provide requesting carriers access to unbundled network elements. 47 U.S.C. § 251(c)(3). The Act further provides that the requesting carrier, not the incumbent, will actually perform the combining of network elements. Id. Notwithstanding these

statutory requirements, the Commission ordered U S WEST to combine unbundled network elements for AT&T unless U S WEST proves to the Commission that the request to combine network elements is not technically feasible or the request would undermine the ability of other carriers to obtain access to unbundled elements and to interconnect with U S WEST's network. Decision at 12, ¶ 83. The Commission relied solely on the FCC's reasoning in the First Report and Order. Id.

The Commission unlawfully required U S WEST to combine network elements in violation of the Act and disregard of the Eighth Circuit's decision in Iowa Utils. Bd. v. FCC, 120 F.3d at 813 & n. 39. Accordingly, the Commission's Decision violates the Act.

1. **The Commission Cannot Order Combinations Until the FCC Issues Valid Unbundling Rules.**

In AT&T Corp., the Supreme Court made two critical holdings with respect to unbundling and combination of unbundled network elements. First, the Court struck down 47 C.F.R. § 51.319, the rule that established the network elements incumbent LECs must provide under Sections 251(c)(3) and 251(d)(2), holding that the FCC improperly gave requesting carriers "blanket access" to incumbent LEC networks by failing to consider the "necessary" and "impair" standards in 47 U.S.C. § 251(d)(2)[7] in determining which network elements incumbent LECs must unbundle. AT&T Corp., 119 S. Ct. at 714-16. Second, the Court

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[7] Section 251(d)(2) provides

> Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether –
>
> (A) access to such network elements as are proprietary is necessary, and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2).

upheld 47 C.F.R. § 51.315(b), which prohibits incumbent LECs from separating elements of their networks that they currently combine. Id. at 736. The Supreme Court did not reverse, nor did it even address, the Eighth Circuit decision that Rules 315(c)-(f), 47 C.F.R. § 51.315(c)-(f), requiring incumbent LECs to combine elements, violate the Act.

a. Rule 319 and the FCC's erroneous interpretation of Section 251(d)(2).

The Supreme Court held that the FCC's approach to determining which network elements incumbent LECs must provide under 47 U.S.C. § 251(c)(3) was fundamentally flawed and provided requesting carriers with "blanket access" to incumbent LEC networks. AT&T Corp., 119 S. Ct. at 734-36. First, the Court held that the FCC started with the unlawful presumption that incumbent LECs must provide any network element that is technically feasible to unbundle, and that this erroneous presumption tainted the FCC's interpretation of Section 251(d)(2). Id. at 736.[8]

Second, the FCC wholly failed to consider the "necessary" and "impair" standards in Section 251(d)(2) by failing to consider self-provisioning or the availability of elements outside the incumbent LEC's network. In particular, the Court rejected the FCC's interpretation of "necessary" that would require incumbent LECs to unbundle network elements, even if the requesting carrier could obtain the elements elsewhere. Id. at 735-36. The Court forcefully stated that the FCC "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." Id. at 735. The Court also rejected the FCC's interpretation that any increase in cost or decrease in quality means a requesting carrier is "impaired" in its ability to offer service. Id. at 735-36. The Court reasoned: "Since any new entrant will request the most efficient network elements that the

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[8] No party petitioned for review of the Eighth Circuit's determination that "technical feasibility" determines only where requesting carriers may obtain access to unbundled network elements, not which elements must be provided. Iowa Utils. Bd. v. FCC, 120 F.3d at 813. The Supreme Court endorsed the Eighth Circuit's decision on this issue, stating that the FCC's position was "undoubtedly wrong." AT&T Corp., 119 S. Ct. at 734.

incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute 'impairment' under [the FCC's] standard." Id. at 735. The FCC's overly generous interpretation of the "necessary" and "impair" standards, the Court held, "is simply not in accord with the ordinary and fair meaning of those terms." Id.

Concluding, the Court stated:

> We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

Id.

b. Rules 315(b)-(f).

The Court held that Rule 315(b) was not unreasonable. Id. at 735. It also affirmed the Eighth Circuit determination that requesting carriers did not have to provide some of their own facilities to obtain access to unbundled network elements -- the "all elements" rule. Id. at 736.[9] The Court left intact, however, the Eighth Circuit decision to invalidate Rules 315(c)-(f), purporting to require incumbent LECs to combine network elements in a manner different than their current configurations and to combine incumbent LEC elements with the facilities of the requesting carrier. Because the Eighth Circuit held that the Act does not

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[9] The Supreme Court decision upholding the "all elements" interpretation does not mean that requesting carriers are entitled to access every element that comprises a finished service. As the Supreme Court explained, this holding means only that requesting carriers do not have to provide their own facilities to gain access to an incumbent LEC's unbundled elements under Section 251(c)(3). AT&T Corp., 119 S. Ct. at 736 (there is no "facilities ownership requirement"). The Supreme Court expressly stated that its decision to vacate Rule 315 could mean that requesting carriers would not be able to obtain all the elements that comprise a finished service. Id. ("The all elements issue may be largely academic in light of our disposition of Rule 319. If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network"). Thus, for example, if the FCC on remand finds that switching does not meet the "necessary" and "impair" standards in Section 251(d)(2), requesting carriers will not be able to obtain access to every element that comprises a finished service under Section 251(c)(3).

require incumbent LECs to perform these combinations, and that holding stands, the Commission cannot require U S WEST to combine elements of its network that are not currently combined or to combine elements of its network with requesting carrier facilities. Several courts have recently addressed the effect of AT&T Corp. on the purported obligation to combine network elements and have held that Rules 315(c)-(f) remain invalid. See, e.g., U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 46 F. Supp. 2d 1068, 1076 (D. Or. 1999); U S WEST Communications, Inc. v. Thomas, Civ. No. 4-97-CV-70082, Memorandum Opinion Ruling Granting AT&T's and MCI's Motion for Reconsideration and Order Amending Judgment at 10-11 (S.D. Iowa Apr. 19, 1999); U S WEST Communications, Inc. v. Garvey, File No. Civ. 97-913 ADM/AJB, slip op. at 19 (D. Minn. Mar. 31, 1999) (recognizing that Rules 315(c)-(f) remain invalid).[10]

c. Rules 319 and 315(b) are intrinsically linked.

The Supreme Court's decision to vacate Rule 319 and the FCC's interpretation of Section 251(d)(2) has far-reaching implications. Most significantly, there is no current FCC rule that establishes which network elements incumbent LECs must unbundle and which elements requesting carriers can access. There is also no valid standard for making this determination. Indeed, until the FCC adopts rules consistent with the Act and the Supreme Court's decision, it is not possible for the Commission or this Court to identify which previously assembled elements U S WEST must provide. If, for example, the FCC determines on remand that switching does not meet the unbundling standard in Section 251(d)(2) as

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[10] On remand, the Eighth Circuit permitted parties to brief whether it should revisit its holding with respect to Rules 315(c)-(f). It did not, however, lift that part of its previous decision vacating those rules. Iowa Utils. Bd. v. FCC, No. 96-3321, Order on Remand from the Supreme Court of the United States at 2-3 (8th Cir. June 10, 1999).

articulated by the Supreme Court, then AT&T could not obtain the so-called "UNE platform."[11]

Because Rules 319 and 315(b) are intrinsically related, the Court cannot apply the Supreme Court's decision in pieces. If the Court orders U S WEST to provide currently combined elements or its assembled platform of elements -- the UNE platform -- under Rule 315(b), it must also accept and implement the Supreme Court's unambiguous decision to vacate the entirety of Rule 319 and the FCC's interpretation of Section 251(d)(2). Under these circumstances, AT&T would be entitled to no elements at all, and as a result, no assembled or combined elements. Indeed, without a valid unbundling rule, the Court cannot even determine which assembled elements U S WEST would have to provide. Enforcing Rule 315(b) at this time would dictate enforcing the elimination of Rule 319 and the elimination of all clauses in the contract requiring the sale of unbundled network elements.

This Court should not attempt to predict how the FCC will address the Supreme Court's decision.[12] A new unbundling standard that complies with the Supreme Court's decision will likely impose different conditions on access to unbundled network elements, or require incumbent LECs to unbundle a different set of elements. At that time, the parties and the Commission can address the FCC's revised rules.

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[11] An incumbent LEC's fully assembled platform of elements is often referred to as the "UNE platform." "Sham unbundling" is the fiction that requesting carriers can obtain the UNE platform, or all of the network elements that comprise a finished service under 47 U.S.C. § 251(c)(3) on a combined basis, at cost-based rates under 47 U.S.C. § 252(d)(1). This practice is termed "sham unbundling" because no "unbundling" ever takes place: the requesting carrier obtains the same finished service that incumbent LECs make available under the resale provisions of the Act, 47 U.S.C. §§ 251(c)(4) and 252(d)(3), but at cost-based rates as opposed to a discount off the retail rate.

[12] The FCC has issued a notice of proposed rulemaking to address the Supreme Court's decision and final rules are expected this fall. See Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, FCC 96-29 (rel. Apr. 16, 1996).

2. The Commission Cannot Independently Order U S WEST to Provide Assembled or Combined Elements.

State commissions have no authority to issue unbundling requirements at this time. The Supreme Court's rejection of 47 C.F.R. § 51.319 and the FCC's interpretation of 47 U.S.C. § 251(d)(2) necessarily require invalidation of 47 C.F.R. § 51.317. Rule 317 provided that state commissions could adopt additional unbundling requirements, beyond the elements set forth in now-vacated Rule 319, and set forth the standards state commissions must consider when determining the additional elements incumbent LECs should provide. Rule 317(a) stated:

> In determining what network elements should be made available for purposes of section 251(c)(3) of the Act, beyond those identified in § 51.319, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

47 C.F.R. § 51.317(a). The Eighth Circuit invalidated this rule to the extent it contained a "technical feasibility" presumption. See Iowa Utils. Board, 120 F.3d at 810 n.19. The Supreme Court did not overturn that determination. AT&T Corp., 119 S. Ct. at 736. Accordingly, this aspect of Rule 317 is invalid.

Moreover, under Rule 317(b)(2), if a state commission finds that it is technically feasible to unbundle an element, it may refuse to require unbundling only if the element is proprietary and a nonproprietary alternative exists or:

> the state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC's network

47 C.F.R. § 51.317(b)(2). This is the same unlawful "requirement" the Supreme Court struck down.

Consistent with this analysis, several courts have held that the Supreme Court's decision mandates that the FCC readdress Rule 317. See U S WEST Communications, Inc., 46 F. Supp. 2d at 1080; MCI Telecomm. Corp. v. GTE Northwest, 41 F. Supp. 2d 1157, 1180 (D. Or. 1999); MCI Telecomm. Corp. v. Bell Atlantic, 36 F. Supp. 2d 419, 425 n.4 (D.D.C. 1999); see also U S WEST Communications, Inc. v. Garney, slip op. at 27-28 (remanding dark fiber and subloop unbundling issues because state commission applied FCC's invalid interpretation of Section 251(d)(2)). In addition, the FCC has voluntarily requested the Eighth Circuit to remand Rule 317 in light of the Supreme Court's decision. As a result, there is no valid FCC rule permitting state commissions to order unbundling. With no rule permitting them to order unbundling, state commissions cannot require incumbent LECs to provide specific assembled or combined elements. Accordingly, the Commission's Decision on combinations violates the Act.

C. **The Agreement Imposes Unlawful Performance Standards in Violation of Section 251(c) of the Act.**

The Commission's orders and approved Agreement unlawfully require U S WEST to provide interconnection that exceeds the "equal in quality" standard contained in Section 251(c)(2) of the Act. In its Decision, the Commission ordered U S WEST to "perform its obligations under the Agreement at no less than the highest level which U S WEST uses for its own operations or those of its affiliates." Decision at 4, ¶ 17. The orders and Agreement also unlawfully require U S WEST to provide access to unbundled network elements that exceeds the "nondiscriminatory" access standard contained in Section 251(c)(3) of the Act. As set forth below, the standards for interconnection and access contained in the order and Agreement are unlawful.

In Iowa Utils. Bd., the Eighth Circuit held that requesting carriers are not entitled to "superior" quality interconnection or "superior" access to unbundled network elements on demand. Iowa Utils. Bd., 120 F.3d at 812. The Eighth Circuit also held that the Act requires incumbent LECs to provide requesting carriers with access to their "existing" network only

Id. at 813. No party petitioned for review of the Eighth Circuit's holding in this regard. See AT&T Corp., 119 S. Ct. at 729 (describing the issues for which parties sought review). Accordingly, the Supreme Court did not reverse this aspect of Iowa Utils. Bd., and the FCC's "superior quality" rules, 47 C.F.R. §§ 51.305(a)(4) and 51.311(c), remain invalid.[13]

Consistent with the Eighth Circuit's decision, AT&T is entitled only to interconnection that is "equal in quality" to what U S WEST provides to itself, as set forth in 47 U.S.C. § 251(c)(2), and to "nondiscriminatory" access to unbundled network elements under 47 U.S.C. § 251(c)(3). See Iowa Utils. Bd., 120 F.3d at 812 (interpreting the interconnection and access standards in Sections 251(c)(2) and (c)(3)).

1. **Interconnection That Is "Equal in Quality"**

The Commission's Decision unlawfully requires U S WEST to guarantee that AT&T will receive the "highest level" of interconnection that U S WEST uses for its own operations or those of its affiliates. See Decision at 4, ¶ 17. However, U S WEST does not guarantee itself or any other carrier that it will consistently provide interconnection at the highest possible levels at all times. Interconnection is not a static concept. By definition, a "highest" level means there is a lower level and thus a range of interconnection quality. U S WEST does not and cannot consistently provide itself the highest level of interconnection. But instead seeks to provide interconnection in an acceptable range in accordance with industry standards. U S WEST is obligated to provide requesting carriers, including AT&T, interconnection equal to what U S WEST provides itself, even when that interconnection level is not the "highest" level within the acceptable range. U S WEST cannot and does not commit to any carrier to provide its highest possible level of service at all times because there are numerous factors beyond U S WEST's control, including unusually busy calling days, the forecast and common

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[13] In its June 1999 Order on Remand from the Supreme Court of the United States, the Eighth Circuit permitted parties to brief whether it should revise its holding on these rules, but it did not reinstate them.

provided by AT&T, and AT&T's own ordering behavior, that affect the quality of interconnection U S WEST provides. It is unreasonable to penalize U S WEST for failing to meet a service standard for reasons beyond its control. Accordingly, the Commission's insistence on U S WEST providing its highest level of service at all times is unreasonable and would require U S WEST to provide discriminatory, "superior" quality interconnection to AT&T.

2. **Nondiscriminatory Access to Network Elements**

During the proceedings before the Commission, AT&T contended that the "at least equal to" or "equality" standard for interconnection should apply to access to unbundled network elements as well. As a result, it sought adoption of language in the Agreement that effectively applied the standard for interconnection to the provision of access to unbundled elements, and the Commission agreed with AT&T's proposal. Second Arbitration Order at 4-5, ¶¶ 4-6. This result is plainly unlawful.

In contrast to the "equal in quality" standard that applies to interconnection under Section 251(c)(2), the Act requires access to unbundled network elements on a nondiscriminatory basis. See 47 U.S.C. § 251(c)(3) (requiring incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. . . ."). Interpreting the term "nondiscriminatory" -- the only term that applies to access to unbundled network elements under Section 251(c)(3) -- the Eighth Circuit held that the term "merely prevents an incumbent LEC from arbitrarily treating some of its competitors differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier." Iowa Utils. Bd., 120 F.3d at 813. Thus, when providing access to unbundled network elements, U S WEST only must ensure that it treats all requesting carriers equally; it is not required to provide access that is in all respects equal to what it provides itself. Clearly, by use of different language in these provisions, subsections

Congress intended to provide different access standards. Bates v. United States, 522 U.S. 23, 29-30 (1997); INS v. Cardoza-Fonseca, 480 U.S. 421, 431-32 (1987); Russello v. United States, 464 U.S. 16, 23 (1983). The Commission's Order is inconsistent with this important distinction in access standards that Congress established.

Like the Act and the Eighth Circuit's decision, the FCC recognizes that U S WEST is not required to provide "equal" access to unbundled network elements. In discussing the type of access to unbundled elements that incumbent LECs must provide, the FCC stated that an incumbent LEC must provide network elements to all requesting carriers equally, but that the incumbent LEC must provide access equal to what it provides itself only "where applicable." First Report and Order ¶ 315. The FCC's use of "where applicable" is an important qualifier and demonstrates that there are circumstances in which an incumbent LEC cannot reasonably be expected to provide requesting carriers with the identical access to its network.

Other provisions of the First Report and Order confirm that incumbent LECs are not required to provide access to unbundled network elements that is in every way identical to the access they enjoy and that incumbent LECs should not be required to cede control over their networks by giving requesting carriers the same control and access that incumbent LECs have. Furthermore, nothing in the Act or the FCC's rules requires requesting carriers to have direct access to U S WEST's main distribution frame where doing so would compromise services to customers of U S WEST, AT&T, or any other requesting carriers that obtain network elements from U S WEST. See First Report and Order ¶¶ 203, 312-13 (threats to network reliability and security must be evaluated in determining access to network elements).

Instead, the FCC established that incumbent LECs must give access to unbundled network elements that allows the requesting carriers "a meaningful opportunity to compete." The FCC stated:

> We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits

> inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.

First Report and Order ¶ 315; see also id. ¶ 203 (carriers must be able to retain control over their own networks).

The FCC reiterated this "meaningful opportunity to compete" standard in its decisions on Bell operating company applications to provide in-region interLATA service pursuant to Section 271 of the Act. Specifically, the FCC contrasted the type of access incumbent LECs must provide when providing requesting carriers with resold services, on the one hand, and unbundled network elements, on the other. With respect to resale, which for incumbent LECs have a retail analogue, the FCC has stated that incumbent LECs must provide service to requesting carriers in the same time and manner as they provide services to themselves and their customers. E.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan, CC Docket No 97-137, 12 FCC Rcd 20543, Memorandum Opinion and Order ¶ 140 (rel. Aug. 19, 1997). For access to unbundled network elements, however, there is no retail analogue. See Application of BellSouth Corp., BellSouth Telecomm., Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, 13 FCC Rcd 20599, Memorandum Opinion and Order ¶ 198 (rel. Oct. 13, 1998). Accordingly, an incumbent LEC is not required to provide unbundled loops in the same manner and under the identical circumstances as it provides loops to itself. Instead, it must provide unbundled loops in a manner that provides an efficient requesting carrier "a meaningful opportunity to compete." Id. As the FCC clearly stated:

> Because the provisioning of unbundled local loops has no retail analogue, BellSouth must demonstrate that it provides unbundled loops in a manner that offers an efficient carrier a meaningful opportunity to compete.

Id. (emphasis added). See also MCI Telecomm. Corp. v. Illinois Bell Tel. Co., No. 97 C 2225, 1999 U.S. Dist. LEXIS 11418 at *27-28 (N.D. Ill. June 28, 1999) (recognizing that the process of providing access to unbundled network elements to competing carriers that operate on a different network is different than providing facilities to the incumbent LEC itself).

Thus, U S WEST must provide unbundled network elements to requesting carriers in a manner that does not discriminate between carriers and offers requesting carriers a meaningful opportunity to compete. U S WEST must also provide unbundled network elements so that requesting carriers can combine them with their own facilities or other U S WEST unbundled network elements to provide service of the same quality as U S WEST.

U S WEST proposed language for Part A, § 52.3 of the Agreement taken directly from the FCC's First Report and Order ¶ 315. See Interconnection Agreement submitted September 4, 1998 (No. 143) at 79. AT&T, by contrast, claimed that it was entitled not only to network elements that are equal in quality to those U S WEST provides to itself, but also that it was entitled to an "equal level of access" to those elements. It demanded language stating that "[f]or purposes of this Agreement, 'equal in quality' shall mean, among other things, equal in the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself."

Notwithstanding the language of the Act and the FCC's orders, the Commission adopted AT&T's proposed language for § 52.3 of Part A of the Agreement. Second Arbitration Order at 4-5, ¶ 6. The Commission did not cite any provision of the Act or of the FCC's regulations in support its interpretation. The Commission stated only that AT&T's language "is reasonable and adds needed specificity to the Interconnection Agreement." Id.[14]

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[14] Thus, consistent with the Commission's Second Arbitration Order, § 52.3 of Part A of the Agreement now states:

> For purposes of this Agreement, "equal in quality" shall mean, among other things, equal to the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself.

A comparison of Sections 251(c)(2) and (c)(3) of the Act and the FCC orders discussed above makes clear that an incumbent LEC has no obligation to provide access to network elements that is "equal in quality" to the access it provides to itself or its affiliates. Because the Commission's Second Arbitration Order and the Agreement impose a standard for the provision of access to network elements that is inconsistent with the Act and the FCC's regulations, the Court should strike that standard from the Agreement.

D. The Commission's Decision To Permit Collocation of Remote Switching Units ("RSUs") Violates Section 251(c)(6) of the Act.

Section 251(c)(6) of the Act requires U S WEST to permit collocation of equipment "necessary" for interconnection or access to unbundled network elements at U S WEST's premises, except where physical collocation is not practical for technical reasons or because of space limitations. 47 U.S.C. § 251(c)(6).

The Commission found that AT&T may collocate RSUs on U S WEST's premises. Decision at 9, ¶ 55. This requirement is incorporated in Part A, §§ 40.1.5 and 40.1.6 of the Agreement. However, collocation of RSUs is not "necessary" for interconnection or access to unbundled network elements within the meaning of Section 251(c)(6).[15] Because collocation of RSUs is unnecessary for interconnection and access, the Commission lacked authority under the Act to impose this requirement upon U S WEST.

In ordering the collocation of RSUs, the Commission relied upon the FCC's interpretation of the word "necessary" in Section 251(c)(6) of the Act. Decision at 9, ¶ 55. According to the FCC, "necessary," for purposes of Section 251(c)(6), means that the

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and equal in the quality of design, performance, features, functions, capabilities and other characteristics, including, but not limited to, levels and types of redundant equipment and facilities for power, diversity and security, that U S WEST provides to itself.

[15] U S WEST demonstrated that the functions RSUs perform are not necessary for interconnection. See Transcript (Vol. IV) at 476-77, 488; Wilcoxon Rebuttal (Vol. VI) at 5.

collocated equipment is "used or useful" for interconnection or access to unbundled elements. First Report and Order ¶ 579.[16]

The FCC's interpretation of "necessary," however, is inconsistent with the Act; accordingly, the Commission erred as a matter of law in applying it. The Supreme Court rejected the FCC's interpretation of the term "necessary" in 47 U.S.C. § 251(d)(2), which had provided that any increase in cost or decrease in quality rendered a network element "necessary." AT&T Corp., 119 S. Ct. at 735; see also First Report and Order ¶ 280. As the Court explained, the FCC's interpretation "is simply not in accord with the ordinary and fair meaning" of that term. Id. The Supreme Court's rejection of the FCC's erroneous definition of "necessary" must also apply to 47 U.S.C. § 251(c)(6) and the FCC's even more expansive "used or useful" interpretation. United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, 508 U.S. 439, 460 (1993) (identical words in different parts of statute are presumed to have same meaning). Thus, as several federal district courts have held, AT&T Corp. seriously undermines the FCC's interpretation of Section 251(c)(6). See U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1068, 1076 (D. Ariz. 1999); Garvey, slip op. at 46; see also Bell Atlantic-Washington, 36 F. Supp. 2d at 473 n.10. In GTE North-west, for example, the court held that the word "necessary" in Section 251(c)(6) "suggests a stricter standard" than the FCC applied: "Anyone who has ever packed for a trip knows the difference between items that might be 'used and useful' versus items that are truly 'necessary.'" 41 F. Supp. 2d at 1182. Thus, the court held that in light of AT&T Corp., "the FCC's interpretation of the word 'necessary' in 47 U.S.C. § 251(c)(6) is no longer tenable." Id.

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[16] Despite specific requests to do so, the FCC did not order LECs to permit the collocation of switching equipment "since it does not appear that [switching equipment] is used for the actual interconnection or access to unbundled elements." First Report and Order ¶ 581.

Moreover, Section 251(c)(6) must be read narrowly because it implicates a physical taking of an incumbent LEC's property. U.S. Const. amend. V, cl. 4; Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). The court in GTE Northwest agreed, stating that the FCC's "loose interpretation" of Section 251(c)(6) "seems especially inappropriate when authorizing a physical occupation of an ILEC's property." 41 F. Supp. 2d at 1182.

The FCC's recent order on deployment of advanced wireline services and associated collocation issues does not change this result. Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, CC Docket No. 98-147, FCC 99-48, 1999 FCC LEXIS 1327 (rel. Mar. 31, 1999) (the "706 Order"). In that order, the FCC ruled that requesting carriers can collocate equipment "used or useful" for interconnection or access to unbundled network elements even if that equipment performs switching functions. Id. ¶ 38. However, the FCC ignored that its "used or useful" interpretation of "necessary" cannot stand in light of the Supreme Court's rejection of the FCC's interpretation of Section 251(d)(2). Indeed, the FCC's "used and useful" interpretation of "necessary" is even more lax than the definition the Supreme Court struck down.[17]

The Supreme Court has now added teeth to the term "necessary." The Commission, however, applied the wrong standard. For this reason alone, the ICM collocation provisions of the Agreement violate the Act.

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[17] The FCC noted that its interpretation of Section 251(c)(6) was not challenged before the Supreme Court and remains in effect. 706 Order ¶ 38 n. 82. This is irrelevant. AT&T Corp. has now undermined that interpretation. Furthermore, as the FCC expressly notes, the First Report and Order did not require incumbent LECs to permit collocation of switching equipment, so there was no reason or basis to appeal the First Report and Order on this issue. See id. ¶ 38. U S WEST has appealed the 706 Order.

E. The Commission's Decision Requiring U S WEST to Unbundle Dark Fiber and the Vertical Features of the Switch Violates Sections 251(c)(3) and (d)(2) of the Act.

The unbundling obligations of incumbent LECs are circumscribed by Section 251(c)(3) of the Act, which requires incumbent LECs to unbundle only "network elements" and by Section 251(d)(2) of the Act, which provides that in determining what network elements must be unbundled, the FCC must consider (at a minimum) whether access to such elements that are proprietary in nature is necessary and whether the failure to provide access to such network elements would impair the ability of the requesting carrier to provide the services that it seeks to offer. 47 U.S.C. § 251(d)(2). The Commission's findings regarding dark fiber and unbundling the vertical features of the switch are inconsistent with these statutory requirements.

1. Dark Fiber

The Commission determined that dark fiber is excess fiber optic cable that has been placed in a network and is not currently being lit by electronics from any carrier. Decision at 10, ¶ 69. The Commission correctly found that dark fiber is not a "network element," within the meaning of 47 U.S.C. § 153(29),[18] but nevertheless ordered that U S WEST may not refuse a request for fiber "based on lack of spare fiber if it has installed dark fiber that is not in use."

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[18] The Commission's determination on this threshold issue was correct: dark fiber is not a "network element" under 47 U.S.C. § 153(29). It is neither "used" to provide telecommunications service, nor is it capable of providing telecommunications service without attaching additional equipment to it. MCI Telecomms. Corp. v. Pacific Bell, No. C 97-0674 SI, 1998 U.S. Dist. LEXIS 17356 at *72-73 (N.D. Cal. Sept. 29, 1998) (dark fiber is "fiber optic cable that is installed in a telephone network but is not connected to the necessary electronic equipment to enable it to transmit telecommunications"); MCI Telecomms. Corp. v. BellSouth Telecomms. Corp., 7 F. Supp.2d 674, 679 (E.D.N.C. 1998) (dark fiber is not "lit" by electronics at the ends that are routing digital impulses onto the fiber and is consequently carries no information"). See also Transcript (No. 79) at 426-28. Only "lit" fiber is "used" to provide telecommunications service. Thus, dark fiber is not just "currently" not in use, it is never used to provide telecommunications service. Furthermore, the FCC declined to define dark fiber as a network element and thus U S WEST is never required to unbundle because requesting carriers intend to provide it with a sufficient record to make that determination. First Report and Order ¶ 439.

functional in order to meet the capacity request." Decision at 10, ¶ 72. In such circumstances, U S WEST may only refuse a request for dark fiber if it can show the Commission that the dark fiber is needed for its own customers. Id. Although the Commission's Decision is not clear, it appears to have the effect of requiring U S WEST to "light" its fiber for AT&T, notwithstanding the Commission's determination that dark fiber is not a network element. Sections 51.1.2 and 51.3 of Part A of the Agreement incorporate the Commission's rulings nearly verbatim.

a. Because dark fiber is not a "network element," the Commission could impose no obligations regarding it.

Given the Commission's determination that dark fiber is not a network element, it could not require U S WEST to provide or "light" dark fiber by attaching electronics to it for AT&T because Section 251(c)(3) only requires incumbent LECs to unbundle "network elements." See 47 U.S.C. § 251(c)(3). This determination, in itself, relieves U S WEST of any obligation to provide dark fiber to AT&T or to "light" its dark fiber.[19]

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[19] In addition, the Commission wholly failed to consider whether access to U S WEST's dark fiber is "necessary" or would "impair" AT&T's ability to provide service within the meaning of Section 251(d)(2). See Decision at 10-11, ¶ 72. As the Supreme Court made clear, under Section 251(c)(3) incumbent LECs are only required to unbundle, and to price at cost-based rates, "network elements" that meet the unbundling standard contained in Section 251(d)(2). AT&T Corp., 119 S. Ct. at 734-35. The Act does not entitle requesting carriers to "blanket access" to an incumbent's network. Id. at 735.

Dark fiber was not included on the list of elements incumbent LECs were required to unbundle in Rule 319. As a result of the invalidation of the FCC interpretation of Section 251(d)(2), there is no valid FCC rule requiring unbundling or permitting state commissions to order additional unbundling. More important, there is no standard against which to judge any state law unbundling requirement. Thus, there is no way to determine whether a requirement that U S WEST provide dark fiber conforms with or is consistent with the Act. Accordingly, since issuance of AT&T Corp., several courts have overturned state commission decisions requiring incumbent LECs to provide dark fiber because of the invalidity of Rule 317 and the state commission's erroneous application of the FCC interpretation of Section 251(d)(2). See MCI Telecomm. Corp., 1999 U.S. Dist. LEXIS 11418 at *45-46; U S WEST Communications, Inc. v. Thoms, Memorandum on Reconsideration at 6-7; U S WEST Communications, Inc. v. Garvey, slip op. at 27-28; GTE Northwest, 41 F. Supp. 2d at 1141. Overturning the Commission's dark fiber decision is even more compelling here, as the Commission did not even attempt to apply the unbundling standard in Section 251(d)(2) or the erroneous Rule 317.

b. The Commission cannot require U S WEST to "light" its dark fiber.

The Commission's Decision that dark fiber is not a network element ends any inquiry into U S WEST's obligation to provide dark fiber to AT&T. Nevertheless, the Commission's Decision has the effect of requiring U S WEST to "light" its dark fiber for AT&T if U S WEST does not have sufficient "lit" fiber available. As set forth above, AT&T is entitled to access unbundled elements of U S WEST's "existing network – not to a yet unbuilt superior one." Iowa Utils. Bd., 120 F.3d at 813 (emphasis in original). Under the Act, U S WEST is not required to "create" network elements for AT&T. Id. Thus, if U S WEST has no "lit" fiber to make available to AT&T, AT&T must seek an alternative source or provide the fiber itself. The Commission's decision requiring U S WEST to convert its dark fiber, which is not even a network element, into "lit" fiber violates the Act. Accordingly, the Court should strike this requirement from the Agreement.

2. Vertical Features of the Switch

The Commission also found that vertical features must be unbundled as part of the local switching element. Decision at 11, ¶ 78. This ruling is inconsistent with the requirements of the Act.

Although FCC Rule 319 required incumbent LECs to unbundle switching, the Eighth Circuit held that vertical features are network elements in their own right, and the Supreme Court affirmed that determination. AT&T Corp., 119 S. Ct. at 734; Iowa Utils. Bd. v. FCC, 120 F.3d at 809. Like dark fiber, this vertical features "element" was not separately listed in the Rule 319 list of elements incumbent LECs must unbundle. Thus, before U S WEST may be required to provide vertical features, the Commission or the FCC must establish that the vertical features "element" meets the unbundling standards in Section 251(d)(2). See also First Report and Order ¶ 244 (state commissions may order additional unbundling only if they

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standard. In MCI Telecomm. Corp., this failure alone was sufficient to overturn the state commission's decision. 1999 U.S. Dist. LEXIS 11418 at *48-50.

determinations are consistent with the Act and FCC regulations). 47 U.S.C. § 252(e)(1) (in resolving disputes in arbitrations, state commissions must ensure that their determinations meet the requirements of FCC rules).

However, because the FCC's interpretation of Section 251(c)(3) has been overturned by the Supreme Court and Rule 317 is invalid, the Commission cannot now require U S WEST to provide vertical features to AT&T. Moreover, to the extent that vertical features are considered part of the switching element, the rule requiring incumbent LECs to unbundle switching (47 C.F.R. § 51.319(c)) is also invalid. Because the Commission cannot require U S WEST to provide its vertical switching features to AT&T, U S WEST is entitled to a declaration that the Agreement's language obligating U S WEST to do so is invalid.

F. The Commission's Denial of Full Construction Cost Recovery Violates Section 252(d)(1) of the Act.

The issue of construction charges arises when U S WEST agrees to construct new facilities to provide a resold service to a particular customer. The Commission found that, if AT&T were required to pay such special construction charges up front, AT&T could pay twice for a portion of the construction charges. Based on this premise, the Commission limited U S WEST's recovery of construction costs to "those nonrecurring charges of construction that U S WEST charges to an end user." Decision at 33, ¶ 178. The Agreement incorporates this ruling at Attachment 1, § 3.2 ("AT&T shall pay only those nonrecurring charges of construction that U S WEST charges an end user").

The Eighth Circuit held that requesting carriers are entitled to access to incumbent LEC's "existing" network only. Iowa Utils. Bd., 120 F.3d at 813. Thus, except to the limited extent necessary to accommodate interconnection and access to existing unbundled network elements, id. at 813 n.33, incumbent LECs are not required to construct or modify new facilities on behalf of requesting carriers. As the Eighth Circuit implicitly confirmed, if facilities are not yet built, there is no reason why a new entrant, rather than the incumbent, should build them; the decision to build rests with the incumbent. The Supreme Court did not reverse this

holding. Accordingly, AT&T is not "entitled" to have U S WEST construct facilities for it on demand. Since the Act does not require U S WEST to construct facilities for AT&T, if AT&T chooses to provide service through facilities that are not yet built and wants U S WEST to build them, U S WEST can freely negotiate the terms of that undertaking. If AT&T does not like those terms, it can build the facilities itself or hire another carrier to do it. Cf. AT&T Corp., 119 S. Ct. at 735-36. Since the Act does not require U S WEST to construct facilities on demand for AT&T, the Commission cannot control the terms of that construction. Moreover, U S WEST should not bear the expense and risk of new investments made solely to benefit its competitors. When U S WEST constructs facilities for AT&T without advance payment, it is essentially bankrolling AT&T's construction.

Even if an incumbent LEC were to agree to upgrade its facilities to accommodate the requests of a requesting carrier, both the Act and the FCC's rules mandate that the requesting carrier compensate the incumbent LEC fully for its costs. See 47 U.S.C. § 252(d)(1); First Report and Order ¶ 382 (if the incumbent LEC conditions a loop for a requesting carrier, the requesting carrier must compensate the incumbent LEC). Accordingly, to the extent that U S WEST agrees to construct facilities for a requesting carrier, it must be permitted to recover its full construction charges from that requesting carrier. Lehman Direct (Oct. 31) at 117-18.

The Act's requirement that incumbent LECs provide interconnection on rates, terms and conditions that are just, reasonable, and nondiscriminatory "does not mandate that incumbent LECs cater to every desire of every requesting carrier." Iowa Utils. Bd., 119 F.3d at 813. U S WEST contends that since it is not required to construct facilities for AT&T on demand, when U S WEST agrees to do so, it should be permitted to control the terms of the recovery of its construction costs, including requiring AT&T to pay for U S WEST's efforts up front. AT&T, of course, is free to reject those terms and construct facilities itself. The Commission and AT&T ignore that U S WEST is not in the business of constructing facilities for its competitors. It has its own construction obligations under state law. Thus, when

U S WEST constructs facilities for AT&T, without advance compensation. It is diverting funds it could use to construct facilities under its own network plans.

The Agreement impermissibly limits U S WEST's assessment of construction charges to those charges that are assessed to its end users. AT&T, however, is not a retail customer; it is a telecommunications carrier that is a competitor of U S WEST. Under the present Agreement, for example, AT&T could order one thousand lines at a single wire center without having to make up front payments. Indeed, the costs that U S WEST incurs to construct facilities for AT&T are entirely different than the costs U S WEST incurs to provide retail service. See MCI Telecomm. Corp., 1996 U.S. Dist. LEXIS 11448 at *9-11 ("The process of providing access to unbundled network elements to competing carriers that also operate on a different network is different, and presumably more time consuming, than the process of provisioning network elements for the incumbent's own use"). Moreover, the evidence shows that the only way U S WEST is assured of full cost recovery is through the assessment of construction charges to the reseller. Lifner Direct (No. 34) at 11.

The Commission cites no authority for the proposition that AT&T is entitled to be treated like a retail customer for construction purposes. The reason is simple: there is no such requirement. Under the Act, the terms and conditions under which U S WEST agrees to construct facilities for AT&T is a matter for private negotiation between the parties. 47 U.S.C. § 252(a). Accordingly, the Act requires this Court to strike the Agreement's limitation on the recovery of construction charges.

G. The Commission's Requirement that U S WEST Exercise Eminent Domain Powers on Behalf of AT&T, and its Prohibition Against Reserving Space on U S WEST's Own Poles, Ducts, Conduits, and Rights-Of-Way, Violate Sections 251(b)(4) and 224 of the Act.

Section 251(b)(4) of the Act requires all local exchange carriers ("LECs"), including AT&T, to provide access to poles, ducts, conduits and rights of way on rates, terms and conditions that are consistent with Section 224 of the Act. 47 U.S.C. §§ 251(b)(4), 224. Section 224 requires that a "local exchange carrier or an electric, gas, water, steam, or other

public utility," 47 U.S.C. § 224(a)(1), provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Thus, the Act requires that a LEC provide access to existing poles, ducts, conduits, or rights-of-way that are "owned or controlled by it." There is no authority in the Act, however, for a state commission to require an incumbent LEC to exercise eminent domain authority or otherwise take any action to expand an existing pole, duct, conduit, or right-of-way. Indeed, this is inconsistent with the Eighth Circuit's interpretation of the Act that a requesting carrier may only obtain access to the incumbent LEC's "existing network -- not to a yet unbuilt superior one." Iowa Utils. Bd., 120 F.3d at 813 (emphasis in original).

Notwithstanding this absence of authority, the Commission's Decision requires U S WEST to exercise eminent domain powers to expand existing rights-of-way to accommodate requests for access by AT&T. Decision at 23, ¶ 215. The Agreement incorporates this requirement in Part A at § 47.4.4.). Because the Act does not require U S WEST to exercise its eminent domain powers on behalf of AT&T, the Commission's requirement that it do so exceeds its authority under the Act.

As the FCC itself acknowledges, the scope of U S WEST's authority over rights-of-way and easements is largely a matter of state law and specific contractual arrangements. First Report and Order ¶ 1179. Indeed, the FCC has found that the access obligations of Section 224(f) apply only when, "as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." Id. The right to use a public right of way normally is conveyed through specific permits, licenses, or easements, which are typically restricted to a given carrier, such as U S WEST. See Schenck Rebuttal Exh. T-1 at 13. Because a carrier has little or no authority to provide other carriers with access to rights-of-way, a new entrant desiring such access must obtain the authority to do so directly from the grantor or licensor. Id. at 14. The Commission cites no authority under Iowa Utilities law that permits or requires U S WEST to serve as an agent for AT&T in exercising any eminent

domain powers or otherwise negotiating access to a right-of-way for AT&T. In fact, under South Dakota law, "every corporation" formed under the laws of South Dakota or another state, "owning or operating lines of telegraph or telephone within [South Dakota] shall have power to acquire such real property as may be necessary for the construction and maintenance of its lines of telephone or telegraph by condemnation . . . " SDCL § 49-16-12. Thus, AT&T can exercise eminent domain rights on its own.

In its Decision, the Commission relies upon paragraphs 1179 and 1181 of the First Report and Order. These paragraphs do not support the Commission's conclusion. The court in U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004, addressed this issue and expressly rejected the Arizona commission's reliance upon the First Report and Order. The court concluded that the state commission had not justified mandating that an incumbent LEC exercise any powers of eminent domain on behalf of requesting carriers. The Court noted that "U S WEST is AT&T's competitor, not its broker" and stated that Section 224 of the Act, which the FCC had cited in the First Report and Order, provided no support for the proposition that incumbent LECs must routinely exercise eminent domain authority on behalf of requesting carriers. Jennings, 46 F. Supp. 2d at 1018 (remanding the issue to the state commission for reconsideration).

In its Decision, the Commission also limited U S WEST's ability to reserve space in its own poles, ducts, conduits, and rights-of-way. Decision at 27, ¶ 52. Citing paragraph 1179 of the First Report and Order, the Commission stated that U S WEST "may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business. . . . U S WEST shall provide nondiscriminatory access on a first come, first served basis." Id. The Agreement incorporates the Commission's requirement at Part A, § 11.2. The Court should declare that this ruling, too, exceeds the Commission's authority. The prohibition against reserving space for its own needs ignores the fact that U S WEST must keep a certain level of spare capacity available for maintenance and administrative purposes. Lehner Direct (No. 34) at 254. In order to ensure uninterrupted service to its customers,

U S WEST must have spare facilities available to serve as a "backup" should a given facility become inoperative. Id.

Because the Commission imposed obligations beyond its authority and ignored U S WEST's own network planning requirements, the Commission's Decision violates the Act.

H. The Commission's Decision Permitting AT&T to Establish Only One Point of Interconnection Per LATA Violates the Act.

The Commission found that AT&T may not be required to establish one point of interconnection for exchange of traffic within each local calling area. Decision at 71, ¶ 38; Agreement, Attach. 4, § 2.2.

Consistent with paragraph 553 of the First Report and Order, U S WEST generally agreed to mid-span meet point arrangements for the purposes of interconnection. Lehner Direct (No. 34) at 126. However, the FCC did not address the question of the distance an incumbent LEC may be required to build to a meet point. As a reasonable limitation on that obligation, a carrier should be required to build no more than one mile of facilities to the meet point, and in no case more than one-half the distance to the jointly provided facilities. Id.

In addition, an incumbent LEC's duty to interconnect requires that it provide "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A) (emphasis added). Thus, an incumbent LEC's duty to interconnect is not limitless; rather, it need only provide interconnection to allow the requesting carrier to either provide "telephone exchange service" or "exchange access."

The Eighth Circuit has defined telephone exchange service as "local service, that is, 'service within a telephone exchange, or within a system of exchanges within the same area that operates as a single exchange, or a comparable service.'" Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068, 1072 n.3 (8th Cir. 1997) (quoting 47 U.S.C. § 153(47)) (emphasis added). Similarly, the FCC has determined that a requesting carrier "may obtain

interconnection pursuant to Section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange." First Report and Order ¶ 191. Thus, a requesting carrier may interconnect in a given local exchange for the purpose of providing exchange service in that same exchange (i.e., for the purpose of terminating calls originating from the requesting carrier's customers that reside in the same exchange in which the requesting carrier has interconnected). There is nothing in the Act to suggest that a requesting carrier may interconnect in one local exchange area for the purpose of providing exchange service in other local exchanges.

Requesting carriers may also obtain interconnection under Section 251(c) for exchange access. Exchange access is "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services,' that is, 'service between stations in different exchange areas for which there is made a separate charge.'" Competitive Telecommunications Ass'n, 117 F.3d at 1071 n.3 (citing 47 U.S.C. §§ 153(16), (48)). However, the FCC has determined in the context of interconnection for toll traffic that a requesting carrier "may not obtain interconnection pursuant to Section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if [the carrier] does not offer exchange access services to others." First Report and Order ¶ 191. Thus, in order to interconnect for the purpose of originating or terminating toll calls (i.e., to provide exchange access), a requesting carrier must interconnect in the very local exchange in which it intends to originate or terminate such calls, regardless of whether the requesting carrier is providing local service in a different local exchange.

Despite these limitations, the Agreement does not require that AT&T have a point of interconnection ("POI") in each local calling area in which it offers facilities-based local telecommunications service. Instead, it permits AT&T to have a single POI for an entire local access and transport area ("LATA"). Agreement, Attach. 4, § 2.2.

Nothing in the Act allows a requesting carrier to establish a single point of interconnection in a given LATA and thereby provide local service throughout that LATA, regardless of how many local calling areas exist within the LATA. A given LATA will typically encompass many local calling areas. An agreement that permits a requesting carrier to establish a single POI per LATA for the purpose of providing "local" service throughout the LATA therefore violates Section 251(c)(2)(A) of the Act.[20] The Court should declare this provision unlawful.

I. The Agreement Imposes Additional Obligations That Are Contrary to the Act.

1. Liability for Lost Profits and Punitive Damages

The Commission determined that under the Agreement there should be "no liability to either party for indirect, incidental, special, or consequential damages." Decision at 4, ¶ 18. Notwithstanding this ruling, the Commission also found, in the same paragraph, that "parties shall be liable for lost profits." Id. These two findings are internally inconsistent because lost profits are consequential damages. See e.g. Diamond Surface v. State Cement Plant, 541 NW2d 155, 161 (SD 1996); Hagen v. Triple U Enterprises, Inc., 388 NW2d 523, 526 (SD 1986). The Commission correctly ruled that the parties are not liable for consequential damages. Consistency requires that the proposed liability for lost profits be stricken.

The Commission also found that an arbitrator may award punitive damages under the Agreement. Reconsideration Order at 5. Under the Act, however, the Commission has no authority to even address this issue. Congress designed the Act to encourage new entrants and incumbent LECs to reach interconnection agreements through negotiations. Accordingly,

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[20] U S WEST also presented substantial evidence that permitting AT&T to establish only one POI per LATA would impose additional unwarranted costs on U S WEST, primarily those related to intraoffice traffic to traffic that uses tandem switching, and would require U S WEST to augment its tandem network and backhaul AT&T's traffic across its network. See Wiseman Direct (No. 51) at 11; Wiseman Rebuttal (No. 58) at 12; Transcript (No. 79) at 493-95.

the Act requires incumbent LECs and requesting carriers to negotiate interconnection agreements in good faith, 47 U.S.C. § 251(c)(1), and requires parties first to attempt to negotiate their agreements before resorting to mediation or arbitration. 47 U.S.C. § 252(a). Further, the Act significantly restricts state commission authority to disapprove negotiated agreements. Compare 47 U.S.C. § 252(e)(2)(A) with 47 U.S.C. § 252(e)(2)(B) (standards that apply to negotiated and arbitrated agreements). Consistent with this goal of encouraging negotiation of as many terms of an agreement as possible, the Act expressly limits the issues that state commissions can impose upon parties in arbitration.

The Act provides that a state commission "shall limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and the response . . . ." 47 U.S.C. § 252(b)(4)(A). In resolving those "open" issues identified in the petition and response, the state commission has authority to impose only those "conditions as required to implement" Section 252(c). 47 U.S.C. § 252(b)(4)(C). A state commission cannot impose any condition it believes may be desirable or beneficial to a new entrant for some competitive reason, or that a new entrant may desire because it is easier for them or saves them money. A state commission may only impose those conditions that are necessary to implement Section 252(c).

Section 252(c), in turn, carefully limits the types of conditions a state commission may impose. First, a state commission shall "ensure that [its] resolution and conditions meet the requirements of section 251," including valid FCC regulations. 47 U.S.C. § 252(c)(1). This authority is quite restricted: a state commission may only ensure that its resolution of open issues and any conditions it imposes do not conflict with the requirements of Section 251 and valid FCC regulations. Section 251 contains the obligations with which telecommunications carriers, local exchange carriers, and incumbent LECs must comply. The relevant obligations of an incumbent LEC are to provide (1) interconnection to its network on rates, terms and conditions that are just, reasonable and non-discriminatory, (2) access to unbundled elements of its network on rates, terms and conditions that are just, reasonable and non-discriminatory,

(3) resale of its retail services at wholesale rates, and (4) collocation of equipment necessary to interconnect or access unbundled network elements. Thus, Section 252(c)(1) does not give a state commission carte blanche to impose any contractual provisions it desires. It may only ensure that its resolution of open issues does not conflict with these core requirements of the Act. Thus, just as negotiations need only cover the incumbent LEC's statutory duties under Section 251, the Commission's power to impose conditions through arbitration is likewise limited.

Second, Section 252(c)(2) authorizes a state commission to perform its final essential task in arbitrations under the Act: to establish rates for interconnection, services, or network elements that comply with Section 252(d). 47 U.S.C. § 252(c)(2). Third, Section 252(c)(3) requires a state commission to establish an implementation schedule for the agreement, or a schedule for when various obligations in the agreement will be performed. In approving interconnection agreements, state commissions also may establish or enforce other requirements of existing state law. 47 U.S.C. § 252(e)(3).

This is the full extent of the Commission's arbitration authority to resolve "open" issues.[21] Tellingly, the Act provides no authority for a state commission to permit a punitive damages award.[22] Accordingly, the provisions of the Agreement permitting punitive damages violate the Act.

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[21] Sound policy arguments support this limited delegation of authority. First, Congress struck a delicate balance in the Act between the competing interests of new entrants and the incumbent LECs. New entrants are provided the means of entering the local telephone market without any barriers. Incumbent LECs, in turn, must comply with the obligations of Section 251(c). The Act does not permit new entrants to impose any contractual term they desire, nor does it require incumbent LECs to turn every aspect of their business over to new entrants. Second, state commissions, unlike the FCC, are not subject to congressional oversight. Thus, Congress clearly limited their role in this federal scheme to ensure that federal rights are preserved.

[22] Moreover, South Dakota law prohibits punitive damages arising from a breach of contract and provides that only a jury may award such damages. SDCL 21-3-2.

2. Aggregation of the Avoided Cost Discount Among All Resold Services

Section 251(c)(4) of the Act requires incumbent LECs to offer for resale at wholesale rates any telecommunications service the carrier provides at retail to subscribers who are not telecommunications carriers. 47 U.S.C. § 251(c)(4). Section 252(d)(3) of the Act provides that the state commission shall determine wholesale rates on the basis of the retail rates charged to subscribers for the telecommunications service requested, excluding the costs the incumbent avoids by reselling the service. 47 U.S.C. § 252(d)(3). The Commission found that the avoided cost discount (for purposes of pricing resold services) should be applied on an aggregate basis to all resold services, as opposed to establishing a separate discount for each relevant service. Decision at 24, ¶ 195. The Commission stated that U S WEST failed to provide a discount for all services that are subject to resale and to show that its disaggregated discounts were based on individual data collected by product or service. Id. The Commission's findings are clearly erroneous. U S WEST witnesses presented detailed cost information, including service-specific discounts, regarding each of the disaggregated discounts it proposed. Gude Direct (No. 39) at 13-15.

A composite discount rate fails to take into account the unique cost characteristics of each of the services U S WEST will provide for resale. As acknowledged by AT&T's own witness on avoided costs, "[t]he costs that will be avoided could vary and be different from service to service." Transcript (No. 79) at 944. Because that is the case, a proper avoided cost study must calculate discounts on a service-by-service basis. Indeed, the FCC rules specifically endorse separate discounts for services subject to resale. First Report and Order ¶ 916.

A primary danger of using a composite discount rate is that U S WEST may be prevented from recovering its costs for a service whose individual discount rate is below the composite rate. For example, before the Commission both parties agreed that the avoided costs of residential service would be below the 27.14% composite discount AT&T had

proposed. Applying the composite discount rate to residential service requires U S WEST to sell that service far below its actual costs. Moreover, the record fails to show that U S WEST will sell enough services with avoided costs above the composite rate to compensate for the shortfall it will suffer selling other services with avoided costs below the composite rate. In those instances in which services have avoided costs above the composite rate, it is unreasonable to assume that competitors will still purchase that service at resale, as opposed to self-provisioning it.

Accordingly, the Commission should not have imposed a composite (or aggregate) avoided cost discount rate. Only service-by-service discounts take into account the unique cost characteristics of each service. Because the aggregate discount the Commission imposed fails to reflect the actual avoided costs of different retail services for resale, the Agreement violates the Act.

3. Remedies Under the Agreement

The Commission ordered that the Agreement contain a provision that all remedies in the Agreement "shall be cumulative and not exclusive." Decision at 4, ¶ 18. This determination undermines the primacy of interconnection agreements. The Act itself is not self-executing. Rather, Congress established a detailed scheme to implement the Act's new rights and obligations. As Section 252 makes evident, the rights and obligations of the Act arise only after carriers have negotiated or arbitrated an interconnection agreement, and the state commission has approved that agreement under Section 252(e). Accordingly, as set forth above, the Act strongly favors negotiation of interconnection agreements, and requires incumbent LECs and requesting carriers to negotiate in good faith. See 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(a)-(b). The Act also limits the issues state commissions can decide in arbitrations. See 47 U.S.C. § 252(c).

Because the parties' agreement reflects their rights and obligations, a carrier's remedies must be confined to those set forth in the agreement, remedies that were either negotiated or

arbitrated. See Goldwasser v. Ameritech Corp., No. 97 C 6738, 1998 U.S. Dist. LEXIS 1467 at *32-33 (N.D. Ill. Feb. 3, 1998) ("Sections 251 and 252 require Ameritech to provide certain access to its facilities, but only when 'any requesting telecommunications carrier' seeks to enter their local market. These duties exist, therefore, only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition"). Because the parties' agreement controls their relationship, a state commission has no authority to permit any extra-contractual remedies. Accordingly, the Commission's Decision that remedies in the Agreement would be "cumulative" and not exclusive to the Agreement, Decision at 4, ¶ 18, violates the Act.

4. Negotiation of Third-Party Licenses on Behalf of AT&T

The Commission found that U S WEST may be required to negotiate third-party intellectual property rights on behalf of AT&T. Second Arbitration Order at 5, ¶¶ 8-9. As directed by the Commission, the parties incorporated this obligation in their Agreement. Part A, § 5.2.

If AT&T requests access to or use of a third-party's intellectual property, AT&T and not U S WEST should bear the burden of obtaining the permission. The Commission failed to recognize that U S WEST is not in a position to mandate that a third-party sell its property to anyone. AT&T should bear the responsibility of negotiating arrangements with third-party providers if it wishes to use the property of a third-party. As the Iowa Utilities court aptly noted, U S WEST is AT&T's competitor, "not its butler." Iowa Utils., 46 F. Supp. 2d at 1011. There is no legal authority for placing that responsibility upon U S WEST. Furthermore, as set forth above, the Commission has no authority to impose this condition under the Act. Accordingly, the Part A, § 5.2 of the Agreement violates the Act.

5. Customer Transfer Charge Limited to $5.00

The Commission ruled that when any resale customer is transferred to another carrier, a customer transfer charge of $5.00 applies. Decision at 22, ¶ 102. The Agreement

incorporates this requirement at Attachment 1, § 2.1. A customer transfer charge of $5.00 is plainly insufficient and is inconsistent with the record established before the Commission.

U S WEST's customer transfer charge is a nonrecurring charge that applies whenever a U S WEST end user account is transferred to a reseller. Lehner Direct (No. 34) at 120. If the reseller accesses U S WEST's Operational Support Systems in order to effect the transfer, the applicable charge reflects the cost of the use of the systems. Id. at 121. Because system development costs are recovered elsewhere, the charge only covers the costs incurred to transfer the service, including the costs to handle orders that "drop out" of the order system for a variety of reasons, such as incomplete or incorrect information provided by the carrier. Where the order drops out of the system, it must be handled manually, and the customer transfer charge covers this cost. Id.

Accordingly, U S WEST proposed a nonrecurring charge of $13.64 for a mechanized transfer and $22.20 for a manual transfer, which costs were supported by cost information provided by U S WEST. Decision at 22, ¶ 100 (citing Lehner Direct (No. 34) Ex. C at 5).

The Commission's Decision fails to distinguish between mechanized and manual transfer operations. In addition, there is no evidence that the "primary interexchange carrier" (or "PIC") transfer charge, upon which the Commission based its $5.00 charge, is related to the costs of customer transfer for local exchange carriers -- or even that the PIC is cost-based, as required by the Act. Accordingly, the Court should vacate the Commission's decision to limit the customer transfer charge to $5.00.

J. The Court Should Construe the Act and the Agreement to Avoid a Taking of U S WEST's Property Without Just Compensation.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. Amend. V. The Takings Clause applies to states through the Fourteenth Amendment of the United States Constitution. The Takings Clause prohibits taking private property for private use, regardless of just compensation. The challenged Commission orders will, if allowed to stand, effect an

uncompensated taking of U S WEST's property. The principle of constitutional avoidance therefore requires that the Court interpret the Act to prevent this result.

Courts must interpret statutes to avoid uncompensated takings to the extent possible. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 78-80, 80-82 (1982); Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1444-46 (D.C. Cir. 1994); TCI of North Dakota, Inc. v. Schriock Holding Co., 11 F.3d 812, 815 (8th Cir. 1993). To constitute "just" compensation for purposes of the Fifth Amendment, compensation must represent "the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." United States v. Miller, 317 U.S. 369, 373 (1943); United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002, 1006 (8th Cir. 1976).

If the Commission has effected an unauthorized taking of U S WEST's property by its interpretation of the Act, then this Court has the power to interpret that Act to avoid that result and declare such terms and conditions of the Agreement and Commission Decisions invalid. See Bell Atlantic, 24 F.3d at 1444; see also GTE Northwest Inc. v. Public Util. Comm'n of Ore., 900 P.2d 495, 504 (Or. 1995), cert. denied, 517 U.S. 1135 (1996). Through the exercise of its power to prevent such a taking, the Court may avoid exposing the public treasury to liability unforeseen by Congress. Bell Atlantic, 24 F.3d at 1444-45. That compensation remedies are available for any authorized takings does not divest this Court of jurisdiction to determine in the first instance "whether the orders under review were indeed duly authorized by law." Id. at 1444 n.1.

In Bell Atlantic, for example, various local telephone exchange carriers challenged FCC orders that required the carriers to "set aside a portion of their central offices" for physical collocation of interconnection-related equipment as demanded by competing access providers ("CAPs"). 24 F.3d at 1444. In response, the FCC claimed authority to order collocation through its authority to require carriers "to establish physical connections with

other carriers.'" Id. at 1444-45. The court held that the collocation rule "went too far" as a taking that exceeded the FCC's authority:

> Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions. The Commission's decision to grant CAPs the right to exclusive use of a portion of the petitioners' central offices directly implicates the Just Compensation Clause of the Fifth Amendment. . . . Of course the Clause prohibits only uncompensated takings, so long as the Tucker Act provides a subsequent action for redress, generally no constitutional question arises and the judicial policy of avoiding such questions may not be applied. But precedent instructs that the policy of avoidance should nonetheless take effect where "there is an identifiable class of cases in which application of a statute will necessarily constitute a taking."
>
> Where administrative interpretation of a statute creates such a class, use of a narrowing construction prevents unnecessary encroachment on Congress's exclusive powers to raise revenue and to appropriate funds

Bell Atlantic, 24 F.3d at 1445-46 (citations and footnotes omitted; emphasis added). Although "the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment," the public treasury remained at risk, compelling the Court to conclude that the FCC had exceeded its authority. Id.; see also GTE Northwest, 901 F.2d at 1551-53 (reversing the Oregon Public Utilities Commission's rule requiring incumbent carrier to permit the collocation of other carriers' equipment on its premises to prevent an uncompensated taking).

Accordingly, this Court should interpret the Act, the Commission's Decisions, and the Agreement to ensure that U S WEST's property is not taken without just compensation.

IV CONCLUSION

For the foregoing reasons, the Court should grant U S WEST the relief requested above and in its Complaint.

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BEFORE THE

PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

IN THE MATTER OF AT&T'S PETITION FOR ARBITRATION WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.	)	DOCKET NO. TC96-184

DIRECT TESTIMONY OF

JON LEITNER

JANUARY 17, 1997

D. OTHER RESALE ISSUES

1. Construction Charges

Q. WHEN USWEST CONSTRUCTS FACILITIES TO SERVE A RESELLER, SHOULD CONSTRUCTION CHARGES APPLY?

A. Yes. If USWEST must construct new facilities to service a reseller, USWEST must be permitted to charge the reseller for construction. The cost should be paid in full by the reseller before the facilities are constructed. The Commission should reject AT&T's self-serving position that it should not be responsible for such charges.[90]

Q. WHY IS IT CRITICAL THAT USWEST BE PERMITTED TO ASSESS CONSTRUCTION CHARGES?

A. In most cases, it is likely that resale requests will be received in areas where facilities are available. However, in some cases a reseller may request new facilities to an area not currently served or an area with limited existing facilities. If USWEST is to build facilities to such an area, it must be assured that it will be able to recover the costs of construction. The only way to assure the recovery of these costs is through the assessment of construction charges to the reseller. This

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[90] Direct testimony of Arleen Starr on behalf of AT&T, page 8.

is particularly the case with the advent of facilities-based competition. USWEST should not be required to construct facilities for resale, when such facilities may be stranded by the construction of facilities by USWEST's competitors. Without such an arrangement, USWEST and its customers could be left "holding the bag" with no way to recover the construction costs. This would be very unfair to USWEST and its customers, who would be forced to cover the loss.

USWEST should not be forced to build networks for resellers like AT&T out of its own pocket. Said another way, USWEST does not have the financial resources to capitalize the entry of resellers into the market. In addition, USWEST should not be forced to assume all of the capital risks for resellers as they enter and expand their presence in the market.

Q. IS USWEST'S POSITION CONSISTENT WITH THE FEDERAL ACT AND THE FCC'S FIRST INTERCONNECTION ORDER?

A. Yes. The FCC makes it clear that incumbent LECs have the right to recover costs incurred from the carrier that caused the cost.[91] Thus, it is consistent with the intent of the FCC's order to request resellers to pay construction charges when facilities are built by USWEST to service the needs of the reseller.

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91 First Interconnection Order at paras. 200 & 672.

the extent technically feasible."[92] Thus, a reseller can purchase resold local exchange services from USWEST and self provision operator services and directory assistance. Please refer to the "Operator Services" and "Directory Assistance" sections of my testimony for additional discussion.

4. Operational Support

Q. WILL USWEST PROVIDE OPERATIONAL SUPPORT (E.G., ELECTRONIC INTERFACES) FOR RESELLERS?

A. Yes. Please refer to the "Ordering" section of my testimony for a discussion of the operational support that USWEST proposes to provide.

5. Customer Transfer Charge

Q. WHAT IS THE CUSTOMER TRANSFER CHARGE?

A. The Customer Transfer charge is a nonrecurring charge that will apply when a USWEST end user account is transferred to a reseller.

The transfer of customers to a reseller will be facilitated through mechanized interfaces. In most cases, a reseller will have mechanized access to USWEST

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[92] First Interconnection Order at para. 336.

systems, and can effectuate the transfer electronically. In these cases, where the reseller accesses USWEST operational support systems, the reseller will pay USWEST for the use of the USWEST systems, via transaction charges.

Since system costs are recovered separately, the Customer Transfer Charge only recovers non-systems costs incurred by USWEST to transfer service. These costs include the costs to handle orders that "drop out" of the order system. Via electronic interfaces, a reseller will submit an order without the involvement of USWEST personnel. In most cases, the order will also be processed without the involvement of USWEST personnel. However, some orders (e.g., an order that is incomplete) will drop out of the system and must be handled manually. The CTC recovers the costs incurred by USWEST to manually process these orders. In addition, the CTC recovers the costs for USWEST personnel to check the account to be sure that it is not in arrears. If a customer's bill is delinquent, the transfer will not be completed.

USWEST's nonrecurring customer transfer charge is presented in Exhibit C. The cost study for this nonrecurring charge is included in the testimony of Mr. Steven Roch.

RESALE

WHOLESALE RATES

SOUTH DAKOTA

100.00% Retail Rate (Note 1)	84.66% Retail Rate (Note 2)	81.28% Retail Rate (Note 2)	77.56% Retail Rate (Note 2)	79.44% Retail Rate (Note 2)
Residence Basic	Business Basic	Frame Relay	Listings	IntraLATA Toll
Oper. Svs. & D.A.	PBX Trunks	ISDN	Features	WATS
Optional Calling Plans				
Volume Discount Plans				
Discounted Feature Packages				
Private Line Transport				
Negotiated Contract Arrangements				

Note (1) USW believes the Commission should establish the wholesale rate for below cost services (e.g., *residence basic exchange service*) at a 100% of the retail rate. However, USW has calculated the appropriate avoided cost of *residence basic exchange service*. The wholesale rate is 97.3% of the retail rate. USW also believes that the Commission should not further discount service packages and volume discount plans since they are already provided at the wholesale rate.

Note (2) Discounts are based on the costs avoided when a service is provided on a wholesale basis to a reseller rather than to a retail end user customer. The discount calculation is in compliance with Section 252(d)(3) of the Federal Act.

RESALE

NONRECURRING CHARGES

SOUTH DAKOTA

Description				
Mechanized Customer Transfer Charge				
Residence, First Line	$12.64	$12.14	$0.50	$12.64
Residence, Each Additional Line	$11.16	$10.72	$0.44	$11.16
Business, First Line	$16.80	$16.17	$0.63	$16.80
Business, Each Additional Line	$13.93	$13.40	$0.53	$13.93
Manual Customer Transfer Charge				
Residence, First Line	$22.20	$21.33	$0.87	$22.20
Residence, Each Additional Line	$16.32	$15.74	$0.64	$16.38
Business, First Line	$22.05	$21.22	$0.83	$22.05
Business, Each Additional Line	$16.30	$15.68	$0.62	$16.30

NOTES

1. TELRIC = Total Element Long Run Incremental Cost
2. TELRIC + Common = Total Element Long Run Incremental Cost plus Forward Looking Common Cost

unbundled network elements, USWEST should be permitted to recover the full economic cost of the Mid-Span Meet arrangement used for such access."[99]

Q. DOES USWEST SUPPORT THE ESTABLISHMENT OF MID-SPAN MEET ARRANGEMENTS AS DESCRIBED BY THE FCC?

A. Generally, yes. The FCC left for the negotiation process and to the states to answer the question of the distance that an incumbent LEC is required to build facilities from the point of interconnection to the meet point.[100] I believe a reasonable standard to apply is that USWEST should be required to build no more than one mile of facilities to the meet point, but, in no case, more than one half the distance of the jointly provided facilities.

Q. HOW WILL THE POINTS OF INTERCONNECTION BE ESTABLISHED?

A. AT&T will choose the point of interconnection for access to the unbundled elements it purchases and whether interconnection will be through virtual or physical collocation, space permitting. And, for the traffic AT&T terminates on the USWEST network, AT&T will have the opportunity to participate in the selection of the point of interconnection and whether that point of interconnection will be accessed via physical or virtual collocation or through a meet point arrangement. AT&T and USWEST must negotiate the location and quantity of

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99 First Interconnection Order at para. 553.

100 First Interconnection Order at para. 553.

exists. This standard applies equally to all carriers, including AT&T and USWEST.

Q. WILL USWEST LEASE FACILITY SPACE UP TO THE POINT THAT IT IS 100% EXHAUSTED?

A. No. USWEST must always keep a certain level of spare capacity available for maintenance and administrative purposes. For example, to assure uninterrupted high quality service to customers, a portion of spare facilities (e.g., 15%) must always be available to serve as a "backup" in case a particular facility goes down. Therefore, under normal circumstances, new capacity is designed and added when facilities reach a threshold capacity level (e.g., 85%). USWEST will only make space available up to this threshold level of capacity. It would be inappropriate for USWEST to jeopardize service quality by leasing facilities beyond the threshold level.

Q. IF FACILITIES ARE NOT AVAILABLE (I.E. A FACILITY IS EXHAUSTED), SHOULD USWEST BE REQUIRED TO CONSTRUCT ADDITIONAL CONDUIT AND/OR POLE FACILITIES FOR ANOTHER CARRIER SUCH AS AT&T?

A. No. The Federal Act does not require USWEST to construct or rearrange facilities for another carrier -- nor would such a requirement be appropriate.

BEFORE THE SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION

IN THE MATTER OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. PETITION FOR ARBITRATION WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996	)))))))	DOCKET NO. TC96-[illegible]

DIRECT TESTIMONY OF

CRAIG WISEMAN

U S WEST COMMUNICATIONS, INC.

January 7, 1997

interoffice facilities that will interconnect the U S WEST and new entrant networks. Network reliability concerns make it imperative that interconnectors and U S WEST work together to minimize the negative interconnection impacts on service to customers of both U S WEST and interconnectors.

Q. PLEASE DESCRIBE THE CURRENT U S WEST INTEROFFICE TRANSPORT NETWORK.

A. The U S WEST interoffice transport network is engineered to route high volume traffic directly from end office to end office through the use of direct trunks. Traffic during unusually high calling patterns or peak usage periods, is designed to overflow from these direct trunk groups to the local tandem switching office via tandem trunks. In other words, the local tandem switch routes overflow calls from one end office to another end office over tandem trunks. This architecture of direct trunking with overflow to tandem trunking allows for the most efficient and cost effective use of U S WEST's network.

Q. HOW WILL AT&T IMPACT THIS NETWORK DESIGN?

A. AT&T's proposal to interconnect at the U S WEST tandem creates two potential problems. First, in an effort to gain the most efficiencies in its network, AT&T has requested the use of U S WEST's local tandem switches to route calls to U S WEST end offices. Rather than performing overflow routing, U S WEST's local tandem switches, under this scenario, will be performing a function for which they were not designed -- primary call routing. Second, increased, unplanned for traffic from AT&T and other interconnectors entering U S WEST's interoffice

transport network at the local tandem switch can cause call blocking. When call blocking occurs, U S WEST, AT&T, and all other CLEC customers are unable to complete calls. Therefore, U S WEST will be required to incur significant additional costs to add capacity to its tandem switches and trunked transport facilities to accommodate the increased traffic.

Q. WHAT OTHER IMPACTS WILL RESULT FROM AT&T'S USE OF U S WEST'S TANDEM NETWORK?

A. The traditional call patterns for which U S WEST's interoffice transport facilities have been engineered will be altered by interconnectors. As I mentioned earlier, the primary impact is the conversion of traffic that is currently intraoffice to interoffice traffic. Intraoffice traffic does not use any interoffice transport facilities. When this traffic is converted to interoffice traffic, an increased traffic load on the U S WEST interoffice transport network is created.

Moreover, the mix of traffic served by interconnectors is unlikely to match U S WEST's traffic, due to the potential customer characteristics of individual interconnectors who may, for example, concentrate their marketing on the business or internet market. Internet Service Providers, for example, generate traffic characterized by calls of long duration. The asymmetric nature of this type of calling pattern (calls that can last from a few minutes to several days) can produce blockages in U S WEST's network. These blockages will occur because uniform switched demand exceeds existing capacity at the local tandem switch, and will affect all customers (U S WEST's and CLEC's) whose calls cannot be completed due to the blocking.

Bellcore and Bell Atlantic studies have quantified the theoretical blocking levels[1] associated with long duration calls common to Internet Service Providers. Should an interconnector serve a substantial number of internet providers and interconnect with U S WEST at its tandem network, the long duration calls could seriously impact the U S WEST tandem's ability to efficiently handle the traffic volumes of all callers in the local calling area.

Q. WHY DOESN'T U S WEST SIMPLY ADD CAPACITY TO ITS INTEROFFICE NETWORK TO ACCOMMODATE THESE NON-TRADITIONAL CALLING PATTERNS?

A. To add capacity to the appropriate elements of the U S WEST interoffice network, U S WEST must know the traffic demands for each of the interconnectors. The interdependencies of the interoffice network with direct and alternate routing and call volume surges require that, in an unbundled environment, all service providers using U S WEST's interoffice transmission network provide reliable forecast information to U S WEST. Further, capacity in this transport network cannot be immediately added. For example, vendor lead times to add capacity to a tandem switch can be as long as six months. As a result, reliable forecasts of traffic volumes are required well in advance of the actual demand in order to ensure that necessary transport capacity is available to meet the forecasted demand. In addition, the appropriate cost recovery methodology for increasing this capacity must be addressed.

[1] Snyder, Beth, *Pileup on the Public Network*, Telephony, August 26, 1996.

Q. WHAT IS THE SIGNIFICANCE OF THE SELECTION OF THE POINT OF INTERCONNECTION?

A. The point of interconnection determines the length of facilities provided by U S WEST to an interconnector. For example, if AT&T were to interconnect at a U S WEST end office through collocation, U S WEST would provide little in the way of transport facilities (in the case of physical collocation, as little as 100 feet of transport from the collocation cage to the U S WEST end office switch). If, however, AT&T selects a interconnection point (i.e., "meet point") outside a U S WEST central office building which is in close proximity to the AT&T end office, U S WEST could be required to construct its facilities from the meet point to the U S WEST central office building which houses the U S WEST tandem, provide tandem switching capacity, and transport from the tandem to the U S WEST end office switch. Therefore the point of interconnection selected has significant impact due to the amount of facilities that would have to be provided to accommodate this type of interconnection.

As discussed above, the selection of the points of interconnection will have a very real impact on the overall network investment required to provide the interconnection. New entrants must compensate U S WEST for additional costs which are caused by their selection of interconnection points as provided for in the FCC's First Interconnection Order (¶209).

Furthermore, if an interconnector, for example, delivered all of its traffic to a U S WEST local tandem instead of using a combination of direct and tandem trunking similar to U S WEST's current interoffice network, two serious impacts

may result. First, if adequate forecasts are provided, U S WEST will have to construct additional tandem switching and tandem transport facilities to accommodate the new entrant. Second, if an inadequate forecast is provided, sufficient capacity will not be constructed, and calls will be blocked. This means that calls will be blocked, not only for the new entrant, but also for all other interconnectors as well as for U S WEST end user customers.

Q. HOW SHOULD THE COMBINATION OF TANDEM SWITCHING AND DIRECT TRUNK TRANSPORT BE RESOLVED?

A. The combination of direct-trunked transport and tandem-switched transport is important to ensure the most efficient form of transport between the U S WEST and the interconnectors' networks. This combination will also have an important role to play in establishing the points of interconnection between the two networks. Direct trunks should be established when the traffic between a U S WEST end office and the interconnector's switch exceeds the busy hour equivalent of one DS1 (i.e., 24 voice grade trunks). While maintaining tandem-switched transport on such a route may appear to be efficient for an interconnector, it requires U S WEST to bear the burden of a more costly transport network, and to be exposed to increased risk of call blockages.

Q. WHAT IS U S WEST'S RECOMMENDATION?

A. To accommodate U S WEST's and all interconnectors' local traffic, it is important that all users of the U S WEST interoffice transport network share responsibility in its development and maintenance. The newly emerging interoffice network, will

BEFORE THE

PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

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IN THE MATTER OF AT&T'S PETITION FOR ARBITRATION WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996	))))))	DOCKET NO. TC96-184

U S WEST COMMUNICATIONS, INC.

DIRECT TESTIMONY

OF

D. M. (MARTI) GUDE

January 17, 1997

reports also reflect the "payment" of access charges ($8.7 million) by the U S WEST Toll product, which is classified as "Emerging Competitive" under South Dakota's deregulation legislation, to the regulated Intrastate Access product. In this study, 1995 ARMIS and intrastate data, as adjusted for these Board ordered accounting treatments were used as the starting point. These amounts are shown in Column (b) of Exhibit 1 and also in Column (a) of Worksheet 1 of Schedule 1 of my testimony.

Schedule 1 contains the results of the embedded cost study. Exhibits 1 through 7 of that Schedule show the various Avoided Cost to Total Cost percentage calculations applicable to each product category and the overall composite Avoided Cost Percentage (ACP), as follows:

Exhibit 1:	Composite	9.36%
Exhibit 2:	Business/PBX (Category 1)	9.52%
Exhibit 3:	ISDN/ACS (Category 2)	13.26%
Exhibit 4:	USWC Toll (Category 3)	10.41%
Exhibit 5:	Listings, CO Features, and Informational Services (Category 4)	41.97%
Exhibit 6:	Residence (Category 5)	5.53%
Exhibit 7:	Private Line (Category 6)	9.28%

Worksheets 1 through 5 of Schedule 1 provide the additional detail necessary to calculate the avoided cost percentages shown in the above described Exhibits, as

follows:

Worksheet 1: Provides the individual financial statement detail for each of the excluded (non-resale) products. These amounts are subtracted from the Total Intrastate results to arrive at the "Retail Intrastate" results which are used in the Avoided Cost percentage calculations.

Worksheet 2: Provides the financial statement detail for each of the six product categories used in the Avoided Cost percentage calculations.

Worksheet 3: Provides detail of avoided Customer Operations expenses by product.

Worksheet 4: Provides calculation of Depreciation expense split between Direct and Indirect Costs and calculation of product specific capital costs (return and tax gross-up)

Worksheet 5: Provides Retail Services revenue summary excluding Non-Recurring revenues

Q. HOW WERE THE AVOIDED COST PERCENTAGES, OR DISCOUNT FACTORS, CALCULATED?

A. The Avoided Cost Discount percentages, reflected above, were calculated for each product category and composite as a percent of Avoided Cost to Total Costs, where Avoided Costs and Total Costs include both expenses and a Capital Cost component.

Q. HOW WERE INTRASTATE LOOP COSTS HANDLED IN YOUR STUDY?

A. The intrastate loop costs were assigned directly to Local Service, consistent with the Company's TELRIC loop assignment methodologies in the cost material filed in this proceeding.

Q. WHY WERE THE PRODUCTS SHOWN ON WORKSHEET 1 EXCLUDED FROM YOUR STUDY?

A. As I stated previously, these are services considered by USWC to be not subject to resale, either by definition of the Federal Act (Intrastate Access, Billing and Collection, Public, and Mobile), by virtue of the type of service offered (E911, Operator Services, DA, and Miscellaneous Other), or because the service is already

BEFORE THE SOUTH DAKOTA
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IN THE MATTER OF THE INTER-CONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF 184 THE MIDWEST, INC., AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C SECTION 252	)	DOCKET NO. TC[illegible]-184

REBUTTAL TESTIMONY OF

MARK SCHMIDT

U S WEST COMMUNICATIONS, INC.

January 24, 1997

Since dark fiber is simply glass strands in a cable sheath, it is not a physical facility possessing features, functions or capabilities.

Second, USWEST is the telecommunications provider of last resort. As such, it must be able to retain its inventory capability in order to provide telecommunications services in an efficient, timely manner.

Q. HOW DOES DARK FIBER IMPACT HIGH BANDWIDTH COMPETITION?

A. It is difficult to understand how access to USWEST's dark fiber would enable high bandwidth competition since this type of competition is flourishing today without the use of USWEST's dark fiber. Further, there are alternate sources of fiber available to AT&T such that USWEST's dark fiber is not necessary for interconnection.

PATHWAYS

Q. WHAT IS A PATHWAY?

A. Pathways, as used by Mr. Riggert, include poles, conduit, ducts, and rights-of-way.

Q. WHY CAN'T USWEST PROVIDE ACCESS TO ITS RIGHTS-OF-WAY TO AT&T?

A. USWEST does not have the right in most cases to allow other entities into a given right-of-way easement. Public right-of-way is managed by government agencies such as city, county, state, and Bureau of Land Management agencies. Private right-of-way is normally exclusive to the party requesting the right-of-way. In order to include interconnectors in this arrangement,

USWEST would be required to open negotiations with the land owner, re-negotiate the agreement, and pay additional fees. This process is much more inefficient than AT&T securing their own private right-of-way.

Q. WHY CAN'T USWEST PROVIDE AT&T ACCESS TO UTILITY POLES IN ALL SITUATIONS?

A. USWEST commonly utilizes pole lines provided by power companies and does not own these poles. Again, negotiations for cable placement on poles should be done by AT&T directly with the owner of the pole.

Q. WHAT SHOULD THE COMMISSION DECIDE IN RELATION TO PATHWAYS?

A. Since AT&T has pathways of their own, any requirement placed on USWEST with regard to sharing pathways should be done in a reciprocal manner. If USWEST would like to lease a duct from AT&T, USWEST should be allowed to do so under the same terms and conditions that it provides leased ducts to AT&T.

CONTRACT ISSUES

Q. DOES AT&T'S PROPOSED INTERCONNECTION CONTRACT WITH USWEST POSE UNREASONABLE NETWORK DEMANDS?

A. Yes. Mr. Riggert states that this Commission should adopt AT&T's proposed Interconnection Agreement (Page 71). I would like to demonstrate to this Commission that the contract imposes upon USWEST many burdensome and costly network tasks. Further, many of the provisions

BEFORE THE SOUTH DAKOTA
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CRAIG WISEMAN

U S WEST COMMUNICATIONS, INC.

January 24, 1997

A. Yes, however the order goes on to say "We also conclude that, as long as new entrants compensate incumbent LEC's for the economic cost of the higher quality interconnection, competition will be promoted."[6]

Q. MR. RIGGERT STATES THAT U S WEST HAS REFUSED TO ALLOW AT&T TO COLLOCATE REMOTE SWITCHING MODULES IN U S WEST COLLOCATION SPACE (RIGGERT, PAGE 51). IS THIS CORRECT?

A. Yes. It is US WEST's opinion that the FCC Order does not require that Remote Switching Modules (RSMs) be collocated for interconnection or access to unbundled network elements. As a matter of fact, the FCC Order at ¶ 581 states "At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements." Additionally, in ¶ 581 the FCC states "We decline to require incumbent LECs to allow the collocation of any equipment without restriction."

Therefore, due to the fact that RSMs are not necessary for interconnection or access to unbundled elements, U S WEST is refusing to allow the collocation of RSMs in U S WEST collocation space.

[6] First Interconnection Order at para. 225.

IMPACT: A single IP within a LATA will require U S WEST to receive and transport traffic throughout the LATA without compensation. The interoffice facilities that today transport toll traffic between end office locations throughout the LATA will require augmentation to carry the local traffic back and forth to the single interconnection point. AT&T expects U S WEST to provide this backhaul without compensation for the costs incurred by U S WEST. This will result in U S WEST customers subsidizing AT&T's entry into the local service market.

U S W Proposal: U S WEST recommends one IP per local calling area as a more efficient use of the network. If only one IP is provided in a LATA, US WEST expects to be compensated for the additional costs associated with increasing capacity to the network.

Q. ARE THERE OTHER IMPACTS FROM THESE PROPOSALS THAT WERE NOT DETAILED IN THE PREVIOUS ANSWERS?

A. Yes. I have described the impacts that will occur if the AT&T proposals were adopted only for AT&T. The impacts will grow exponentially as additional CLECs adopt these arrangements for their own unique applications. U S WEST cannot be expected to bear the costs and potential network reliability burdens that will occur if this Commission adopts the AT&T proposed agreement in its entirety.

Q. WHAT IS YOUR RECOMMENDATION ?

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	TC96-184

HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

PROCEEDINGS: February 3, 1997
9:00 A.M.
Conference Room, State Hotel
Pierre, South Dakota

PUC COMMISSION: Jim Burg, Chairman
Laska Schoenfelder, Commissioner
Pam Nelson, Commissioner

COMMISSION STAFF PRESENT: Rolayne Ailts Wiest
Karen Cremer
Cameron Hosack
Harlan Best
Bob Knadle
Gregory A. Rislov
Steve Thegzan
William Bullard, Jr.

Reported by: Lori J. Grode, RPR and

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PROCEEDINGS

THE CHAIRMAN: Does anybody have any questions before we get started? If not, we'll get started. I'll begin the hearing for Docket TC96-184 in the matter of the interconnection contract negotiations between AT&T Communications of the Midwest, Incorporated, and U S West Communications, Inc. Pursuant to 47 U.S.C. Section 252.

The time is 9:00 a.m. The date is February 3rd, 1997, and the location of the hearing is the Conference Room of the State Hotel, 640 North Euclid Avenue, Pierre, South Dakota.

I am Jim Burg, the Commission Chairman. Commissioners Laska Schoenfelder and Pam Nelson are also present. I am presiding over this hearing. The hearing was noticed pursuant to the Commission's Amended Procedural Schedule Order for the Matter of Hearing issued January 10, 1997.

The issues at this hearing will be resolved -- will be to resolve all the contentions related to the appropriate charges, terms, and conditions for interconnection service and network elements which are to be in an agreement between AT&T and U S West for the purpose of providing competitive telecommunication services.

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LIS-Link, I'm not exactly sure what that stands for, but it's in their tariff. If the loop is integrated -- if that loop is integrated into a digital switch they propose, if AT&T as a customer in that digital stream now that they will take that digital stream demultiplex it to a channel, it will bank down to its 24 channel, at the same time put it back through a digital cross-connect system and give the signal to AT&T at its collocation.

With the technology that's available under Bell Corp's specification 303, that grooming -- in other words, dividing, separating AT&T's customers from U S West customers, can be done more efficiently at the remote terminal, therefore, you bring a dedicated digital signal that's dedicated to AT&T customers in from the loop and all of this extra equipment that their proposing that affects these nonrecurring charges wouldn't be necessary.

I think that just about concludes what I was wanting to do in my opening remarks.

MS. TRIBBY: Thank you.

MS. WIEST: U S West.

MR. WELK: Mr. Chairman, counsel, and Commissioners: I have filed with the Chairman this morning an Order admitting Bill Ojile, a nonresident

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attorney, to practice before this Commission. And Mr. Ojile will conduct the cross-examination.

MR. OJILE: Thank you. Good morning.

CROSS-EXAMINATION

BY MR. OJILE:

Q. Mr. Riggert, my name is Bill Ojile. I'm in-house counsel for U S West, and I have some questions for you this morning.

Let's start with dark fiber, one of the subjects you just concluded with. Would you agree, Mr. Riggert, that dark fiber is spare unused capacity in U S West's network?

A. It's unused capacity just like any other facility that is not used like a copper pair or switching capacity.

Q. And, presumably, U S West will use that capacity as its network needs change and expand over time?

A. That's what I would assume that when you put dark fiber in, that you have some sort of a forecast that you engineer to. And I think a lot of this fiber has been put in probably with at least the knowledge that competition was going to happen and that unbundling could happen.

Q. Now, are you aware, Mr. Riggert, that there

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are other companies that place fiberoptic facilities besides U S West in South Dakota?

A. I'm not familiar with the specifics of anybody. I know that in general there are some firms in some cities that place fiber, but I don't know any specifics.

Q. And those would be what are commonly referred to as competitive access providers?

A. In some cases I would agree with that.

Q. These companies, like MFS that have gone into cities and built fiberoptic rings to compete with companies like U S West?

A. MFS has certainly built some fiberoptic capacity. I'm not sure I would characterize MFS as solely a competitive access provider any more.

Q. And AT&T has the ability, doesn't it, Mr. Riggert, to put in its own fiberoptic facilities?

A. We have that ability. Whether it's feasible, as stated earlier, all at once, you might -- it might be constrained by putting in a cable particularly because of other demands.

Q. And, in fact, Mr. Ward testified yesterday that AT&T has fiberoptic facilities in South Dakota, didn't he?

A. I was not here when Mr. Ward testified, but I

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would accept that.

Q. So when you testified on page 23 of your testimony that AT&T is going to be disadvantaged if it can't buy dark fiber from U S West, you didn't have in mind the fact that AT&T could deploy fiber in its -- for its own purposes in certain situations?

A. Well, I think I probably was referring or thinking when I wrote that testimony -- I was thinking more about loop design than anything. And certainly AT&T's fiber that we have or have installed is on the trunk.

Q. Are you familiar with AT&T's proposed interconnection agreement, which I believe is now a part of Exhibit 8 in that proceeding?

A. I know it's in the proceeding. I've read parts of it. I don't purport to be familiar with the total document.

Q. Have you read the part pertaining to dark fiber?

A. Yes.

Q. I'll refer you specifically to attachment 3, page 15, of that agreement, paragraphs 4.2.4 through 4.2.6.

A. I don't have that agreement. Okay.

Q. 4.2.4 says that upon AT&T's request, U S West

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affected our forecast is, we did some trial and error and some different what-if analyses to say, if we know that there are going to be 300 customers in this area over the next three years, our forecast with competition would say we need to reduce the number of customers in that area that U S West would provide service to. It wasn't to say that there is 300 customers out there today, and, oh, by the way, there may be three CLECs, so let's make that 900 customers that we may have to provide the facilities for, so we could give, keep 300 for ourselves, and 300 for AT&T and 300 for the next. I think you're kind of mixing the way forecasting works.

Q. Interesting point. The way you raise it, it sounds as though if there is just U S West, there is a fixed number of customers, you used example of 300. And if there are two more CLECs added in, and suddenly there is 900. But, in fact, the number of customers doesn't go up just because you increase competition, does it?

A. I think you misunderstood what I said. I said of that base of 300 customers, we use competition to say that the likelihood is that of those 300 customers, we will serve less in that total 300. And what I was trying to demonstrate is, on the

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other hand, we didn't say U S West thinks it's going to need facilities for 300 customers, so we need to build them, but we're not going to build an additional 300, an additional 300, just so we could unbundle them for a competitor. That didn't make sense.

Q. Let me ask my question this way. The amount of fiber necessary ultimately will depend on the number of end-user customers who need the fiber, not whether the customers purchases the fiber from AT&T or U S West; isn't that correct?

A. That is correct.

Q. Now dark fiber is, in fact, fiber that's been installed in the network even if it hasn't been turned on; isn't that correct?

A. That is what I call dark fiber. That is fiber within a black cable sheet that does not have electronics attached on either end of it. It is waiting for that forecast of customers, customer growth to materialize so that I do need to go out and put equipment on both ends of that to provide facilities.

Q. Dark fiber, when you call it inventory, dark fiber is not sitting in a truck or in a warehouse, is it? It's actually installed in the network. Not

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turned on, but installed in the network. Those were words that you used earlier, I believe?

A. It is actually within that cable sheet within the ground.

MS. WIEST: Excuse me, Mr. Solomon.

(DISCUSSION OFF THE RECORD)

MR. SOLOMON: I could either take a break now or finish my dark fiber questions and take a break. And once I take a break, I'm pretty far along, whichever is your preference? Should we do it now?

MS. WIEST: We'll just take one now. Thanks. 10-minutes.

(RECESS TAKEN AT 2:45 P.M. UNTIL 3:00 P.M.)

MS. WIEST: Let's get started again. Okay. We'll go back on the record. Mr. Solomon.

MR. SOLOMON: Thanks you.

BY MR. SOLOMON CONTINUING:

Q. When we went off the record, we were talking about dark fiber, Mr. Schmidt, and you suggested in your testimony that dark fiber purposedly is not part of the network because it's not currently being used. Isn't that true?

A. Yes. As I said in my testimony, dark fiber is not a network element because it's not being used.

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Q. Okay. If a customer requests that you turn off his or her --

MS. SCHOENFELDER: Mr. Solomon, could you speak louder, please?

MR. SOLOMON: Oh, yes. I'm sorry. I will.

Q. If a customer requests that you turn off his or her telephone service, then the line going to that customer's house becomes nonoperational until it's turned back on. Isn't that correct?

A. I think we're talking a difference of semantics here. Fiber must have optical equipment that sends an optical signal over that cable before any other facility can be added to it. With that copper loop, it still works as long as you make that connection back to the switch or you make that connection anywhere else. I know what you're trying to say, the high level it sounds the same, but that copper is a facility that's able in its present state to transport a service. And that unlit fiber simply is not. It's not a network element yet.

Q. But in both cases, and Mr. Schmidt, I'm not raising my voice at you. I'm raising my voice to amplify. In both cases, fiber that's not currently being used and loop that's not being currently used, both are physically in the network, aren't they?

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Q. My question is, have you taken any positions that you feel are inconsistent with the FCC Order?
A. The only position that I'm aware of is the fact that we have asked the Commission to restrict collocation to U S West central offices. U S West has concerns over safety and network reliability issues on CEBs, and environmental vaults. U S West has stated that they will consider collocation in those areas on a bona fide request basis.
Q. Because it's been a long day, I'm going to try to just ask one question, and have you answer just one question. And then I may ask a follow-up. But it's not necessary for you to volunteer beyond the answer of yes. So on that question, then, I'll go directly to where collocation should occur.
It's a fact, then, that the FCC Order, states that collocation should be allowed not only at central offices, but also at serving wire centers, and tandem offices, as well as buildings, or similar structures, owned or leased by U S West that house U S West network facilities. Isn't it true that that's what the FCC Order says at paragraph 573?
A. Let me just look. Yes, that's correct.
Q. And doesn't that paragraph 573 also say that collocation requirement includes, quote, any

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structures that house U S West network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures. Doesn't it also say that?
A. Yes, it does.
Q. And your position and U S West's position is inconsistent with that Order, isn't it?
A. Yes, and I've explained why, that U S West has concerns of network reliability, safety, and has agreed to address each one of those requests for those facilities on a bona fide request basis.
Q. If I may, Mr. Wiseman, if I ask why, I would certainly want an explanation, but if I fail to, certainly your counsel can cover that on redirect. But are you aware that in papers U S West filed with the Eighth Circuit, when it sought a stay for a portion, U S West represented that it was appealing certain portions of the Order, and that it was appealing many portions of the Order but it was only seeking a stay as to certain portions, and that U S West intended to abide by the other portions while they remained in effect. Are you aware of that?
A. No.
Q. I want to ask you about RSUs you mentioned, remote switching units. An RSU and a DLC. You said

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what an RSU is. A DLC would be a digital line carrier; is that correct?
A. Digital loop carrier.
Q. Digital loop carrier. Thank you. An RSU and a DLC are both used for interconnection, isn't that correct?
A. Yes, they could be.
Q. And a DLC and an RSU both contain, I'm going to list some things. Why don't we do them one at a time. Both an RSU and a DLC contain a loop battery, isn't that correct?
A. I don't know.
Q. How about a detection of off hook? Do they both contain that?
A. I don't pretend so, or I don't present myself as being a DLC expert, so I don't know whether they both do or not.
Q. Does an RSU contain a loop battery?
A. What do you mean by loop battery?
Q. I mean the term exactly as I say it. If you don't know what it means, that's okay, too. If you don't know what I'm referring to, that's your answer. How would a detection of off hook, do you know what that is?
A. You asked me two questions in a row. I

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mean, I'm not trying to be argumentative.
Q. It's fine, please slow me down.
A. I could say that if you mean a loop battery is like a little Nycad battery that hangs on a loop, I'll say, No, the switch does not do that. But if you mean that powers the cable pair with battery potential, the answer is yes. And that's why I asked you what you meant, what do you mean by a loop battery.
Q. I understood, the latter is, yes, as to define that latter answer, and RSU has one?
A. To provide a loop battery an RSU does, yes.
Q. And RSU has detection of off hook?
A. Yes.
Q. And it has a ringing current, doesn't it?
A. Yes.
Q. And high voltage protection has that?
A. Yes.
Q. And an RSU has an analogue to digital conversion, multiplexing, and testing? Doesn't it have all of that?
A. Yes.
Q. And you said you don't know what a DLC has, or do you know if a DLC has any of those?
A. I'm not an outside plant expert.

Q. So if I were to tell you DLC has all of those, you wouldn't disagree with that, would you?
A. I would not agree with you, because I just said I don't know.
Q. All of the functions I just listed, in some way are related to interconnection and access to unbundled loops, aren't they?
A. All of the functions that you listed are related to switching functions of an RSU.
Q. All of those functions are related to interconnection and access, aren't they?
A. I don't know –
Q. Not saying that it has other functions, but does it have those functions?
A. I don't know what you mean by that. I don't know if you're asking for a legal opinion of something that says you have to have those to interconnect. I don't know what you mean by, are they related to interconnection?
Q. Well, they are used in interconnection. I'm not asking if they're used in switching. That may or may not be the case. But I'm asking whether they're used in interconnection and access.
A. Well, here again, they're used in a switch to provide switching functions. How you interconnect

to network elements doesn't require that you have all those functions to interconnect the network elements.
Q. I'm really not asking you if it's required. I'm asking if it's used for that.
A. Solely for interconnection? I'm not totally understanding your question.
Q. I'm not asking solely. Very simple are those functions in RSU, each and every one of them is used in interconnection and for access; isn't that correct?
A. No.
Q. Now you don't know what a DLC has in it, do you?
A. I already told you that twice or three times that I don't know.
Q. Now it is U S West's position as stated by you, that we should do our interconnection through DLCs, not through RSUs; isn't that correct?
A. Through transmission equipment.
Q. And you don't, and as you sit here today, you don't even know what a DLC does, do you?
A. I didn't say that. I told you I wasn't an expert on DLCs.
Q. If AT&T were to interconnect only with DLCs, and not to RSUs, then AT&T would have to perform

switching a location other than the central office, isn't that true?
A. You would use a central office somewhere to do the switching, yes. All of those functions that you described as an RSU, and it could be an RSU across the street. It could be an RSU in a pseudo arrangement that AT&T has with U S West.
MR. SOLOMON: If it's okay with the Commission, I would like to use one piece of paper and draw something very simple that may cut to the chase on this.
Q. I'm going to draw two environments, an environment we collocated an RSU for interconnection purposes. And an environment where the interconnection occurs not with an RSU, but with a DCL. I am no artist, so I don't know what's going to – how perfect this will be, but once I've finished, I'm going to ask you a couple of questions on this.
Let's say we have a U S West central office over here. Over here we're collocating an RSU. This is the RSU environment. We have two South Dakota customers, Mr. Smith and Mr. Jones. And they're neighbors. They are serviced by the same central office at U S West. I'll use an "S" to represent

Mr. Smith, and a "J" to represent Mr. Jones.
If an RSU is used for the collocation, for interconnection, then the call can be routed as follows: Line goes, let's say Mr. Smith wants to call Mr. Jones. He routes a line in, to the RSU, interconnection occurs here. Comes on out. This way. Can be switched at the U S West central office. Isn't that correct?
A. Who did you say the customers belonged to? Mr. Smith and Mr. Jones?
Q. Mr. Smith and Mr. Jones are two customers that for whatever reason have decided they no longer want to be with U S West and so they've switched to, let's say, AT&T. And Mr. Smith wants to call Mr. Jones, and AT&T has collocated an RSU at U S West's central office.
A. Uh-huh (Yes).
Q. The call comes through, interconnection of the loop occurs here, for both Mr. Smith and Mr. Jones; correct?
A. Uh-huh (Yes).
A. Yes.
Q. And the switching occurs at U S West central office; correct?
A. It occurs in the RSU.

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was, on the DLC example, if you severed the facility, you couldn't make the call. And what I'm responding to is, if you sever the umbilical between the host and the remote, in certain places, you cannot make the call either. It doesn't matter how far the call travels. Travels. It has to do with your ability to even establish the call.

Q. What you're talking about is if you add something new into the equation, your call wouldn't be made. But I'm just talking about the path the call takes, and the setup U S West wants to impose on AT&T is to force its calls to go farther and longer for whatever reason; isn't that correct?

A. It's not to force AT&T to do anything. The Act only requires that AT&T -- or U S West allow transmission equipment for interconnection to U S West network or its unbundled elements. It specifically says that we have the right to restrict certain types of equipment. The Act does not require that U S West allow remote switching and U S West is exercising its rights under the Act.

Q. Well, now, the Act doesn't, in fact, say that U S West has the right to restrict all or any equipment that U S West chooses, does it?

A. It says that the Commission refuses to

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require that U S West allow all or any equipment, which gives us the right to restrict that that is not required. And that is not necessary. And it's US West's opinion that remote switching modules are not necessary for interconnection.

Q. I'm going to get back to what the Act says in a moment, and I'm going to address with this RSU issue. It seems you don't know some of the questions I thought you would know on DLC. Even though you want AT&T to interconnect with DLC. But does U S West --

A. Mr. Schmidt is the DLC expert.

Q. Does U S West use RSUs in South Dakota at all?

A. Oh, yes, we do.

Q. And it's more efficient to do it that way than to do it with a DLC situation, isn't it?

A. It's not a similar application that you're talking about. If it was --

Q. Well, does U S West use RSUs for efficiency reasons, because it is an efficient way to structure the network?

A. Yes. But U S West application is not for collocation. U S West is providing telephone service to central offices located throughout South Dakota

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with that.

Q. Do you know how many customers a basic DLC can handle?

A. I am not the DLC expert.

Q. Would you disagree that it's around 700 customers?

A. I would disagree because I do not know.

Q. Do you know how many customers a basic RSU can handle?

A. Depends on how many switch mods you put in it.

Q. Let's start without putting -- Let's put the basic number of modules in there. Let's not have any additional ones put in, just the base ones that the RSU can handle.

A. I believe it's with one switch mod it's 512.

Q. And if I add a switch -- Is that the basic RSU?

A. A basic RSU would have to have at least one switch mod, yes.

Q. Okay. Now add a mod to that, how many can it handle?

A. It's in multiples of 512.

Q. Okay. The standard RSU's, the type of RSU's that we are talking collocating the type that you're

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testifying about, they'll actually handle thousands of calls, won't they?

A. Did the calls -- Now, you've gone from lines to calls.

Q. I'm happy to do it as lines.

A. I'm just wanting to make sure I understood.

Q. Okay.

A. They'll handle thousands of calls, sure.

Q. Isn't it true that the capacity of an RSU in its basic form, is that it can handle more than the capacities of the DLC in its basic form?

A. I don't know. Well, what you said earlier was, you told me a basic DLC could do 700 lines.

Q. I'm not testifying, sir. If your answer is you don't know, that's a fine answer.

A. Fine.

Q. A collocating RSUs would facilitate AT&T's ability to compete, wouldn't it?

A. I'm sorry. I was coughing when you --

Q. Sure.

A. Said that.

Q. Collocating RS -- Do you need a drink?

A. No, I just had one. I was choking on it.

Q. Collocating RSUs would facilitate AT&T's ability to compete, wouldn't it?

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consistent with the Order, is that what expenses that U S West incurs to provide interconnection arrangements to new entrants, should be paid for by the new entrant.

Q. Okay. Now per your testimony, the problem we have with the tandem arises because in the monopoly environment, what we have now, two calls entering the same central office would be switched at the central office rather than at the tandem. But in the competitive environment, under U S West's proposal, the CLECs are to transport that same traffic out of the central office and switch it at a tandem. I'm referring to pages four through six, and I'm not quoting, but that is, I think, the essence of the argument.

A. No, it's not. I don't say that the CLECs have to transport the call out of the tandem. If you interconnect at U S West tandem, and your switch is therefore receiving all of its calls from U S West customers, at the U S West tandem, then calls that were intraoffice in nature, as I described here in Pierre, when a U S West customer now calls an AT&T customer, instead of delivering that call through the Pierre central office, it'll have to be transported to the U S West tandem over U S West facilities and

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delivered to AT&T's point of interface at, or point of interconnection, at the U S West tandem. Therefore, U S West will have to augment or increase the capacities between the end office and the tandem to accommodate that new network arrangement. That is not what occurs today in the U S West network.

Q. Let me see if I can make that into a short sentence. Smith and Jones want to call each other, currently they're neighbors, their call is currently switched at U S West central office; correct?

A. Yes.

Q. In the new environment, Smith and Jones calls may end up being switched somewhere other than the U S West central office, such as the tandem; correct?

A. No.

Q. Well, in the new environment, Smith and Jones call, still neighbors, won't be switched to necessarily the U S West central office, at the U S West central office; correct?

A. It depends on who the service provider is for Smith and who the service provider is for Jones.

Q. Smith and Jones are not provided by U S West anymore, because Smith and Jones decided they wanted to go to another provider. Smith and Jones no longer

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are being switched by U S West central office in your environment. They're being switched somewhere else, and as a result of not being switched at the U S West central office, the tandem use gets increased, right?

A. No.

Q. I feel you might be reluctant to answer any of my questions as correct, but –

A. No, I'm not looking to not answer, but you're not describing the situation that I'm describing in my testimony. The situation I'm describing in my testimony is today Smith and Jones are served in Pierre central office. Tomorrow, Mr. Smith becomes an AT&T subscriber. Mr. Jones calls today, when Mr. Jones calls Mr. Smith, that call is switched within Pierre central office. However, tomorrow, now I forgot which one became your customer, whoever, is Mr. Jones is still a U S West customer and he calls Mr. Smith, AT&T s customers, and AT&T has chosen to their point of interconnection to be at the U S West tandem, then U S West will have to route that call across U S West facilities to the tandem. It will be switched there and delivered to AT&T, who will then take it to their switch and process it and give it to Mr. Jones.

Q. And potentially that could happen if Smith

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and Jones are both AT&T customers, right?

A. No.

Q. Potentially, that is one thing that could happen?

A. Not that description, no. It is not.

Q. The switching –

A. In the case of them being, in the case of them both being AT&T customers, when they call each other, the call will be an AT&T switch, not a U S West network.

Q. Mr. Wiseman, have AT&T collocated an ESP in a central office, and Mr. Smith is U S West customer and Jones is an AT&T customer, that switching doesn't have to go through the tandem anymore. It can go through the U S West office, can't it?

A. No. Not as long as your point of interconnection with U S West network is at the tandem, the call would still go from the U S West end office to the tandem, and then back to the AT&T.

Q. But you could route the calls without going through the tandem, if you wanted, if you had an ESP collocated there, couldn't you?

A. Not if your point of interconnection is at the tandem.

Q. What if your point of interconnection is at

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A. As reflected on this sensitivity analysis, to the extent there is accurate cost data that reflects those product management related costs, that will still exist in a wholesale environment, as shown here, a small 6.8 percent, which is a reasonable proxy, from U S West data, to the extent that the data exists to show that those costs will still exist in a wholesale environment, I agree that they should not be reflected in the wholesale discount rate.

Q. Okay. Thank you. Let's step back again for a moment, and let me ask you if this Commission were to set a discount rate, that was too high, that was in excess of U S West actual avoided costs, would you agree that would have an adverse effect on U S West's ability to compete here in South Dakota?

A. If they set a discount rate too high, so, you mean, higher than the one that I've proposed?

Q. In excess of U S West's actual, what it cost, actually, maybe even the one you did propose. But in excess of actual avoided cost, would you agree that would affect adversely U S West's ability to compete?

A. I think it would have an adverse impact on the customers in South Dakota.

Q. Okay. Go ahead, I'm sorry.

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A. I'm done. Do you have a question?

Q. What about U S West? Would it have an adverse effect on U S West?

A. I think it would. If too much cost is indicated and just as if too little cost, it's why we're having these proceedings to understand what the appropriate level of costs are.

Q. So it's very important that we understand what costs U S West still will incur in the wholesale environment, isn't it?

A. Is that a question? I'm sorry.

Q. Yes.

A. Yes.

Q. Okay. Now do I understand that you and AT&T are advocating that the wholesale discount be applied to prices that are already below cost?

A. Yes.

Q. I just wanted to make sure that I understood that. You are proposing one wholesale discount; is that right, as opposed to a number of discounts by individual services?

A. That's correct.

Q. So you would ask this Commission to apply the same rate to residential, to business, ISDN, to toll; is that right?

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A. Yes.

Q. Would you agree with me that each of these services has unique cost characteristics that are different from the others?

A. Yes, I would.

Q. And the costs that will be avoided will differ from service to service?

A. The costs that will be avoided could vary and be different from service to service. I can't say for certainty because part of the dilemma is not having costs that are attributable to the different services in a way that allows us to, in fact, discern that.

Q. It's reasonable to assume, isn't it, that the costs are going to differ service by service?

A. If, for example, the cost, if I was to compare it in the context to providing Centrex versus private line, for example.

Q. Right.

A. Sure. I think it's reasonable to assume that.

Q. Okay. Okay. But in light of the unique cost characteristics for each service, doesn't it make more sense to have individual discounts for each service rather than one composite discount?

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A. I think for the purposes of this proceeding, with the data available, and the objectives before us, I think it is reasonable to used aggregate discount, which, in fact, again, goes to my point earlier of the notice that Qwest's more data does not necessarily imply or mean greater accuracy. It's to me it's very dangerous to take data that's not as a cause and effect fashion attributed to different products and services and that individual discount for each unique product and service. All that does is display that there is a difference, but does not display that the true cost causing relationships have been established. So absent that, I believe that an aggregate discount across all products and services is appropriate.

Q. I think what you just told me, and I want to be sure I understood it, is that if one could properly allocate costs to specific services, that that would probably be the best way to go, but tell me, that's a hard thing to do, is that right?

A. No, I didn't used word allocate at all, actually. What I said, is if the costs were appropriately understood and attributable and collected on a product by product basis, then it would make sense to do that. That's different than

"Interconnection" is as described in the Act and refers to the connection of separate pieces of equipment, facilities, or platforms between or within networks for the purpose of transmission and routing of telephone exchange service traffic and exchange access traffic.

"ISDN" (Integrated Services Digital Network) means a switched network service that provides end-to-end digital connectivity for the simultaneous transmission of voice and data. Basic Rate Interface-ISDN (BRI-ISDN) provides for a digital transmission of two 64 Kbps bearer channels and one 16 Kbps data channel (2B+D). Primary Rate Interface-ISDN (PRI-ISDN) provides for a digital transmission of twenty-three (23) 64 Kbps bearer channels and one 64 Kbps data channel (23B+D).

Issue A-5

[U S WEST proposed language]
"Itself" shall mean U S WEST Communications Inc. or any affiliate or Subsidiary thereof, for the purpose of Interconnection.

[AT&T proposed language]

"Itself" shall mean U S WEST Communications Inc. or any Affiliate or Subsidiary thereof.

"IXC" (Interexchange Carrier) means a provider of Interexchange Telecommunications Services.

"LATA" means Local Access Transport Area.

"LEC" means local exchange carrier.

"LIDB" (Line Information Data Base(s)) is an SCP database that provides for such functions as calling card validation for telephone line number cards issued by LECs and other entities and validation for collect and billed-to-third services.

"Local Interconnection" shall have the meaning set forth in the Recitals to this Agreement.

"Local Resale" or "Services for Resale" means, collectively, Telecommunications Services and service functions provided by U S WEST to AT&T pursuant to Attachment 2 of this Agreement.

"Local Traffic" is intraLATA traffic within an exchange that is treated as toll free traffic as established by the Commission and as reflected in the effective tariffs of U S WEST.

"Loop" is a transmission facility between a distribution frame, or its equivalent, in a U S WEST central office or wire center, and the Network Interface Device (as defined herein) or network interface at a subscriber's premises, to which AT&T is granted exclusive use. This includes, but is not limited to, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the signal up to needed to provide ISDN, ADSL, HDSL, and DS-1 level signals. A Loop may be composed of the following components:

Loop Concentrator / Multiplexer
Loop Feeder
Network Interface Device (NID)
Distribution

52.3.1 *U S WEST shall provide nondiscriminatory access to the network elements specified in this Agreement at any technically feasible point that is equal in quality to the access which U S WEST provides to itself or any other Person and that is on rates, terms and conditions that are just, reasonable and nondiscriminatory. AT&T acknowledges that certain provisions contained in this Agreement may conflict with this standard.*

52.3.2 *For purposes of this Agreement, "rates, terms and conditions that are just, reasonable and nondiscriminatory" shall mean that (i) such terms and conditions are equal in quality to the terms and conditions that U S WEST provides to itself or any other Person, or, (ii) where it is technically infeasible to provide such terms and conditions to AT&T, such terms and conditions are offered equally to all requesting carriers.*

Issue A-14a

[U S WEST proposed provision]

52.3.3 U S WEST shall not provision or provide access to unbundled Network Elements for AT&T that are inferior in quality to what U S WEST provides itself. If U S WEST cannot provide AT&T access to requested Network Elements on a basis that is equal in quality to the manner in which U S WEST provides such access or provisioning to itself, U S WEST must provide such access or elements in a manner that enables an efficient AT&T a meaningful opportunity to compete.

[AT&T proposed provision]

52.3.3 For purposes of this Agreement, "equal in quality" shall mean, among other things, equal to the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself and equal in the quality of design, performance, features, functions, capabilities and other characteristics, including, but not limited to, levels and types of redundant equipment and facilities for power, diversity and security, that U S WEST provides to itself.

52.3.4 *If AT&T requests a particular level of access that is set forth herein, but U S WEST demonstrates that it does not provide that particular level of access to itself or that such access is technically infeasible, U S WEST shall not be required to provide that level of access to*

network elements,[33] but rather the level of access U S WEST provides itself (if technically feasible) or the level of access equal to that provided to all other competing carriers.

52.4 Technical Feasibility. The Parties recognize that providing a number of the services specified in this Agreement depend upon the "technical feasibility" of providing that service, as that term is defined under the Act and/or by FCC or Commission rules and decisions. If the Parties cannot agree on whether providing a service is technically feasible, the matter, including cost and expenses (if any), shall be resolved through good faith negotiation or the dispute resolution process outlined in this Agreement.

52.5 Equipment

52.5.1 The Parties recognize that equipment vendors may manufacture telecommunications equipment that does not fully incorporate and may deviate from industry standards referenced in this Agreement. Due to the manner in which individual equipment manufacturers have chosen to implement industry standards into the design of their products, along with differing vintages of individual facility components and the presence of embedded technologies predating current technical standards, some of the individual facility components deployed within U S WEST's network, including, without limitation, Network Elements and associated business processes and the standards associated with the equipment providing such Network Elements (collectively, "Network Components"), may not adhere to all the specifications set forth and described in the Bellcore, ANSI, ITU and other technical and performance standards outlined in this Agreement. Within forty-five (45) days after the Effective Date of this Agreement, the Parties will develop a process by which U S WEST will advise AT&T of deviations from standards referenced in this Agreement. In addition the Parties agree that those deviations from such standards documented by U S WEST to AT&T shall to the extent permitted by FCC and Commission rules and regulations, supersede sections of this Agreement referencing technical standards otherwise applicable for the affected Network Elements.

52.5.2 U S WEST agrees that in no event shall it intentionally allow any Network Component provided by U S WEST to AT&T under this Agreement to perform below the standards or thresholds therefrom reflected in Section 52.5.1. U S WEST shall minimize any degradation to its equipment relative to currently applicable service, where reasonable in view of industry adopted performance standards and technological developments. Written notice (the "Change Notice") of any planned changes in standards for any Network Component which could impact that Network Component will be provided at least ninety (90) days (or at the make/buy point) prior to the planned implementation. If AT&T notifies U S WEST of how the proposed change may adversely impact AT&T or its Customers within fourteen (14)

33 Pursuant to the Eighth Circuit Decision, the Parties agree to this language.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

CERTIFICATE OF SERVICE

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 13th day of September, 1999, true and correct copies of U S WEST Communications, Inc.'s Opening Brief on the Merits of its Affirmative Claims were sent by U S mail, postage paid, to the following at the following addresses:

Michael Meyers, General Counsel
S.D. Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

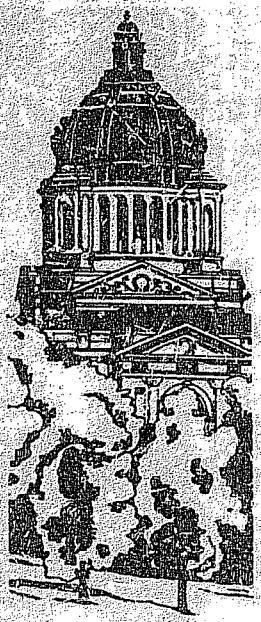
John S. Lovald
Olinger, Lovald, Robbennolt & McCahren
117 East Capitol
P.O. Box 66
Pierre, SD 57501-0066

Maria Arias-Chapleau
Rebecca B. De Cook
AT&T Communications of the Midwest
1875 Lawrence Street, Suite 1575
Denver, CO 80202

Michael D. Warden
Christopher D. Moore
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Bonnie P. Ulrich
Assistant United States Attorney
United States Dept. of Justice
P.O. Box 5073
Sioux Falls, SD 57117-5073

Tamara A. Wilka



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
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TTY Through
Relay South Dakota
1-800-877-1113

Internet Website
www.puc.state.sd.us/puc/

Jim Burg
Chairman
Pam Nelson
Vice Chairman
Laska Schoenfelder
Commissioner

William Bullard Jr.
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Michele M. Farris
Marlette Fischbach
Heather K. Forney
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Lisa Hull
Dave Jacobson
Katie Johnson
Bob Knadle
Delaine Kolbo
Charlene Lund
Terry Norum
Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

October 15, 1999

Ms. Tamara Wilka
Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Tammie:

Enclosed you will find the original Joint Stipulation to Extend Time for Filing of Briefs with reference to the above captioned matter. Also enclosed is an envelope and letter addressed to the Clerk of Courts. On Monday, October 18, 1999, would you please sign the Joint Stipulation and send the original and a copy to the Clerk for filing.

Also on Monday, after you have signed the Joint Stipulation, would you please fax it to me so I can mail the necessary copies to all interested parties.

Thank you.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

October 18, 1999

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Mr. Haas:

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Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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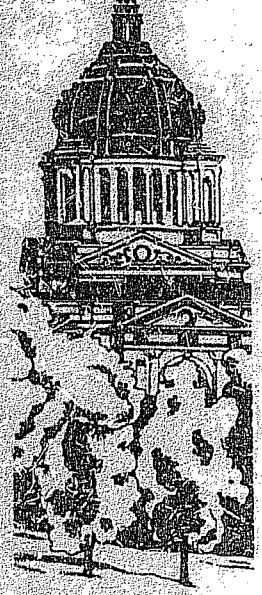
Rolayne Ailts Wiest



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Gregory A. Rislov
Keith Senger
Rolayne Ailts Wiest

October 18, 1999

Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

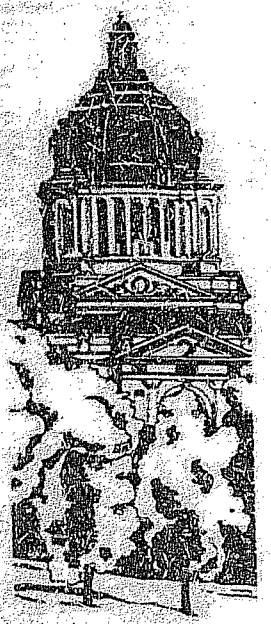
Dear Judge Battey:

Enclosed you will find a courtesy copy of Joint Stipulation to Extend Time for Filing of Briefs in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.



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Rolayne Ailts Wiest

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

October 18, 1999

Mr. Alex Duarte
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Trial Attorney
U.S. Department of Justice
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Ms. Rebecca B. DeCook
Attorneys at Law
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1875 Lawrence Street, Suite 1575
Denver, CO 80202

Ms. Bonnie P. Ulrich
Assistant United States Attorney
United States Department of Justice
P. O. Box 5073
Sioux Falls, SD 57117-5073

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel

Enclosed each of you will find a copy of Joint Stipulation to Extend Time for Filing of Briefs in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	Civ. No. 99-5024 JOINT STIPULATION TO EXTEND TIME FOR FILING OF BRIEFS

The parties, James A. Burg, Pam Nelson, and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota (Commissioners), U S WEST Communications, Inc. (U S WEST), AT&T Communications of the Midwest, Inc. (AT&T) and the United States of America (USA) through their counsel of record, file this Joint Stipulation to Extend Time for Filing of Briefs and propose the following new briefing schedule:

The Commissioners, AT&T and Intervenor USA shall file responsive briefs, not to exceed fifty (50) pages, on or before December 2, 1999. U S WEST may file an optional reply brief limited to twenty-five (25) pages on or before January 11, 2000.

The parties respectfully request that the Court accept this Joint Stipulation.

Dated at Pierre, South Dakota, this 15th day of October, 1999.

Dated this 15 day of October, 1999

Rolayne Ailts Wiest

Rolayne Ailts Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
Telephone (605) 773-3201
Attorney for James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota

Dated this 18th day of October, 1999

Thomas J. Welk
Tamara A. Wilka
Attorneys at Law
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P. O. Box 5015
Sioux Falls, SD 57117-5015
Telephone (605) 336-2424

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Telephone (303) 672-2700

Attorneys for U S WEST Communications, Inc.

Dated this 15th day of October, 1999

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Maria Arias-Chapleau
Rebecca B. DeCook
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Michael D. Warden
Christopher D. Moore
Attorneys at Law
Sidley & Austin
1722 Eye Street N.W.
Washington, DC 20006

Attorneys for AT&T Communications of the Midwest, Inc.

Dated this 15 day of October, 1999 David Zaring (by RW)

David Zaring
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
P. O. Box 883, Room 907
Washington, DC 20044
Telephone (202) 514-4964
Attorney for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that copies of Joint Stipulation to Extend Time for Filing of Briefs were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 18th day of October, 1999.

Mr. Alex Duarte
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, CO 80202

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
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Mr. Thomas J. Welk
Ms. Tamara A. Wilka
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Ms. Rebecca B. DeCook
Attorneys at Law
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Mr. Christopher D. Moore
Attorneys at Law
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Ms. Bonnie P. Ulrich
Assistant United States Attorney
United States Department of Justice
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Sioux Falls, SD 57117-5073

Mr. David Zaring
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
P. O. Box 883, Room 907
Washington, DC 20044

Rolayne Wiest

Rolayne Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

FILED
OCT 20 1999
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., Defendants. and UNITED STATES OF AMERICA, Intervenor.	)	CIV. 99-5024 ORDER

RECEIVED
OCT 21 1999
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Pursuant to the Joint Stipulation to Extend Time for Filing of Briefs, it is hereby ORDERED that the Commissioners, AT&T and Intervenor USA shall file responsive briefs, not to exceed 50 pages, on or before December 2, 1999. U S WEST may file an optional reply brief limited to 25 pages on or before January 12, 2000.

Dated October 20, 1999.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES SENIOR DISTRICT JUDGE

...this document was
...docket of the Clerk
...States District Court
...District of South Dakota
on 10-20-99
...Deputy

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

ATTORNEYS AT LAW

[redacted]

101 North Phillips Avenue, Suite 600
Sioux Falls, South Dakota 57104
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Facsimile 605 334-0618

tawilka@boycemurphy.com

Tamara A. Wilka
Carolyn A. Thompson
Lisa Hansen Marso
Jeffrey C. Clapper

Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1966)

October 27, 1999

[redacted]
S.D. Public Utilities Commission
[redacted]

[redacted]
[redacted]
[redacted]

[redacted]
[redacted]
[redacted]

Michael D. Warden
Christopher D. Moore
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Bonnie P. Ulrich
Assistant United States Attorney
United States Dept. of Justice
P.O. Box 5073
Sioux Falls, SD 57117-5073

RECEIVED
OCT 2 8 1999
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

[redacted]
[redacted]
[redacted]

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

[redacted]

There has been some confusion as to who should be served on behalf of U S WEST Communications, Inc. in this case. Please be advised that Tom and I should be served with all pleadings as well as Michael Thompson at U S WEST Communications, Inc., 1801 California Street #5100, Denver, CO 80202.

Sincerely yours,

BOYCE, MURPHY, MCDOWELL & GREENFIELD, L.L.P.

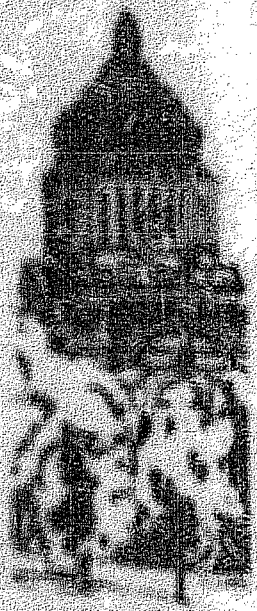
Tamara A. Wilka

Tamara A. Wilka

I need Pam, Michael Thompson to be served as well also. I thought perhaps Tom Tidd told you that.

cc: Michael Thompson

Correct, but Ted is not involved so file any papers.



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

November 30, 1999

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Mr. Haas:

Enclosed for filing you will find original and copy of Commission's Responsive Brief with reference to the above captioned matter.

Very truly yours,

Karen Aliz West

Karlyne Aliz West
Special Assistant Attorney General

KAW:de
Enc.

South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

November 30, 1999

The Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

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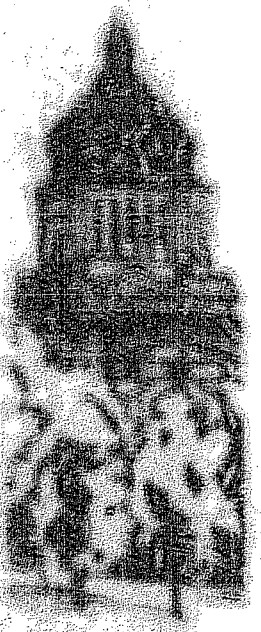
Very truly yours,

Rolayne Alts Wiest

Rolayne Alts Wiest
Special Assistant Attorney General

RAW:dk
Enc.



South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

November 30, 1999

Mr. Michael Thompson
Senior Attorney
U S WEST Communications, Inc.
1801 California, Suite 5100
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Mr. Thomas J. Welk
Ms. Tamara A. Wiken
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Civil No. 99-5024

Dear Counsel:

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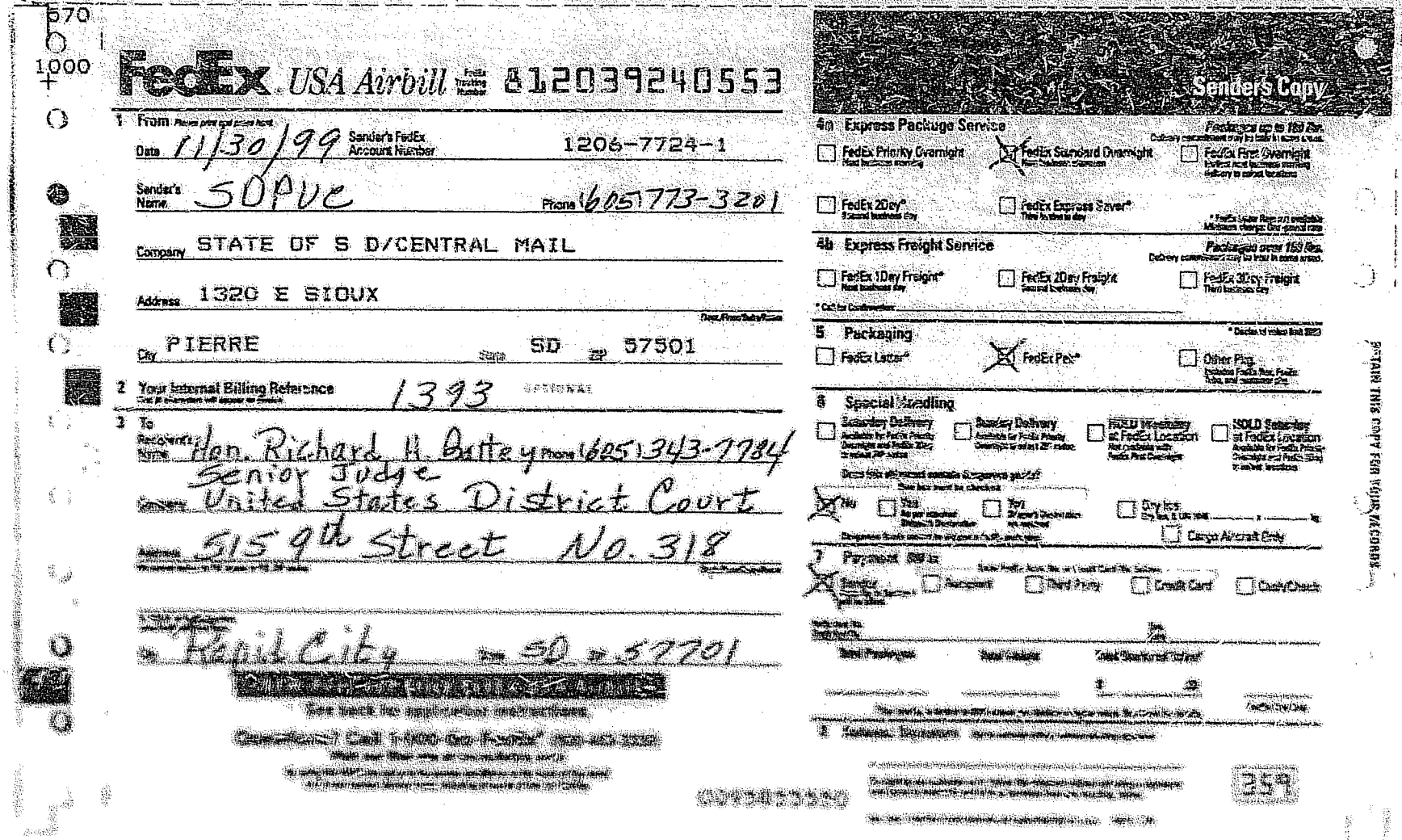
Very truly yours,

Karen E. Cremer

Karen Cremer
Special Assistant Attorney General

kkw:ak
Enc.



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City PIERRE State SD ZIP 57501

2 Your Internal Billing Reference 1393

3 To
Recipient's Name Hon. Richard H. Battey Phone (605)343-7784
Senior Judge
Company United States District Court
Address 515 9th Street No. 318
Rapid City SD 57701

Sender's Copy

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FedEx Standard Overnight
FedEx First Overnight
FedEx 2Day*
FedEx Express Saver*

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FedEx 1Day Freight*
FedEx 2Day Freight
FedEx 3Day Freight

5 Packaging
FedEx Letter*
FedEx Pak*
Other Pkg

6 Special Handling
SATURDAY Delivery
SATURDAY Delivery
HOLD Weekday at FedEx Location
HOLD Saturday at FedEx Location
No
Yes
Dry Ice
Cargo Aircraft Only

7 Payment Bill to
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Recipient
Third Party
Credit Card
Cash/Check

259

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	)	Civ. No. 99-5024 COMMISSION'S RESPONSIVE BRIEF

STATEMENT OF THE CASE

THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110, Stat. 66 (hereinafter "Telecommunications Act" or "Act") provides for the development of competition in the telecommunications industry. The Telecommunications Act permits competitors to enter the local exchange market that has historically been served by incumbent local exchange carriers (hereafter "LECs"). Not only does the Act allow for competition, it also places upon the incumbent LEC the following obligations: 1) to interconnect with competitive telecommunications carriers; 2) to provide competitive carriers access to the incumbent LEC's network elements on an unbundled basis; and

[redacted] to retail services to competitive carriers at wholesale rates. 47 U.S.C. § [redacted]

In the Telecommunications Act, Congress envisioned that the competitive carrier and the incumbent LEC would negotiate interconnection agreements that would set forth the prices, terms, and conditions relating to the provisioning of interconnection, access to network elements, and retail services at wholesale prices. 47 U.S.C. § [redacted] However, Congress also recognized that the parties may be unable to reach a negotiated agreement so the Telecommunications Act allows a party to request that a State Commission resolve any disputed issues. 47 U.S.C. § 252(b).

After the unresolved issues have been decided by the State Commission, the parties may incorporate the State Commission's decision into their interconnection agreement and then submit the agreement to the State Commission for approval. 47 U.S.C. § 252(e)(1). The State Commission may reject the agreement but only for certain reasons specified in the Act. *Id.* If a State Commission refuses or fails to carry out its responsibilities as required by the Act, the Federal Communications Commission (FCC) is required to "issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). As required by section 252(d)(1), the FCC issued its decision establishing

[illegible] to implement section 251 requirements on August 8, 1999. First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC docket No. 96-98, 11 FCC Rcd 15499, 1996 FCC LEXIS 4312 (rel. Aug. 8, 1996) (hereafter "First Report and Order").

PROCEEDINGS BEFORE THE COMMISSION.

On November 20, 1996, the Public Utilities Commission (hereafter "Commission") received a filing from AT&T Communications of the Midwest, Inc. (hereafter "AT&T") pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (hereafter "U S WEST"). U S WEST filed its response on December 16, 1996.

A hearing was held on the open issues on February 3, 1997, through February 7, 1997, in Pierre, South Dakota. On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997 (hereafter "First Arbitration Decision" (Attachment A)).[3] The Commission's decision contained detailed findings of fact and conclusions of law setting forth its decision on each of the unresolved issues as presented by the parties. In that same order, the Commission told the parties to file a complete Interconnection Agreement containing both negotiated and arbitrated issues within 30 days. On April 21, 1997, U S WEST and AT&T filed separate proposed

[3] Since the Court does not have the settled record, the Commission has attached the documents that it refers to in its briefs. Therefore, the Commission will cite to the individual document page numbers and paragraphs instead of the settled record numbers.

Interconnection Agreements. AT&T also filed a Motion for Reconsideration. In response to the Motion for Reconsideration, the Commission issued its Order on Reconsideration on August 13, 1997, (hereafter "Reconsideration Decision" or "Arbitration Order") and again ordered the parties to file a complete Interconnection Agreement.

On September 12, 1997, an agreement for network interconnection and service was filed between AT&T and U S WEST was filed with the Commission. However, the agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues.

It was not until September 4, 1998, that U S WEST and AT&T filed another interconnection agreement. Again, the agreement contained unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely

by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order For and Notice of Prehearing Conference and Hearing (Attachment C), dated October 22, 1998, the Commission made it clear that it was not the responsibility of the Commission to ensure that the parties made a sufficient record.

At the prehearing conference held October 28, 1998, the parties informed the Commission that they had agreed to withdraw many of the disputed issues. The Commission pointed out that even with those issues withdrawn, other remaining issues argued by the parties may involve facts that are not in the record. In its Order for and Notice of Hearing (Attachment D), dated November 6, 1998, the Commission once again gave notice to the parties that additional evidence may be necessary if the parties wanted the Commission to decide all of the issues. The Commission also ordered the parties to resubmit their briefs with citations to the record. The Commission stated that if the parties did not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing.

On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending

before the United States Supreme Court, and the two open issues." The letter also stated that they waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues. The Commission issued its Second Arbitration Order on December 30, 1998 (hereafter "Second Arbitration Decision" (Attachment E)).

On February 3, 1999, the Commission received a Joint Request for Approval of the Arbitrated Interconnection Agreement (Attachment F). In a letter of transmittal presenting the Interconnection Agreement, the parties requested approval of the Interconnection Agreement as filed. Although the parties, in separate statements referred to modifications to the Interconnection Agreement, the parties agreed "that the Interconnection Agreement can be approved and become effective at this time without the requested modifications and further negotiation toward resolution of the parked issues." The parties acknowledged the issuance of the recent U.S. Supreme Court decision and AT&T stated that the parties will attempt to negotiate resolutions of the parked issues in light of that recent decision. *See AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721 (1999).

At its March 3, 1999, meeting, the Commission approved the Interconnection Agreement (hereafter "Order Approving Interconnection Agreement" (Attachment G)). In its March 4, 1999, written Order approving the Interconnection Agreement, the Commission made no findings on whether the Interconnection Agreement accurately

reflected the Commission's arbitrated decisions since the parties were free to further negotiate and decide upon mutually agreeable terms and conditions that differed from the Commission's arbitrated decisions. The Commission noted that its arbitrated decisions were made in accordance with the Eighth Circuit's decisions, that were in effect at the time, concerning the local competition provisions of the federal Act. The Commission further recognized that the U.S. Supreme Court recently reversed a number of issues contained in the Eighth Circuit's decisions. Notwithstanding the issuance of that U.S. Supreme Court decision, the Commission noted that the parties requested that the Interconnection Agreement be approved as filed. The Commission further stated that it also anticipated that the FCC will issue new orders to address the effects of the Supreme Court's decision on interconnection agreements and other issues are on remand to the Eighth Circuit. Pending those anticipated FCC orders and the Eighth Circuit remand decision and because the parties were not requesting that the Commission revisit issues affected by the Supreme Court's decision, the Commission approved the Interconnection Agreement as requested by the parties without modifications. The Commission specifically stated that it expected that the parties would comply with the anticipated orders of the FCC and court decisions and, if unable to negotiate revisions to comply with those orders, that the parties would return to the Commission for arbitration. This appeal followed.

JURISDICTIONAL STATEMENT

On April 23, 1999, the Commission filed a motion to dismiss based upon Eleventh Amendment immunity. The Court denied the motion, finding "the criteria for

applying Ex parte Young doctrine are present in this Case." *U S WEST v. Burg, et al.*, Order Denying Motions to Dismiss, page 6, CIV. 99-5024 (June 17, 1999). The Court also found that the Commission constructively waived its Eleventh Amendment immunity by engaging in a review of the Interconnection Agreement. *Id.* at 6-7.

However, since the issuance of the Court's decision the U. S. Supreme Court has now ruled that "the constructive-waiver experiment of Parden was ill conceived, and [we] see no merit in attempting to salvage any remnant of it." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, et al.*, 119 S.Ct. 2219, 2228 (1999). A recent district court decision found the reasoning in *College Savings Bank* applicable to reviews of interconnection agreements and reaffirmed a prior ruling that the state Commission was entitled to Eleventh Amendment immunity. *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin*, 57 F.Supp.2d 710, 714-715 (W.D. Wis. 1999).

STANDARD OF REVIEW

With respect to the Commission's findings of fact, the proper standard to apply is whether the findings are arbitrary and capricious which requires that substantial deference be afforded to the Commission's factual determinations. *MCI, et al., v. Bell-Atlantic, et al.*, 36 F.Supp.2d 419, 423 (D.D.C.Cir. 1999) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Commission's interpretation of federal statutes is subject to de novo review. *Id.* at 422 (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C.Cir. 1996).

ISSUES

I. The Commission's Decision Requiring U S WEST To Combine Network Elements Is Not Reviewable By This Court.

As acknowledged by U S WEST in its brief, U S WEST and AT&T "parked" the unresolved issues relating to combining network elements. Thus, there is no obligation on U S WEST to combine network elements. And, indeed, U S WEST admits that "because the Agreement does not impose this combination obligation, the Court need not address this issue at this time." U S WEST Brief at 5. But for some reason, U S WEST goes on to argue this issue at length, claiming that "to preserve its rights in the event either AT&T or the Commission contends that U S WEST must combine network elements for AT&T, U S WEST has briefed this issue for the Court." *Id.*

The Commission is at a loss to understand why U S WEST would brief an issue to this Court when U S WEST has conceded that the issue is not ripe for review. If it is not ripe for review how does briefing the issue preserve any rights? As stated by this Court in its decision dismissing U S WEST's appeal of the Commission's arbitration decision, "the plain language of subsection 252(e)(6) indicates that the 'decision' the district court will review is whether the agreement is in compliance with the Act." *U S WEST v. Burg, et al.*, Memorandum Opinion and Order Granting Motion to Dismiss, CIV. 97-3017 (Aug. 27, 1997). Since AT&T and U S WEST agreed not to incorporate unbundling requirements into the interconnection Agreement that was approved by the Commission, there is nothing with respect to unbundling in the Agreement for the Court

waiver. The Commission will not further waste the Court's time by briefing the merits of an issue that is not properly before it.

B. The Agreement Does Not Impose Unlawful Performance Standards.

1. Level Of Interconnection.

a. Standard Applicable To Interconnection.

U S WEST argues that the Commission's finding in its First Arbitration Decision that U S WEST perform its obligations under the agreement "at no less a level than the highest level which U S WEST uses for its own operations or those of its affiliates" is higher than the "equal in quality" standard as set forth in 47 U.S.C. § 251(c)(2). *See* First Arbitration Decision at 4, ¶ 17 (Attachment A). However, U S WEST fails to point to any section in the Interconnection Agreement where the parties adopted this language. As stated in section 252(e)(6), this Court's review is limited to determining "whether the agreement or statement meets the requirements of section 251 and this section." The language that U S WEST objects to is found in the Commission's arbitration decision. The parties apparently negotiated their own standard and did not use the Commission's language contained in paragraph 17. As stated in the Commission's Order Approving Interconnection Agreement, "the parties were free to further negotiate and decide upon mutually agreeable terms and conditions that differed from the Commission's arbitrated decisions." Order Approving Interconnection Agreement at 3-4 (Attachment G). Moreover, U S WEST admitted in its brief that if the Interconnection Agreement does not impose an obligation, then "the Court need not

address" the issue. U S WEST Brief at 5. Thus, there is nothing for the Court to review on this issue.

2. Standard Applicable To Provisioning Of Network Elements.

U S WEST next argues that the Commission required U S WEST to provide access to network elements that is equal in quality to the access which U S WEST provides itself when the proper standard was nondiscriminatory access. U S WEST Brief at 14-15. The difficulty for U S WEST in making this argument is that U S WEST expressly agreed to provide access to network elements that is "equal in quality" to the access that U S WEST provides to itself.

During the second arbitration proceeding, the parties briefed this issue. The Commission explained the parties' positions in its Second Arbitration Decision:

> 4. The first disputed issue concerns the definition of "itself." Part A, Definitions. U S WEST's definition includes the phrase "for the purposes of interconnection." AT&T's definition does not include that phrase. The effect of which definition is accepted by the Commission is found in Part A, section 52.3. As explained by AT&T, the parties agreed that if the Commission accepts AT&T's definition, the parties will capitalize the term "itself" in section 52.3. If the Commission accepts U S WEST's definition, the parties will leave the term uncapitalized. AT&T's Revised Brief at 5, footnote 1. The apparent effect of not capitalizing "itself" is that the term would be undefined. *Thus, U S WEST would have agreed to provide access to its network elements that is "equal in quality" to the access that U S WEST provides to itself, with the term "itself" left undefined.*

Commission's Second Arbitration Decision at 4, ¶ 4 (emphasis added) (Attachment E). Thus, the simple fact is that even if the Commission had accepted U S WEST's definition of itself, U S WEST would still have agreed to provide AT&T access that is equal in quality to that which it provides to itself with respect to the provisioning of

network elements.[2] U S WEST cannot now claim that the Commission ordered it to do so.

In addition to the definition of itself, the Commission was asked to decide between two competing interpretations of what the term "equal in quality" means.[3] U S WEST states that its proposed language follows FCC language that allows a competitor a meaningful opportunity to compete. U S WEST fails to state the entire text of its proposed language which was as follows:

> U S WEST shall not provision or provide access to unbundled Network Elements for AT&T that are inferior in quality to what U S WEST provides itself. If U S WEST cannot provide AT&T access to requested Network Elements on a basis that is equal in quality to the manner in which U S WEST provides such access or provisioning to itself, U S WEST must provide such access or elements in a manner that enables an efficient AT&T a meaningful opportunity to compete.

Proposed Interconnection Agreement, Part A at 77, § 52.3.3 (Attachment H).

Thus, U S WEST's proposed language in section 52.3.3 conflicted with the language the parties had agreed to in section 52.3.1, namely that U S WEST would provide access to network elements that is "equal in quality" to the access which U S

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[2] The Interconnection Agreement that was approved by the Commission shows that in Part A, section 52.3.1, the disputed issue was the meaning of the word "itself." Interconnection Agreement, Part A at 73, § 52.3.1 (Attachment F). In the Interconnection Agreement bold type denotes AT&T's and U S WEST's determination of what was ordered by the Commission that the parties decided to incorporate into the Interconnection Agreement. The first sentence of the section reads as follows: "U S WEST shall provide nondiscriminatory access to the network elements specified in this Agreement at any technically feasible point that is equal in quality to the access which U S WEST provides to Itself or any other Person and that is on rates, terms and conditions that are just, reasonable and nondiscriminatory."

[3] Attached is a copy of the language contained in section 52.3.1 as proposed by both parties during the second arbitration proceeding. Note that section 52.3.1 is not highlighted in any manner, indicating the parties had agreed on the language except for the issue of whether "itself" would be capitalized. Proposed Interconnection Agreement, Part A at 77, § 52.3.1 (Attachment H)

U S WEST provides to itself. Once U S WEST agreed to provide "equal in quality" access it missed the sense that the Agreement would then provide that if U S WEST cannot provide "equal in quality" access, then U S WEST would provide access allowing an efficient AT&T a meaningful opportunity to compete." As recognized by the Commission in its Second Arbitration Decision, "U S WEST's proposed language is ambiguous and vague and can be construed to conflict with the language of sections 52.3.1 and 52.3.2." Second Arbitration Decision at 4-5, ¶ 6 (Attachment E).

By contrast, AT&T's proposed language was consistent with the language the parties had agreed upon in section 52.3.1. As stated by the Commission in its Order, the "language which defines the words 'equal in quality' is reasonable and adds needed specificity to the Interconnection Agreement." Second Arbitration Order at 5, ¶ 6 (Attachment E). Once the parties agreed that U S WEST would provide access to unbundled network elements that is equal in quality to the access U S WEST provides itself, it was not error for the Commission to approve language that sought to further define "equal in quality."

III. The Commission's Decision To Permit Collocation Of Remote Switching Units (RSUs) Does Not Violate Section 251(c)(6) Of The Act.

U S WEST claims that the Commission erred in utilizing the FCC's interpretation of the words "necessary for interconnection or access to unbundled elements" found in section 251(c)(6). The Commission decided that, in accordance with the FCC rules, it would require collocation of equipment that was "used or useful" for interconnection or access to unbundled network elements. First Arbitration Decision at 8, ¶ 51 (Attachment A). The Commission found that remote switching units are used and

used for both interconnection and for access to unbundled network elements and thus must permit AT&T may collocate remote switching units on U S WEST premises. *Id.* at ¶¶ 92, 96. U S WEST's argument that the Commission erred in using the FCC's interpretation is based on a collateral attack of an FCC rule and must be rejected.

As the basis for its claim that the FCC's interpretation of the word "necessary" is wrong, U S WEST argues that the Supreme Court's interpretation of the term "necessary" as applied to section 251(d)(2) also applies to section 251(c)(6) because that section uses the word "necessary." However, the FCC rule that the Commission relied on when deciding this issue, 47 C.F.R. § 51.323(b), was not vacated by the Supreme Court. And, in fact, the FCC reasserted the validity of section 51.323(b) even after the Supreme Court's decision. *See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, CC Docket No. 98-147, FCC 99-48, 1999 FCC LEXIS 1027 (rel. Mar. 31, 1999) (hereafter "706 Order"). In that order, the FCC acknowledged the Supreme Court's decision concerning the interpretation of the word "necessary" in section 251(d)(2) but still concluded that "[t]he Commission's implementation of the requirement in section 251(c)(6) that incumbent LECs permit collocation of equipment *necessary* for interconnection or access to unbundled network elements,' 47 U.S.C. 251(c)(6) (emphasis added), was not challenged before the Supreme Court and the Commission's rules remain in effect." *706 Order* at ¶ 28, n. 57. Moreover, the FCC revised section 51.323(b) specifically to *include* remote switching modules as equipment that is used for interconnection and access to unbundled network elements. *Id.* at ¶¶ 28-29.

[illegible] functional in order to meet the capacity request." First Arbitration Decision at [illegible] (Attachment A).

In its decision, the Commission found that dark fiber was not a network element. Id. As stated in its order, at the time Commission made its decision the FCC had not yet received whether dark fiber should be listed as a network element due to an [illegible] record. Id. at ¶ 71.[3] Even though the Commission found dark fiber was not a network element, the concern was that U S WEST could install fiber, not install the electronics to make the fiber operational, and then refuse requests for unbundled local loops because the fiber was "unlit." Thus, the Commission reasonably determined that U S WEST should be required to place the necessary electronics on its fiber in order to fulfill an AT&T request for unbundled local loops. This is not a finding that dark fiber, in itself, is a network element because if dark fiber were a network element then AT&T would have had the ability to buy the dark fiber and place its own electronics on the fiber. By requiring U S WEST to light its own fiber to meet requests for local loops, the Commission was ensuring that U S WEST could not deliberately place fiber in the ground without electronics in an attempt to limit the availability of local loops to its competitors and then light the fiber when U S WEST needed it, thus hindering competition. By requiring U S WEST to install the necessary electronics on its fiber, the fiber then becomes a network element, the local loop, which is available to a requesting

[3] As explained in greater detail below, the FCC has now determined that dark fiber is a feature, function or capability of the local loop.

U S WEST states that "there is no way to determine whether a requirement that U S WEST provide dark fiber conflicts with or is inconsistent with the Act." U S WEST Brief at 22, fn. 19. However, the FCC recently issued an order in response to the Supreme Court's decision that required the FCC to reevaluate the unbundling obligations of section 251(c)(3). *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, (Released November 5, 1999) (hereafter "*UNE Remand Order*"). In that order, the FCC ruled that a LEC must provide nondiscriminatory access to the local loop, including all features, functions, and capabilities of the loop. *UNE Remand Order* at ¶ 166, 47 C.F.R. § 51.319(a). The FCC rule provides that dark fiber is a feature, function, or capability of the local loop. 47 C.F.R. § 51.319(a)(1).[8]

The FCC decision that dark fiber is a feature, function, or capability of the local loop is very similar to the Commission's finding that although dark fiber, in itself, is not a network element, a competitor should not be denied access to local loops because the fiber is dark. In both instances, a competitive carrier is allowed access to dark fiber through the purchase of the unbundled local loop. The Commission's decision regarding dark fiber should be upheld as consistent with the Act.

V. The Commission's Decision Concerning Vertical Features Does Not Violate Section 251(d)(2) Of The Act.

U S WEST misinterprets the Eighth Circuit's and Supreme Court's determination regarding vertical features. U S WEST claims that the Courts determined that vertical

[8] That rule will be effective 120 days after publication in the Federal Register. UNE Remand Order at 224, ¶ 526.

switches are network elements in their own right. U S WEST Brief at 23. But, as stated by both Courts, the part of the FCC order at question with regard to vertical features was paragraph 413 of the FCC's First Report and Order. *See AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, 734 (1999) ("vertical switching features, such as caller I. D., are features . . . provided by means of the switch, and thus fall squarely within the statutory definition."); *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 808-809 (8th Cir. 1997). In paragraph 413, the FCC found that "vertical switching features are part of the unbundled local switching element." First Report and Order at ¶ 413. The FCC specifically declined to require the unbundling of the local switch into a basic switching element and independent vertical feature elements. First Report and Order at ¶ 414. Since both Courts referenced paragraph 413 in their decisions, it was the FCC's determination that vertical features are part of the unbundled local switching element that was upheld by the Courts.

Likewise, the Commission did not rule that vertical switching elements are separate network elements, but, consistent with paragraph 413, the Commission found that the unbundled local switching element shall include all vertical features that the switch is capable of providing." First Arbitration Decision at 11, ¶ 78 (Attachment A). This decision was in accordance with FCC rules and U S WEST's claim that the FCC or the Commission must now establish that vertical features meet the unbundling standards of section 251(d)(2) is based on a faulty reading of the U. S. Supreme Court's and Eighth Circuit's decisions and should be summarily rejected.[7]

[7] U S WEST's claim that the Supreme Court's overturning of 47 C.F.R. § 51.319 means U S WEST's obligation to provide its vertical switching features to AT&T is invalid must also be rejected. The FCC's recent UNE Remand Order specifically reiterated that the local switching

VI. The Commission's Decision Regarding Construction Cost Recovery Does Not Violate Section 252(d)(1) Of The Act.

U S WEST claims that the Commission's requirement that U S WEST shall pay for construction charges when constructing facilities needed to provide a resold service to a particular customer violates the Act and is contrary to the Eighth Circuit's and FCC's decisions. However, U S WEST's citations to these decisions are not applicable to this issue since the Commission's decision regarding payment of construction charges applies to resold services (resale), not unbundled network elements or interconnection.

For example, U S WEST's citation to the Eighth Circuit's decision concerns whether the FCC could require that incumbent LECs provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to those levels at which the incumbent provides to itself. *See* U S WEST Brief at 24. The Eighth Circuit's decision rested on its interpretation of sections 251(c)(2) and 251(c)(3). *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 812-813 (8th Cir. 1997). However, the applicable section for resale is section 251(c)(4). U S WEST's citation to the FCC's decision is also to a section that concerns unbundled network elements. *See* U S WEST Brief at 25, *citing* First Report and Order at ¶ 382. What U S WEST fails to address in its argument is the fact that in a resale situation, the competitive LEC, such as AT&T, is merely reselling services that are provided and controlled by U S WEST.

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element includes all vertical features that the switch is capable of providing, including customized routing functions, CLASS features, Centrex and any technically feasible customized routing functions. *Local Reconsideration Order* at ¶ 244, fn. 475.

In a resale situation, the competitive carrier should not be required to pay upfront costs for the construction of facilities that U S WEST owns and controls. The whole point of resale is that the incumbent owns and operates the facilities and the competitive carrier resells the *services*, not the *facilities*. U S WEST is in the same position if it constructs facilities to a new customer and the customer later decides to buy the resold services from AT&T as when AT&T is the customer's provider from the beginning. A new customer should not be forced to take services from the incumbent LEC just because the customer's premises did not have existing facilities already serving it.

U S WEST's assertion that "the costs that U S WEST incurs to construct facilities for AT&T are entirely different than the costs U S WEST incurs to provide retail service" is incorrect. U S WEST Brief at 26. In support of that assertion U S WEST cites *MCI Telecomm. Corp.*, 1999 U.S. Dist. LEXIS 11418 at *27 in which the court found that "[t]he process of providing access to *unbundled network elements* to competing carriers that often operate on a different network is different, and presumably more time consuming, than the process of provisioning network elements for the incumbent's own use." (emphasis added) However, as already noted, this is not a situation where U S WEST is providing access to unbundled network elements; this is resale. Since the Commission required AT&T to pay the same nonrecurring end user charges as the customer would have paid, U S WEST is in the same position financially in both instances.

VII. The Commission's Requirements Concerning Eminent Domain Powers And The Reservation Of Space On Poles, Ducts, Conduits, And Rights-of-Way Do Not Violate Sections 251(b)(4) And 224 Of The Act.

A. Exercise Of Eminent Domain Power.

U S WEST has a "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." 47 U.S.C. § 251(b)(4). The FCC found that "a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that 'intends to modify or alter such . . . right-of-way . . . .'" First Report and Order at ¶ 1181, *quoting* 47 U.S.C. § 224(f).* Consistent with the FCC's decision in effect at the time of the Commission's decision, the Commission concluded that "U S WEST shall, to the extent permitted by state law, exercise its eminent domain powers to expand an existing right of way to

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* However, the Commission must point out to the Court that the FCC has recently reversed its position on this issue. Upon reconsideration, the FCC stated as follows:

> Based upon the record before us, we agree with those commenters that argue that the right to exercise eminent domain is generally a matter of state law, exercised according to the varying limitations imposed by particular states. We are persuaded that neither the statute nor its legislative history offers convincing evidence that Congress intended for section 224 to compel a utility to exercise eminent domain. Accordingly, on reconsideration, we find that section 224 does not create a federal requirement that a utility be forced to exercise eminent domain on behalf of third party attachers.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Order on Reconsideration, FCC 99-266, (released October 26, 1999) (hereafter *266 Order*).

accommodate a request for access." First Arbitration Decision at 27, ¶ 225 (Attachment A). Although U S WEST's witness stated that a new entrant must obtain access directly from the grantor or licensor, U S WEST cites to no state law which prohibits U S WEST from complying with the Commission's decision. If, in fact, there were a state law prohibiting U S WEST from expanding an existing right of way to accommodate a request for access then U S WEST would be exempt from this requirement.*

Further, since the Commission's ruling was in accordance with the FCC's decision, U S WEST's attack of this decision is, once again, a collateral attack on an FCC decision. The Commission relies on its arguments concerning collateral attacks as stated in Section III of this brief.

Even though the FCC has now reversed its position on this issue, the Commission's decision complied with the then applicable FCC decision and, therefore, the Court should uphold the Commission's finding. *See U S WEST v. AT&T, et al.*, 46 F.Supp.2d 1068, 1071 (D. Oregon 1999) (District Court rejected request to overturn portions of interconnection agreements on the ground that the state Commission did not apply regulations that were not in effect when the agreements were approved by the state Commission.)

B. Reservation Of Space On Poles, Ducts, Conduits, And Rights-of-Way.

U S WEST objects to the Commission's finding that "U S WEST may not reserve space for its local exchange service to the detriment of an entrant into the local

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* The Commission's order states: "U S WEST shall, *to the extent permitted by state law*, exercise its eminent domain powers to expand an existing right of way to accommodate a request for access." First Arbitration Decision at 27, ¶ 225 (emphasis added) (Attachment A).

exchange business. First Report and Order at ¶ 1170. U S WEST shall provide nondiscriminatory access on a first come, first served basis." First Arbitration Decision at 27, ¶ 222 (Attachment A). As stated in its order, the Commission's decision was based on the FCC's First Report and Order wherein the FCC noted that "[s]ection 224(f)(1) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way." First Report and Order ¶1170. Interpreting section 224(f)(1) the FCC concluded:

> Congress seemed to perceive such ownership and control as a threat to the development of competition in these areas, thus leading to the enactment of the provision in question. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC.

Id.

Thus, U S WEST's claims that the Commission imposed obligations beyond its authority should be rejected; the Commission's decision clearly complied with the FCC's decision on this issue.

Moreover, U S WEST's assertion that the Commission's decision prevented it from keeping spare capacity for maintenance purposes is directly contradicted by the Interconnection Agreement entered into between the parties. In section 47.4.5, the parties agreed that "U S WEST shall not preclude or delay allocation of these facilities to AT&T because of the potential needs of itself or of other Person, *except a maintenance spare may be retained as described below.*" Interconnection Agreement,

Part A at 49-50, § 47.4.5 (emphasis added) (Attachment F). A later section also references "the innerduct or conduit designated by U S WEST as emergency spare for maintenance purposes." *Id.* at 52-53, § 47.4.25. Since the parties have voluntarily agreed that U S WEST may designate emergency spare innerducts or conduits for maintenance purposes, U S WEST's appeal of this part of the Commission's order should be denied.[10]

VIII. The Commission's Decision That U S WEST May Not Require AT&T To Have One Point Of Interconnection For Exchange Of Local Traffic To Be Within The Local Calling Area Does Not Violate The Act.

U S WEST claims that not requiring AT&T to establish a point of interconnection for exchange of traffic within each local calling area violates the Act. U S WEST Brief at 29-31. In support of its position, U S WEST cites to section 251(c)(2)(A) which provides that the incumbent LEC must provide interconnection with its network "for the transmission and routing of telephone exchange service and exchange access[.]" However, U S WEST fails to cite the very next subdivision which states that such interconnection must be "at any technically feasible point within the carrier's network[.]" *See also U S WEST v. MFS Intelenet, et al.*, 1999 WL 799082, *9 (9th Cir. 1999) ("The

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[10] The Commission also notes that although its order stated that "U S WEST shall provide nondiscriminatory access on a first come, first served basis[,]" the Interconnection Agreement allows AT&T to reserve poles, ducts, conduits and right-of-way for 90 days following U S WEST's confirmation that the facilities requested by AT&T are available. Interconnection Agreement, Part A at 50-51, § 47.4.10. Even when another party requests to use the facilities, AT&T may continue to reserve the facilities as long as it pays U S WEST "in a manner equal to the amount the requesting party would have otherwise paid U S WEST for AT&T's reserved facilities." *Id.* Allowing AT&T to reserve space for an indefinite period as long as U S WEST receives payment is not providing "nondiscriminatory access on a first come first served basis." This language shows that, once again, the parties have chosen not to follow the Commission's decision but have voluntarily negotiated their own terms.

plain language [of section 251(c)(2)] requires local exchange carriers to permit interconnection at any technically feasible point within the carrier's network.") Instead U S WEST cites to paragraphs 190 and 191 of the FCC's First Report and Order which have nothing to do with technically feasible points of interconnection but rather contain an explanation of the FCC's decision as to why an interexchange carrier may not receive interconnection pursuant to section 251(c)(2) for the origination and termination of its interexchange traffic.

Clearly, the relevant question is whether a particular point of interconnection is "technically feasible." As interpreted by the FCC, "the term 'technically feasible' refers solely to technical or operational concerns, rather than economic, space, or site considerations." First Report and Order at ¶ 198; *see also* 47 C.F.R. § 51.5. This interpretation was upheld by the Eighth Circuit which stated that "the FCC's definition of 'technically feasible' is reasonable and entitled to deference." *Iowa Utilities Bd. v. FCC*, 120 F.3d at 810. Pursuant to 47 C.F.R. § 51.305(e), "[a]n incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible." The Ninth Circuit recently upheld a provision in an interconnection agreement that permitted a single point of interconnection per local access and transport area. *U S WEST v. MFS Intelenet, et al.*, 1999 WL 709082 at *9. U S WEST does not even attempt to assert that the lack of a point of interconnection within a local calling area renders interconnection technically infeasible. Instead it seeks to read into the Act and FCC orders limitations on points of interconnection that do not exist. Given the absence of any indication that the lack of a

single point of interconnection within a local calling area renders interconnection technically infeasible, the Commission's decision should be upheld.

IX. Liability For Lost Profits.

U S WEST claims that the Commission erred in finding that the parties shall be liable for lost profits. U S WEST Brief at 31. However, U S WEST fails to cite to any place in the Interconnection Agreement where this finding was incorporated by the parties. The actual language regarding limitation of liability is as follows:

> In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including, but not limited to revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, "Consequential Damages"), even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation to indemnify, defend and hold the other Party harmless against any amounts payable to a third party, including any losses, costs, fines penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third party. Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence); (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such party's negligent act or omission or that of their respective agents, subcontractors or employees, nor shall anything contained in this section limit the Parties indemnification obligations, as specified above.

Interconnection Agreement, Part A at 18, ¶ 19.3 (Attachment F).[11]

As the Commission has previously noted, this Court has found that "the plain language of subsection 252(e)(6) indicates that the 'decision' the district court will review is whether the agreement is in compliance with the Act." *U S WEST v. Burg, et al.*, Memorandum Opinion and Order Granting Motion to Dismiss, CIV. 97-3017 (Aug.

[11] This section is not highlighted indicating it was voluntarily negotiated.

27, 1997).[12] The Commission's Order Approving Interconnection Agreement recognized that "the parties were free to further negotiate and decide upon mutually agreeable terms and conditions that differed from the Commission's arbitrated decisions." Order Approving Interconnection Agreement at 3-4 (Attachment G). The language that U S WEST objects to is found in the Commission's arbitration decision, not in the Interconnection Agreement. Thus, there is nothing for the Court to review on this issue.

X. Ability Of The Arbitrator To Award Punitive Damages.

U S WEST protests the Commission's decision not to impose limitations on an arbitrator's decision with respect to punitive damages and claims that "the provisions of the *Agreement* permitting punitive damages violate the Act." U S WEST Brief at 33 (emphasis added). However, U S WEST fails to cite to any provision in the Agreement allowing punitive damages to be awarded by an arbitrator. U S WEST's failure to cite to any such provision is certainly understandable since the parties have chosen *not* to follow the Commission's Second Arbitration Decision and have instead agreed that an "arbitrator shall not have authority to award punitive damages." Interconnection Agreement, Part A at 21, ¶ 27.1.[13] Once again U S WEST chooses to waste the

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[12] This is consistent with section 252(e)(6) wherein a court's review is limited to determining "whether the agreement or statement meets the requirements of section 251 and this section."

[13] It would appear that U S WEST's argument on the merits would have this Court find that a state Commission was without authority to decide open issues involving general terms and conditions. U S WEST Brief at 31-33 (arguing that the conditions must relate to interconnection, access to unbundled network elements, resale, or collocation). However, if a Commission cannot resolve those unresolved issues, then the likelihood exists that there would be no Interconnection

Court's time by bringing up a finding in one of the Commission's arbitration decisions that the parties *voluntarily agreed not to incorporate* in their Interconnection Agreement. U S WEST's continued attempts to argue issues without regard to what is actually contained in the Interconnection Agreement should be summarily rejected.[14]

XI. Aggregation Of The Avoided Cost Discount Among All Resold Services.

U S WEST claims that the Commission's decision to reject U S WEST's proposed discounts for specific services was in error. U S WEST Brief at 34-35. However, as explained in the Commission's decision, U S WEST's proposed discounts were only proposed for selected services, not for all services subject to resale. First Arbitration Decision at 24, ¶ 195 (Attachment A). As explained by AT&T in its prefiled testimony, U S WEST's "Embedded Study excludes several retail services which are subject to resale, such as semi-public payphone and non-regulated services. Additionally, U S WEST has excluded specific portions of all retail product/service

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Agreements because the parties would be unable to reach a negotiated agreement on all issues. This result would hardly reflect the outcome contemplated by the Act. Section 252(b)(1) clearly provides that "the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open* issues." (emphasis added). *See e.g., U S WEST v. TCG Oregon*, 31 F Supp 2d 829, 837 (D. Oregon 1998) (District court rejected U S WEST's challenge of a liquidated damage clause finding that "[a]lthough the Act does not expressly provide for such damages, neither does it categorically preclude such provisions in an interconnection Agreement so long as they are reasonable and justified under the circumstances.")

[14] And, in fact, these attempts lead to misleading and irrelevant arguments. For example, U S WEST argues that South Dakota law prohibits punitive damages arising from a breach of contract. U S WEST Brief at 33, fn 22. However, in their Interconnection Agreement the parties agreed that the Federal Arbitration Act shall apply "not state law." *Id.* Therefore, since the parties have agreed not to let an arbitrator award punitive damages and have further agreed that state law does not apply, of what possible relevance is state law to this issue?

categories, claiming that these costs represent nonrecurring charges." Suit Rebuttal at 13, lines 8-12 (Attachment I). U S WEST had excluded what it termed to be "non-resale services" from its analysis of avoided costs and the calculation of discounts. Gude Direct at 6, lines 6-20 (Attachment J). The Commission found that "U S WEST should not have excluded the costs and revenues associated with E911, semi-public payphone, Public Access Line (PAL) payphone, Centrex, and nonrecurring charges." First Arbitration Decision at 24, ¶ 193 (Attachment A). U S WEST's decision not to include a discount for *all* services subject to resale rendered invalid its six categories of services assigned different discount rates. *See* Gude Direct at 4, lines 1-8 (Attachment J).

Moreover, the Commission found that U S WEST failed to show that the discounts were "based on individual data that is collected by product or service." First Arbitration Decision at 24, ¶ 195 (Attachment A). As explained by an AT&T witness, U S WEST failed to produce activity-based costing data causing the six service categories proposed discounts to be both unverifiable and unreliable. Suit Rebuttal at 13 lines 12-15 (Attachment I). The witness stated that U S WEST's six service discounts were achieved by disaggregating "services from a pool of data that was collected in aggregate." *Id.* at 20, lines 1-3. As an example of the problems that occur with this approach the witness explained what happens when the indirect avoidance factor is calculated in a desegregated model: "[B]ecause the indirect allocator varies with the proportion of Avoided Direct Costs to Total Direct Costs, it is difficult to force the avoided indirect total for all of the product service categories to equal the avoided

indirect costs in aggregate." *Id.* at lines 3-8. Given the faulty method U S WEST used to determine its six service category discounts and its failure to provide discounts for all services subject to resale, the Commission was justified in rejecting the proposed discounts and applying an aggregated avoided cost discount.

XII. Remedies Under The Agreement.

U S WEST objects to the Commission's finding that "remedies shall be cumulative and not exclusive." First Arbitration Decision at 4, ¶ 18 (Attachment A). However, the remedies section is not in bold language but is in italicized print, demonstrating that the remedies section was "agreed to by the Parties."[15] The Commission reasserts its arguments made in sections IIA, VIIB, IX, and X of this brief: if the parties agreed to the language and did not use the Commission's decision, then it is not a proper issue for appeal.

Even though this is not a proper issue for appeal, the Commission feels compelled to point out that U S WEST's arguments on the merits are absolutely baffling. U S WEST contends that "[b]ecause the parties' agreement reflects their rights and obligations, a carrier's remedies must be confined to those set forth in the agreement, remedies that were either negotiated or arbitrated." U S WEST Brief at 35. If U S WEST believes that the remedies must be confined to those listed in the Agreement, then why did it agree to the following:

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[15] The section on remedies can be found in the Interconnection Agreement, Part A at 25, § 33 (Attachment F). The title page of the Interconnection Agreement states in a note at the bottom that "[i]n this Agreement, *italicized language* corresponds to language agreed to by the Parties; . . . bold language corresponds to language included to comply with the Commission's order . . . ."

> All rights of termination, cancellation or other remedies prescribed in this Agreement, or otherwise available, are cumulative and are not intended to be exclusive of other remedies to which the injured Party may be entitled at law or equity in case of any breach or threatened breach by the other Party of any provision of this Agreement. Use of one or more remedies shall not bar use of any other remedy for the purpose of enforcing the provisions of this Agreement.

Interconnection Agreement, Part A at 25, ¶ 33.2 (Attachment F). Since the parties agreed on the language contained in the section on remedies, there is nothing for the Court to review concerning this issue.

XIII. The Commission Did Not Err In Requiring The Negotiation Of Third-Party Licenses On Behalf Of AT&T.

U S WEST objects to the Commission's requirement that, if requested by AT&T, U S WEST shall enter into good faith negotiations with the owner of the intellectual property to obtain any necessary licenses for use of Third Party Intellectual Property. U S WEST Brief at 36. The Commission found that "the Party Providing Access [U S WEST] may be in a better position to negotiate with its existing vendors to obtain the use of Third Party Intellectual Property for use by the Party Requesting Access [AT&T]." Second Arbitration Order at 5, ¶ 8 (Attachment E). Since U S WEST would already have an existing contractual relationship with the vendors, it is logical to expect that U S WEST would be in a better position to successfully negotiate the use of the intellectual property by AT&T. The Commission also found that "[a]ny costs associated with obtaining the necessary licenses are the responsibility of the Party Requesting Access [AT&T]." *Id.* at ¶ 9.

U S WEST states that "[t]he Commission failed to recognize that U S WEST is not in a position to mandate that a third-party sell its property to anyone." U S WEST Brief at 36. However, nothing in the Commission's findings assume that U S WEST can mandate the licensure of third party property; the only requirement was that U S WEST enter into good faith negotiations. Moreover, it should be noted that U S WEST's proposed language on this issue was that U S WEST shall, "to the extent necessary, use reasonable efforts to facilitate the negotiation of any necessary licenses." Proposed Interconnection Agreement, Part A at 14, § 5.2 (Attachment H).

U S WEST again, referencing prior arguments, claims that the Commission has no authority to impose this condition under the Act. U S WEST Brief at 36. Apparently, U S WEST is reasserting its position that since this issue does not directly address interconnection, access to unbundled network elements, resale, or collocation, then the Commission has no power to impose conditions. See U S WEST Brief at 31-33. This argument is disingenuous given that U S WEST specifically requested that the Commission decide the issue of the parties' obligations regarding third-party intellectual property. U S WEST agreed with AT&T that the issue would be brought to the Commission for a decision in order that the parties might finally be able to enter into an interconnection agreement. As previously stated by the Commission, inability of the Commission to decide issues relating to general terms and conditions would be a significant impediment to the completion of an interconnection agreement. One only needs to review the lengthy procedural history of this case to know that without the

ability of a state Commission to decide unresolved issues, including general terms and conditions, the parties may very well never come to an agreement.[16]

Moreover, section 252(b)(4)(C) provides that the state Commission "shall resolve each issue set forth in the petition and the response." Based on this provision, a district court found that a state Commission has an obligation to address all open issues designated by the parties. *U S WEST v. Minnesota Public Utilities Commission, et al.*, 55 F.Supp.2d 968, 986 (D. Minn. 1999). The court specifically found as follows:

> The language of § 252(c)(1) stating that the state commission shall ensure that the resolution of open issues meets the requirements of § 251, does not confine the resolution of the issues to the requirements of § 251. If a state commission ensures that the resolution meets the requirements of a section, it is merely certifying that the resolution meets the affirmative requirements of the section while simultaneously determining that it does not conflict with or violate the section's affirmative and negative requirements. Not every issue included in the resolution necessarily involves the affirmative requirements of § 251. Thus, the only limitations that § 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251.

Thus, the Commission had the necessary authority to decide this issue and the requirement that U S WEST engage in good faith negotiations to obtain third party licensees with the costs to be paid by AT&T was not arbitrary.

XIV. Customer Transfer Charge Of $5.00.

U S WEST objects to the Commission's findings that the charge to transfer a U S WEST customer account to a reseller or to transfer a customer account from one

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[16] The Commission received the request for arbitration on November 20, 1996, and its decision was issued on March 20, 1997. However, the Commission did not receive a complete Interconnection Agreement until February 3, 1999. The Commission, at the request of both parties, continued to resolve open issues up until December 30, 1998.

reseller to another reseller is a nonrecurring charge of $5.00. U S WEST proposed a nonrecurring charge of $12.64 for a mechanized transfer and a charge of $22.20 for a manual transfer. First Arbitration Decision at 22, ¶ 180 (Attachment A).

However, AT&T's testimony was that the transfer charge should be $0.45. This charge was based on information from BellSouth which examined a complaint filed by MCI with the FCC against U S WEST, alleging U S WEST was charging excessive PIC [primary interexchange] charges. Transcript at 1352, lines 14-18 (Attachment K). The information from BellSouth was based on information from an FCC complaint that specifically concerned U S WEST's PIC charges and "outlined all the steps involved in actually processing a change of this type and the cost associated with all of those steps." *Id.* at lines 19-21. AT&T also testified that the common PIC charge for changing a long distance company is $5.00. *Id.* at 11-14.

Given testimony which ranged from a proposed AT&T charge of $0.45 to proposed U S WEST charges of $12.64 to $22.20, it was reasonable for the Commission to find a charge of $5.00 was fair since the charge was well within the confines of the evidence presented.[17]

XV. U S WEST Has Failed To Show That A Taking Will Occur.

U S WEST requests that this Court "interpret the Act, the Commission's Decisions, and the Agreement to ensure that U S WEST's property is not taken without

[17] With respect to U S WEST's claim that the Commission failed to distinguish between mechanized and manual transfer operations, it should be noted that since the $5.00 charge was significantly above the $0.45 per transfer as proposed by AT&T, any additional costs for a manual transfer (which should be a rare occurrence) would reasonably be expected to be included in that $5.00.

just compensation." U S WEST Brief at 39. U S WEST further states that "[i]f the Commission has effected an unauthorized taking of U S WEST's property by its interpretation of the Act, then this Court has the power to interpret that Act to avoid that result and declare such terms and conditions of the Agreement and the Commission Decisions invalid."[18]

U S WEST presented the same argument to a district court in Oregon and the court found that "the takings claim fails because no taking has yet occurred. No evidence has been presented to this court to show that TCG has purchased any services pursuant to this Agreement, nor is there any assurance it ever will." *U S WEST v. TCG Oregon, et al.*,, 31 F.Supp.2d 828, 838-830 (D. Oregon 1998); *see also U S WEST v. WorldCom Technologies, et al.*, 31 F.Supp.2d 819, 827 (D. Oregon 1998); *U S WEST v. AT&T, et al.*, 31 F.Supp.2d 839, 857-858 (D. Oregon 1998).

U S WEST cites to *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) in support of its request for injunctive and declaratory relief. U S WEST Brief at 38-39. However, a district court has found that the Bell Atlantic case is not applicable to interconnection appeals. The court concluded that "U S WEST appears to be alleging a violation of the jurisdictional grant of the Act." *U S WEST v. Minnesota Public Utilities Commission, et al.*, 55 F.Supp.2d 968, 988 (D. Minn. 1999). The court rejected the allegation that such a violation had occurred, finding:

> In Bell Atlantic, the D.C. Circuit determined that 47 U.S.C. § 201 did not vest the FCC with the necessary authority to order LECs to provide

[18] *Id.* at 38. In its brief on this issue, U S WEST does not even bother to state which decisions of the Commission it is alleging result in a taking.

> physical collocation of equipment upon demand. Id. at 1444-47. It found that because the particular statute did not expressly authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, 47 U.S.C. § 251(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement that incumbent LECs have a duty to provide for the physical collocation of equipment. See 47 U.S.C. § 251(6).

Id. The Court concluded that "Congress clearly intended to vest the agencies with the authority to place limitations on the LEC's property rights." *Id.*

The Minnesota District Court then proceeded to apply a traditional takings analysis used for public utilities to address U S WEST's claim that the interconnection agreement did not fully compensate U S WEST for the alleged taking of its property. *Id.* at 988-990. The Court found that the question to be asked is "whether any provision or provisions of the Agreement negatively affect the overall operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment." *Id.* at 990. The Court ultimately found that the takings issue was premature because the state commission had not reached a final decision regarding prices and U S WEST could still petition the commission for a rate change. *Id.*

In its brief, U S WEST fails to cite to the standards it must meet in order to show a regulatory taking. In order for a regulatory taking to have occurred, a rate order must produces overall rates so low as to "jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989). "A rate is too low if it is 'so unjust as to destroy the value of [the] property for all

the purposes for which it was acquired . . . .'" *Id.* at 307 (internal quotation marks and citation omitted). Obviously, U S WEST has not made any kind of a showing that the Interconnection Agreement produces rates that have left U S WEST with insufficient operating capital or that its ability to raise future capital is impeded.

In its brief, U S WEST merely asserts that "[t]he challenged Commission orders will, if allowed to stand, effect an uncompensated taking of U S WEST's property." U S WEST's Brief at 37-38. U S WEST does not state *which* specific decisions effect this taking but nonetheless declares that "[t]he principle of constitutional avoidance therefore requires that the Court interpret the Act to prevent this result." *Id.* at 38. However the principles of constitutional avoidance provide that a statute should be interpreted to avoid an unconstitutional taking only in "cases in which application of a statute will *necessarily* constitute a taking." *United States v. Riverside Bayview Homes, Inc.*, et al., 474 U.S. 121, 128 and n.5 (1985) (emphasis added). Here U S WEST does not even bother to explain in its brief which statute the Commission has administratively interpreted that U S WEST alleges will necessarily constitute a taking. Moreover, U S WEST has made absolutely no showing that the Commission's decisions will effect a taking. Thus, there is no basis for the Court to find that a taking will occur in the future and no basis for the Court to apply the principles of constitutional avoidance.

CONCLUSION

For the foregoing reasons, the Court should find the Interconnection Agreement meets the requirements of sections 251 and 252.

Dated at Pierre, South Dakota, this 30th day of November, 1999.

Rolayne Ailts Wiest

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CERTIFICATE OF SERVICE

I hereby certify that copies of Commission's Responsive Brief were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 30th day of November, 1999.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	))))))	FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER AND NOTICE OF ENTRY OF ORDER TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule, Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a Matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket.

The Commission having reviewed the evidence of record and being fully informed in the matter, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 (federal Act) provides for the development of competition in the telecommunications industry. The federal Act opens up local markets by imposing new obligations on incumbent local exchange carriers (LECs). Under the federal Act, an incumbent LEC has the duty to interconnect with other telecommunications carriers, must provide other carriers access to the incumbent LEC's network elements on an unbundled basis, and must provide its retail services to other carriers at wholesale rates. 47 U.S.C. § 251(c). The federal Act requires an incumbent LEC to negotiate terms and conditions of service with the requesting carrier. 47 U.S.C. § 251(c)(1). If the parties are unable to reach a negotiated agreement on all areas, the federal Act provides for state Commissions to resolve any disputed issues. 47 U.S.C. § 252(b).

ATTACHMENT A

themselves are not certain as to what issues they agree or disagree on, it is difficult to understand why the parties apparently believe that the Commission can determine this for them.

GENERAL TERMS AND CONDITIONS

10. AT&T's Petition at 52 raises the issue of what General Terms and Conditions are to be addressed in this arbitration. Exhibit 1. AT&T's proposed General Terms and Conditions are contained in AT&T's Proposed Interconnection Agreement. Exhibit 8, Part 1, Sections 1 to 33, at 8 to 33 and Attachment 1 to the Agreement. U S WEST's Proposed Interconnection Agreement contains its proposed General Terms and Conditions. Exhibit 4. Appendix B to U S WEST's post hearing brief indicates issues where probable accord has been reached. Based upon these sources in the record, the issues to be resolved with respect to general terms and conditions are as follows:

(a) What shall be the term of the Agreement;
(b) How shall payments be made under the Agreement;
(c) Shall audits and inspections be allowed by AT&T of U S WEST records and under what circumstances;
(d) Should the parties provide for indemnification;
(e) Should there be limits on liability of the parties;
(f) Should U S WEST provide a warranty as to its performance;
(g) Should remedies be provided to the respective parties;
(h) In what manner should disputes be resolved;
(i) In what manner should information be treated as confidential when provided from one party to the other;
(j) Should AT&T have the option to obtain local service or network elements which U S WEST may offer under other agreements;
(k) Should there be a mutual obligation to make customer payment history available to the other party;
(l) How shall patents and trademarks be treated;
(m) Should the Agreement have a force majeure clause;
(n) Which state's law governs the Agreement;
(o) Should the Agreement intend to benefit third party beneficiaries;
(p) How shall assignment and subcontracting be handled;
(q) Should the Agreement address severability;
(r) How shall contractual notices to the other party be handled;
(s) Should the Agreement address successors and assigns;
(t) Should AT&T be required to furnish a letter of authorization to U S WEST for disconnection and furnishing of certain services;
(u) Should reciprocal services be the subject of this Agreement; and
(v) Should this Agreement be considered a joint work product.

11. The Commission finds that the General Terms and Conditions present mixed issues of fact and law and it will address them in that context.

12. The Commission finds that an initial term of five years for the Agreement is reasonable for an Agreement of this length and complexity. The Commission further finds that the following concepts of mutual responsibility shall be agreed to by the parties: (1) provide sixty days notice to the other party for termination; (2) termination for breach with thirty days to cure the breach if the cause is nonpayment; (3) termination for breach if the cause is failure to perform and the breach affects the non-breaching party's subscribers, with ten days to cure the breach; and (4) optional termination of Agreement or any of its parts for other breach due to failure to perform if not cured within forty-five days.

21. Consistent with 47 U.S.C. § 252(i), the Commission finds that if U S WEST enters into an agreement with a party other than AT&T during the course of this Agreement which contains terms and conditions different from those available under this Agreement, AT&T may substitute terms and conditions of that agreement for terms and conditions contained in this Agreement.

22. The Commission finds that each party shall have an obligation to provide any customer's payment history to the other party upon request.

23. The Commission finds that nothing in the Agreement creates a license for a patent, trademark, or logo except that a limited license is created to use patents and copyrights necessary for the parties to use any facilities or equipment or to receive any service solely under this Agreement. Neither party shall have a right, unless otherwise agreed, to use the other party's logo, trademark, service mark, name, language, pictures or symbols, or words from which the other party's name may be inferred or implied in any product, service, advertisement, promotion, or any other publicity matter. The Commission further finds that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims.

24. The Commission finds that the Agreement shall contain a force majeure provision.

25. The Commission finds that no waiver of any provision of the Agreement or consent to default under the Agreement shall be effective unless it is in writing.

26. The Commission finds that the laws of the state of South Dakota shall govern this Agreement and U S WEST shall be responsible for maintaining such regulatory approvals as are necessary for it to perform under this Agreement. AT&T shall have a similar obligation with regard to approvals necessary for it to perform under this Agreement. Each party shall have an obligation to cooperate with the other in obtaining and maintaining necessary regulatory approvals.

27. The Commission finds that the Agreement shall not be intended to confer any rights on third party beneficiaries.

28. The Commission finds that neither party may assign the Agreement without the prior written consent of the other party. U S WEST may assign the Agreement to one of its affiliates which is wholly owned by U S WEST. U S WEST shall not subcontract for the performance of the Agreement or any part thereof without prior written consent of AT&T. In the event such subcontracting occurs, U S WEST shall retain full responsibility for performance under the Agreement.

29. The Commission finds that the Agreement shall contain a severability provision which allows the Agreement to function in the event parts of it are found to be invalid or unenforceable. In the event part of the Agreement is found to be invalid or unenforceable, the parties shall negotiate replacement language.

30. The Commission finds that the Agreement shall contain a provision for notices and who within each party's organization shall be notified of specific contractual events. Parties may change their designated representative by giving seven days' written notice to the other party. Notices are to be deemed effective when received.

31. The Commission finds that the Agreement shall be binding on and to the benefit of all successors and permitted assigns.

COSA

U S WEST has agreed to provide interconnection at each of the above-listed points. Exhibit 23 at 19, lines 21-24. The parties have further agreed that U S WEST will provide, through a bona fide request process, interconnection at other technically feasible points. Exhibit 40 at 2, lines 5-6; Tr. at 270, lines 8-12.

38. AT&T may select for itself those points in U S WEST's network to which it wishes to interconnect. First Report and Order at ¶ 209. Therefore, the Commission finds that U S WEST may not require AT&T to have one point of interconnection for exchange of local traffic to be within the local calling area.

39. If, through the bona fide request process, a type of interconnection requested by AT&T is found to be technically feasible, AT&T shall not be required to request substantially similar interconnection through the bona fide request process. See 47 C.F.R. § 51.305(c) and (d).

40. Consistent with the federal Act, meet points for interconnection shall be made available upon request if technically feasible. 47 U.S.C. § 251(c)(2)(B). If the meet point arrangement is requested for purposes of interconnection pursuant to 47 U.S.C. § 251(c)(2), each party shall pay its portion of the cost to build out the facilities to the meet point. First Report and Order at ¶ 553. However, if the meet point arrangement is for access to network elements pursuant to 47 U.S.C. § 251(c)(3), then AT&T shall pay all of the economic costs of the meet point arrangement. Id.

41. The parties appear to disagree on whether there is disagreement on distance limitations for meet points requested for purposes of interconnection. In AT&T's brief, AT&T submits that the parties have agreed to no distance limitations. AT&T brief at 46, footnote 13. However, U S WEST's matrix lists this as an unresolved issue. Therefore, the Commission will make a finding on this issue. The Commission finds that a specific distance limitation for meet points for interconnection would be an arbitrary decision without knowing the facts of the particular meet point in dispute. However, since U S WEST must pay its portion of the cost to build out facilities for interconnection meet points, U S WEST may contest a particular meet point request by AT&T by showing the distance to AT&T's meet point is unreasonable. The Commission rejects U S WEST's request for a specific distance limitation.

SEPARATE TRUNKING

42. The issue with respect to separate trunking is whether U S WEST can require AT&T to have separate trunks for toll and local traffic.

43. AT&T requests the right to combine local and toll traffic on a single two way trunk group. Exhibit 3 at 8. U S WEST opposes this request contending that since toll and local traffic currently have different rate structures it should be allowed to require the use of separate trunk groups for toll and local traffic. Exhibit 23 at 129, lines 5-14.

44. The Commission finds that U S WEST may require separate trunks for toll and local traffic due to the different rate structures.

COLLOCATION

COLLOCATION OF EQUIPMENT

45. With respect to the issue involving collocation of equipment, the parties dispute the following issues:

55. The Commission finds that RSUs will be used by AT&T for interconnection or access to unbundled network elements. Therefore, the Commission will allow AT&T to collocate RSUs on U S WEST premises.

56. AT&T requests the right to select its own contractors for installation and engineering of both virtual and physically collocated equipment. Exhibit 47 at 16, lines 6-16.

57. The Commission finds that AT&T may select its own contractors subject to U S WEST's approval. If U S WEST objects to the contractor, it will have the burden of proof to show why the contractor is unacceptable. 47 C.F.R. § 51.323(j).

PRICING OF COLLOCATION

58. AT&T recommends the adoption of the physical collocation rates proposed by the Oregon Commission staff and the virtual collocation rates ordered by the Oregon Commission in Oregon Docket UT119. Tr. at 1347, lines 12-18. AT&T did not provide any supporting documentation for its proposal.

59. U S WEST's rates were based on a cost study with both recurring and nonrecurring charges. Exhibit 23 at 46, lines 19-20 and attached Exhibit R.

60. The Commission will accept U S WEST's proposed prices for collocation. However, the Commission finds that its entrance facility nonrecurring charge of over $3,000.00 and its quote preparation nonrecurring charge of over $2,100.00 may pose a barrier to entry. Therefore, the Commission shall require U S WEST to charge $1,000.00 as a nonrecuring charge for each of these services and U S WEST may recover the remainder of the charges in its recuring charge over a two year period.

PRICING FOR EXPANDED INTERCONNECTION CHANNEL TERMINATION

61. AT&T contends that U S WEST proposes to treat the expanded interconnection channel termination (EICT) jumper wire as a designed or special service/private line circuit. Exhibit 40 at 36, lines 15-16. AT&T objects to treating the EICT in this manner because AT&T asserts it causes additional nonrecuming charges and higher recuming charges than necessary by adding unnecessary investments. Id. at lines 18-19. In addition, AT&T maintains it increases the standard provisioning interval and adds other unnecessary steps and components to the overall provisioning process. Id. at 18-22. Moreover, AT&T maintains that U S WEST does not provision its end-users' plain old telephone service and integrated services digital network circuits in this manner. Id. at lines 16-18.

62. The Commission finds that U S WEST has not shown that its proposed provisioning and pricing of the EICT is appropriate or necessary. Therefore, the Commission does not adopt U S WEST's pricing proposal. If the parties are unable to negotiate an agreement on this issue, the parties shall present additional evidence to the Commission to allow it to reach a decision on this issue.

UNBUNDLED NETWORK ELEMENTS

EXTENT OF UNBUNDLING

63. With respect to the extent of unbundling network elements, the unresolved issues are as follows.

required to light its installed dark fiber if it needs to retain the dark fiber to accommodate its customers in the future. The burden is on U S WEST to show that the dark fiber is needed for its own customers.

73. U S WEST proposes to offer only common transport as a transport option directly to the tandem switch. Tr. at 279, lines 12-16. The Commission finds that since direct transport, common transport, and tandem switching are all unbundled network elements, U S WEST cannot refuse to provide direct transport to the tandem switching. See First Report and Order at ¶ 440.

VERTICAL FEATURES

74. With respect to vertical features, the unresolved issue is whether the unbundled local switching element must contain all vertical features that the switch is capable of providing.

75. The federal Act defines a network element as including "features, functions, and capabilities that are provided by means of such facility or equipment including subscriber numbers, databases, signaling systems...." 47 U.S.C. § 153(29).

76. The FCC found that these features, functions, and capabilities provided through a switch include "all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions." First Report and Order at ¶ 412.

77. U S WEST states that it will make vertical features available only as retail services to be purchased through the resale provisions of the federal Act. Exhibit 23 at 84, lines 19-21.

78. Consistent with the FCC's First Report and Order, the Commission finds that the unbundled local switching element shall include all vertical features that the switch is capable of providing. First Report and Order at ¶ 412.

COMBINING UNBUNDLED ELEMENTS

79. With respect to combining unbundled elements, the unresolved issues are as follows:

(a) Whether U S WEST must combine unbundled network elements at the request of AT&T; and
(b) If U S WEST is required to combine unbundled elements, whether U S WEST may charge AT&T a "rebundling" charge.

80. Pursuant to 47 U.S.C. § 251(c)(3), an incumbent LEC must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.

81. The FCC concluded that this provision of the federal Act "bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated." First Report and Order at ¶ 293. The FCC further concluded that "incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined. Incumbent LECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or they are not ordinarily combined in the incumbent's network, provided that such combination is technically feasible, and such combination

lines 16-18. The first Hatfield model was used to produce estimates of the total service long run incremental cost of basic local exchange service to examine the cost of universal service. Id. at 7, lines 14-16. The second version, Hatfield Model 2.2, Release 1, estimated costs for unbundled network elements only. Id. at lines 16-17. The third version, Hatfield Model 2.2, Release 2, the version used in this docket, considers both unbundled elements and basic local exchange service. Id. at 7, lines 18-19 to 8, line 1. The Hatfield Model is publicly available and uses nonproprietary data obtained from publicly available sources. Id. at 10, lines 19-21 to 11, lines 1-3.

92. Under AT&T's Hatfield Model, the local loop is priced at $15.62 per month. Exhibit 76. U S WEST priced its loop at $29.83. Exhibit 77.

93. U S WEST did a sensitivity analysis by running the Hatfield Model with revised inputs and assumptions. Exhibit 37 at 2, lines 10-16. U S WEST's sensitivity analysis of the Hatfield Model produced a per line price of over $36.00 which was higher than U S WEST's TELRIC cost study using its Regional Loop Cost Analysis Program (RLCAP) to price the loop. Exhibit 37.

94. The Commission finds the Hatfield Model's assumptions on structure sharing are erroneous. The Hatfield Model assumes U S WEST would be responsible for paying only 33% of the cost to place aerial, underground, and buried facilities because the placement of these facilities would be shared with other utilities. AT&T also assumes that all currently existing utility facilities are scorched. Tr. at 714, line 24 to 715, line 2. However, under the scorched node concept, only telecommunications facilities should be assumed to be scorched. Tr. at 856, lines 11-12. By assuming all utility facilities are scorched, AT&T is able to assume other utilities would pay the other approximately 66% of plant costs. The Commission finds that AT&T's assumption that U S WEST will pay only 33% of aerial placement costs, buried placement costs, and underground placement costs is unreasonable.

95. The Commission finds that AT&T's Hatfield Model overcounts the number of lines. The model counts digital special access lines on a per channel basis so one DS-1 is counted as 24 access lines and one DS-3 is counted as 672 access lines. Exhibit 37 at 7, lines 11-12. However, the cost of placing a DS-1 would be considerably less than the cost of placing 24 separate basic access lines. The Commission finds that each DS-1 and DS-3 should be counted as one line.

96. The Commission finds AT&T's Hatfield Model underestimates the drop investment per line. The Hatfield Model estimates an average of 73 feet for a typical drop length; the estimate is from a Bellcore study. Exhibit 42 at 24, line 3, and footnote 2. The model assumes a half hour installation time for the drop and 15 minutes to one half hour installation for the Network Interface Device (NID) (Exhibit 42 at 24, lines 12-13) with a total investment of $70.00 (Id. at line 8) for a two pair drop (Id., attached Exhibit DRF-1 at 21). The Commission finds it is unreasonable to assume a drop and a NID can be installed in a range of 45 to 60 minutes with a total investment of $70.00.

97. The Commission finds the Hatfield Model understates the required distribution cable. Both parties agreed that the Hatfield Model overstates the number of distribution cables for some distribution groups and understates it for others. Exhibit 42 at 31, lines 2-3; Exhibit 29 at 39, lines 1-3, and 39, lines 31-34. AT&T states that the new revised version, Hatfield Model 2.2, Release 3, will attempt to address this issue. Exhibit 42 at 31, lines 11-13. Hatfield Model, 2.2, Release 3, will feature many enhancements and changes from the version used in this docket in order to correct its current flaws. Exhibit 60.

98. The Commission finds AT&T failed to show whether the additional costs of unbundling are included in the Hatfield Model. Tr. at 596, lines 4-6.

107. However, due to the deficiencies in both models, the Commission may open a docket to evaluate whether it shall set prices based on a different model or on improved versions of the models presented in this case.

108. Although the Commission shall base the price for the unbundled local loop on U S WEST's TELRIC cost studies, it finds that U S WEST must make modifications to the inputs it used in its cost studies.

109. The first modification is to the network operations factors. In Finding of Fact 99, the Commission found that although AT&T's proposed reduction of 30% was too high, it is reasonable to assume that network operations expenses will be lowered in a more competitive environment. Therefore, the Commission finds that U S WEST shall reduce its network operations expenses by 10%.

110. Similarly, the Commission finds that U S WEST shall reduce its corporate overhead. Although, the Commission found in Finding of Fact 101 that AT&T's reduction of corporate overhead from 21% to 10% was unreasonable, it is reasonable to expect some reduction in corporate overhead. Therefore, the Commission finds that U S WEST shall reduce its 21% corporate overhead by 10% which would reduce it to 18.9%.

111. With respect to the issue of cost of capital, U S WEST requests an equity ratio of 72% with a cost of equity at 12.4%. Exhibit 29, attached Exhibit 4 at 15. AT&T recommends a 55% equity ratio and an 11.9% cost of equity. Exhibit 14, attached Exhibit JCK-2 at 1. In Docket TC94-121 the Commission accepted an equity ratio of 59% and a cost of equity of 11.5%.

112. The Commission finds that U S WEST's equity ratio shall be its actual ratio on the date of this Order or 60%, whichever is lower. The Commission further finds that the cost of equity requested by U S WEST is too high and U S WEST shall use AT&T's proposed cost of equity of 11.9%.

113. U S WEST proposes a loop conditioning charge of $555.68. Exhibit 23 at 74, line 18 to 75, line 4, and attached Exhibit F. AT&T claims this cost is unnecessary in a forward looking digital environment. Exhibit 40 at 38, lines 16-17.

114. The Commission finds it is reasonable to assume that loop conditioning costs will decrease in an increasingly digital environment. However, it is unreasonable to assume there will be no costs associated with conditioning loops. Therefore, the Commission finds it shall base loop conditioning costs on what U S WEST currently charges to condition loops to provide ISDN which is $58.50. U S WEST's Exchange and Network Services Catalog, Section 14, Page 18, Release 1; Exhibit 47 at 5, lines 16-20.

PRICING OF UNBUNDLED SWITCHING

115. U S WEST requests recovery of $101.15 for nonrecurring charges for the first end office port and a nonrecurring charge of $54.43 for each additional port. Exhibit 23 at 82, line 20 to 83, line 7 and attached Exhibit 6. AT&T believes these costs are included in its recurring charges as calculated by its Hatfield Model. Tr. at 1360, lines 5-12.

116. The Commission finds AT&T failed to show that these nonrecurring costs are included in its proposed recurring charges. Therefore, the Commission will accept U S WEST's nonrecurring charges of $101.15 for the first port and $54.43 for each additional port.

127. The Commission finds that a mileage based rate for dedicated transport is a more appropriate costing methodology than a fixed charge with no mileage charges. Therefore, the Commission will accept U S WEST's proposed rates for dedicated transport for DS-1 and DS-3 lines.

128. U S WEST did not propose a dedicated transport rate for a DS0 line. Exhibit 23 at 166, lines 13-15. AT&T states that U S WEST provides DS0s to its own customers and therefore must provide it to AT&T. Exhibit 47 at 12, lines 9-10. U S WEST did not rebut this claim.

129. The Commission finds that U S WEST shall offer dedicated transport per equivalent DS0 line. U S WEST provided a rate for a DS0 line for signaling links. The Commission finds that this rate shall apply to dedicated transport as an unbundled network element. Exhibit 29, Appendix 1, Table 1.

PRICING FOR TANDEM SWITCHING

130. U S WEST proposes a tandem switching rate of $.002076. Exhibit 23, Attached Exhibit M. AT&T proposes a tandem switching rate of $.0029. Exhibit 76. U S WEST's tandem switching rate includes its requested depreciation reserve deficiency amortization of $.0004 per minute of use for five years. Exhibit 23, attached Exhibit M, note 3.

131. Consistent with the Commission's Findings of Fact 118-119, the Commission will not allow U S WEST to include its depreciation reserve deficiency amortization of $.0004 per minute of use. The Commission finds that U S WEST's tandem switching rate should be adopted minus the depreciation reserve deficiency amortization.

PRICING OF COMMON TRANSPORT

132. U S WEST proposes a $.00041 per minute fixed rate with a $.000012 per minute per mile charge, with mileage bands for common transport. Exhibit 23, attached Exhibit M. AT&T proposes a common transport charge of $.00168 per minute of use. Exhibit 76.

133. The Commission finds that a transport rate should be structured on the basis of mileage and therefore adopts U S WEST's proposed rate. Moreover, U S WEST's rate would appear to be less than AT&T's up to a significant mileage add on.

PRICING OF COMMON CHANNEL SIGNALING

134. Although the parties both state in their testimony that they are in agreement on signaling issues (Exhibit 23 at 91, lines 2-3, Exhibit 12 at 33), the parties appear to have differences with respect to the rates to be charged for common channel signaling (CCS).

135. U S WEST proposes a flat rate for the CCS link and the signal transfer point (STP). U S WEST states that the cost for the service control point (SCP) is included in the STP rate. Exhibit 23, attached Exhibit A at 2. AT&T proposes a flat rate for the CCS link and a per message rate for STP and SCP. Exhibit 76.

136. The Commission finds that since it has rejected the Hatfield Model it may not base these rates on AT&T's proposed rate. However, the Commission will not accept U S WEST's rate either because it is flat rated. The Commission finds that rates for signaling and database services should be usage sensitive because a usage sensitive rate most accurately reflects the underlying costs of the service. If the parties are unable to negotiate an agreement on this issue, the parties shall present additional evidence to the Commission to allow it to reach a decision on this issue.

144. The FCC has promulgated rules which specifically allow for two types of restrictions on resale. First, the Commission "may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC." 47 C.F.R. § 51.613(a)(1). Second, with respect to short term promotions, the FCC stated that "[a]n incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if: (A) such promotions involve rates that will be in effect for no more than 90 days; and (B) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates." 47 C.F.R. § 51.613(a)(2). Any other restrictions on resale may be permitted only if the incumbent LEC "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

145. The Commission finds that it is reasonable and nondiscriminatory for U S WEST to prohibit AT&T from offering services that U S WEST makes available only to residential customers or to a limited class of residential customers from offering those services to classes of customers that are not eligible to subscribe to such services from U S WEST.

146. U S WEST contends it should not be required to make enhanced services available for resale because enhanced services are not telecommunications services as defined in the federal Act. Exhibit 23 at 102, lines 1-5.

147. Enhanced services are defined by the FCC as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

148. The FCC has concluded that all of the services that the FCC has previously considered to be enhanced services are information services. In the Matter of Implementation of the Nonaccounting Safeguards of §§ 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149 at ¶ 102.

149. The federal Act defines information services as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

150. In the FCC's First Report and Order, the FCC found that information service providers are not telecommunications carriers. First Report and Order ¶ 995. Thus, information services are, by definition, different than telecommunications services as defined by 47 U.S.C. § 153(43).

151. The Commission agrees that the federal definition of information services includes enhanced services and therefore enhanced services are not telecommunications services as defined by the federal Act. Thus, U S WEST is not required to make its enhanced services available for resale.

152. The Commission finds that U S WEST shall be required to provide Lifeline and Link-Up services for resale, however, these services may not be offered to end users not eligible to subscribe to such service offerings. First Report and Order at ¶ 962.

165. The Commission concludes that restrictions on the resale of services available only to residential customers and restrictions related to promotions of less than 90 days are reasonable and nondiscriminatory. However, pursuant to the FCC's rules, other resale restrictions, beyond promotional and residential restrictions must be proven to be reasonable and nondiscriminatory. 47 C.F.R. § 51.613(a). U S WEST failed to show that its proposed broad restriction would be reasonable and nondiscriminatory.

BRANDING

166. With respect to the issue of branding, the unresolved issues are as follows:

(a) Whether U S WEST's repair personnel must inform the customer that a service call is being made on behalf of AT&T; and
(b) Whether U S WEST's repair personnel must leave behind an information card with the repair call information relating to AT&T.

167. Branding means a service is offered to a customer in a manner that identifies to the customer the requesting carrier's brand name. Unbranding means a service is offered in such a manner that an incumbent LEC's brand name is not identified to the customer.

168. AT&T requests that U S WEST's personnel be required to identify themselves as representing AT&T. Exhibit 13 at 29, lines 16-20.

169. With respect to branding requirements for repair and maintenance, the Commission agrees with AT&T that U S WEST's personnel should identify themselves as representing AT&T when they make a service call on behalf of AT&T. The requirement that U S WEST's personnel state to the customer that they are there on behalf of AT&T is not an onerous requirement.

170. AT&T requests that U S WEST's personnel be required to leave AT&T informational material at the customer's premise. Tr. at 1057, lines 19-23.

171. Given that U S WEST may have numerous competitors requesting the same treatment, the Commission finds that requiring U S WEST's repair and maintenance personnel to carry informational material for all competing carriers is too burdensome. However, the Commission encourages the parties to agree to some form of neutral information that can be used by all competing LECs.

172. AT&T requests that it be allowed to review and approve the training of U S WEST's personnel. Tr. at 1062, line 24 to 1063, line 24.

173. The Commission rejects AT&T's request to review and approve the training of U S WEST personnel as an unnecessary intrusion into U S WEST's business.

DEPOSITS

174. With respect to deposits, U S WEST states that it should be allowed the option to require AT&T to make a deposit as a guarantee of the payment of charges. Exhibit 23, attached Exhibit B at 72, section 11.10.

175. As AT&T points out, U S WEST does not impose a deposit requirement on an end user customer who has a good credit history. See ARSD 20:10:08:05. In addition, AT&T has an excellent credit history with U S WEST. Exhibit 19 at 8.

price of any retail service. Tr. at 925, line 23 to 926, line 5. AT&T's inputs into its avoided cost study are U S WEST state specific financial and ARMIS data that is filed by U S WEST with the FCC. Exhibit 16 at 9, line 1 to 10, line 10. AT&T's cost model used ARMIS 43-03 total state data in its avoided cost model. Exhibit 44 at 18, lines 17-18.

186. AT&T's study presumed that the direct costs in the following Uniform System of Accounts (USOA) are 100% avoided: 6611 (product management); 6612 (sales); 6613 (product advertising); 6623 (customer services); 6621 (call completion services); and 6622 (number services/directory assistance) and that the direct costs in 6533 (testing) and 6534 (plant operations administration) are 20% avoided. AT&T's study further presumed that indirect costs in the following USOA accounts are avoided in proportion to the avoided direct expenses: 6121 to 6124 (general support expenses); 6560 (depreciation); and 6711, 6712, 6721 to 6728 (corporate operations expenses); and that the indirect costs in 5301 (uncollectibles) are 100% avoided. Exhibit 16, attached Exhibit DBS-2.

187. The Commission rejects AT&T's simplified avoided cost model due to the following flaws: (a) the AT&T Model does not properly match revenues and cost elements in its discount calculation which misstates and inflates its discount factor (Exhibit 35 at 9, lines 7-12); (b) AT&T's Model assumes that all product management expenses will be eliminated which is an unreasonable assumption since U S WEST will still incur product management costs associated with its current non-retail services (Id. 35 at 8, lines 10-17); (c) the AT&T Model assumes all marketing and billing costs will be avoided which is unreasonable since there will still be marketing and billing expense that will be incurred to provision non-resale services (Id. 35 at 6, lines 17-23); (d) the AT&T Model fails to incorporate property tax expense, interarea rent, equal access depreciation, and other operating expense (Id. 35 at 2, lines 22-25 and at 15, lines 1-12); and (e) the AT&T Model did not include any return on U S WEST's investment (Tr. at 983, lines 18-24).

188. U S WEST submitted two different cost studies to determine wholesale discounts: a cost study based on embedded costs and a TELRIC cost study. Exhibit 30 at 4, lines 21-28.

189. U S WEST's TELRIC study is based on forward-looking costs. Exhibit 30 at 4, lines 24-28. The Commission rejects the use of U S WEST's TELRIC cost study because a TELRIC cost study would only be appropriate if U S WEST's current retail rates were established using the TELRIC methodology. In South Dakota, the Commission sets U S WEST's retail rates using an embedded cost methodology.

190. U S WEST's embedded avoided cost study was based on 1995 operating results. Data was drawn from 1995 FCC ARMIS reports, certain TELRIC avoided cost study related assumptions, and U S WEST's embedded Cost Accounting Allocation System (CAAS). Exhibit 30 at 5, lines 8-11. U S WEST's avoided cost study used ARMIS 43-04 data which is intrastate data. This eliminated all interstate access revenues and part 36/69 separated costs. Exhibit 30 at 7, line 14 to 8, line 4. U S WEST's study excluded intrastate access, intrastate billing and collection, public services, E911, operator services, directory assistance, and Centrex service. Tr. at 986, lines 11-19. It also excluded miscellaneous service revenues and costs because miscellaneous services primarily reflect contractual services for plant maintenance and other adjustments, and it excluded nonrecurring business office costs and revenues. Exhibit 30 at 15, line 18 to 16, line 3.

191. U S WEST applied direct avoided cost percentages to the following accounts: 6611 (product management); 6612 (sales); 6613 (product advertising); 6621 (call completion); 6622 (number services); and 6623 (customer services). U S WEST applied an indirect avoided cost percentage in proportion to the avoided direct expense for the following categories: general support

repair, and billing. 47 C.F.R. § 51.319(f)(1). The FCC required incumbent LECs to provide nondiscriminatory access to operations support systems functions no later than January 1, 1997. 47 C.F.R. § 51.319(f)(2).

201. U S WEST's interim solution is a web page interface for pre-ordering, ordering, provisioning, and maintenance and repair connections. Exhibit 27 at 8 through 10. According to U S WEST, its web page interface is currently available for plain old telephone service except for some maintenance and repair functions which will not be available until July 1, 1997. Exhibit 27, chart at page 10. The web page interface proposal will not be available for design services such as ISDN or Centrex until at least July 1, 1997, and several other maintenance and repair functions will not be available until November 1, 1997. Id.

202. U S WEST's web page interim solution is a human interface and therefore subject to error and delay. Tr. at 1040, line 5. Further, the web page interim proposal is inferior to the service U S WEST provides itself because U S WEST's service representatives will not be using the web page screen form for ordering. Tr. at 1120, line 25 to 1121, line 3.

203. The FCC concluded that an incumbent LEC must provide nondiscriminatory access to its operations support systems functions and such nondiscriminatory access includes "access to the functionality of any internal gateway systems the incumbent employs in performing [operations support systems] functions for its own customers." First Report and Order at ¶ 523. The FCC stated that "an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention ..." Id.

204. The Commission finds that U S WEST's web page interface proposal does not comply with the federal Act or the FCC First Report and Order. U S WEST shall take the necessary steps to create electronic interfaces that will provide AT&T with ordering processes that are equal to the ordering processes U S WEST has available to itself.

PRICING OF OPERATIONAL SUPPORT SYSTEMS

205. The only issue with respect to pricing of operational support systems concerns how the cost to develop gateway systems used to access databases should be recovered. The gateways in question are not yet developed. Exhibit 27 at 10, line 7.

206. U S WEST proposes that gateway development costs be paid by the users of the gateway. Tr. at 1105, line 25 to 1106, line 6. AT&T proposes that each company pay for its own gateway. Tr. at 1364, lines 20-23.

207. Gateways allow outside parties to access another company's databases. Therefore, the cost causers are the parties who need the gateway to access the databases.

208. The Commission finds that it would not be fair to assess the first company that requires access to U S WEST's databases to pay the full cost for the development of that gateway since other companies will also use U S WEST's gateway. In addition, there will be ongoing, recurring costs associated with the continued use of that gateway. The Commission therefore finds that a company shall be allowed to assess the users of its gateway on a per transaction basis. The company may include the costs incurred for the development of the gateway in its costs used to derive the transaction charge.

218. Consistent with the FCC's Number Portability Order, the Commission finds that the terminating carrier shall receive the carrier common line and local switching charges. Transport charges shall be shared based on the meet point billing arrangement.

ACCESS TO POLES, CONDUITS, DUCTS, AND RIGHTS-OF-WAY

219. With respect to access to poles, conduits, ducts, and rights-of-way, the unresolved issues are as follows:

(a) Whether U S WEST may reserve space for itself;
(b) Whether AT&T has the duty to afford access to poles, conduits, ducts, and rights-of-way to U S WEST;
(c) Whether U S WEST must modify its facilities to increase capacity for AT&T;
(d) Whether U S WEST must exercise its eminent domain powers, if needed, to expand an existing right-of-way; and
(e) How costs are recovered.

220. Pursuant to 47 U.S.C. § 251(b)(4), U S WEST has "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."

221. The Commission finds that consistent with the federal Act and the FCC rules, U S WEST must provide nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. U S WEST may deny AT&T "access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." 47 C.F.R. § 1.1403(a).

222. With respect to the issue of reservation of space by U S WEST, the Commission finds, consistent with the FCC's First Report and Order, that U S WEST may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business. First Report and Order at ¶ 1170. U S WEST shall provide nondiscriminatory access on a first come, first served basis.

223. With respect to the issue of reciprocal access, the Commission finds that 47 U.S.C. § 251(b)(4) and § 224 impose the duty to afford access to poles, ducts, conduits, and rights-of-way on all local exchange carriers. Therefore, when AT&T becomes a local exchange carrier as defined by 47 U.S.C. § 153(26), then it also has the same duty as U S WEST to afford access to its poles, ducts, conduits, and rights-of-way.

224. On the issue of modifications to a facility to increase capacity, the Commission finds, consistent with the FCC's First Report and Order, that U S WEST must take all reasonable steps to accommodate requests for access. Before denying access based on lack of capacity, U S WEST must "explore potential accommodations in good faith with the party seeking access." First Report and Order at ¶ 1163.

225. The next issue with respect to access to a right-of-way concerns whether U S WEST must exercise its eminent domain powers to expand an existing right-of-way. U S WEST shall, to the extent permitted by state law, exercise its eminent domain powers to expand an existing right of way to accommodate a request for access. First Report and Order at ¶¶ 1179 and 1181.

calls." This language cannot be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements)...." 47 U.S.C. § 252(d)(2)(B)(i).

234. AT&T proposes to exchange local traffic on a bill and keep basis until procedures for measuring traffic are in place. AT&T contends that bill and keep should be used provided traffic is reasonably balanced and if not in balance TELRIC should be the basis for establishing prices. Exhibit 19 at 18, lines 1-7.

235. U S WEST proposes prices for three functions: call termination, call transport, and call transit. Exhibit 23 at 155, lines 4-5. U S WEST states that its proposed price for call termination is based on TELRIC plus an allocation of common costs and an allocation of U S WEST's alleged depreciation reserve deficiency. Id. at 157, lines 3-5. U S WEST's price for call termination is $0.003734 per minute of use. Exhibit 23, attached as Exhibit M. U S WEST proposes the waiving of reciprocal call termination charges in a given month if traffic between U S WEST and AT&T is reasonably balanced. Exhibit 23 at 159, lines 14-16. U S WEST defines reasonably balanced as within a 5% threshold. Id. at lines 16-20.

236. Call transport may include the use of a tandem switch, dedicated facilities or tandem transmission. Id. at 165, lines 6-7. For direct trunked transport, U S WEST proposes two charges: a fixed per month charge and a per mile charge. Id. at 168, lines 4-5. Different charges apply based on whether a DS-1 or a DS-3 is used. Id. at 168, lines 7-8. U S WEST proposes three rate elements for call transport. The first rate element consists of the direct trunked transport element. Id. at 168, lines 10-13. The second rate element is the tandem switching charge which is based on per minutes of use. Id. at 168, lines 13-15. The third rate element is the tandem transmission charge which consists of a fixed per minute charge and a per mile per minute charge, both of which are distance sensitive. Id. at 168, lines 15-21.

237. Call transit is the provisioning of the transport of traffic between two other local exchange carriers. Exhibit 23 at 159, lines 8-9. U S WEST proposes to apply tandem switched transport and tandem switching charges for each call originated by AT&T and delivered to a third party carrier in the local calling area. Id. at 179, lines 20-23.

238. The Commission finds that it will accept U S WEST's proposed prices, minus any costs related to its alleged depreciation reserve deficiency. Consistent with Findings of Fact 118-119, the Commission shall not allow U S WEST to attempt to recover its alleged depreciation reserve deficiency in these prices. Reciprocal call termination charges will be waived if, within a given month, the traffic is within a 5% threshold. The Commission rejects the use of bill and keep because it finds that it is not reasonable to assume that traffic will be in balance.

239. In an exhibit under the heading Exchange Access, U S WEST states the prices for call termination, call transport, and call transit are per its switched access tariff. Exhibit 23, attached Exhibit A at 1. This reference is confusing since U S WEST states in its testimony that the prices for call termination, call transport, and call transit are found in Exhibit M, attached to Exhibit 23. To avoid any confusion, the Commission wants to make it clear that it is accepting the prices listed in Exhibit M, minus any recovery of its alleged depreciation reserve deficiency. The Commission is not accepting the prices in U S WEST's switched access tariff for local exchange access.

240. U S WEST contends that AT&T should not be allowed to receive tandem switched rates because AT&T's switch does not cover a comparable geographic area that is served by U S WEST's tandem switch and does not perform the same functions. Exhibit 23 at 177, lines 16-21.

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250. The Commission agrees with U S WEST and will not require U S WEST to give AT&T its own NXX number at each central office.

NUMBER ADMINISTRATION

251. AT&T requests that an independent third party compile central office code forecasts instead of U S WEST because NXX usage forecasts are proprietary. Exhibit 12 at 62. U S WEST states that the FCC will assign numbering administration to an independent third party in the near future and, in the meantime, U S WEST will treat such information as proprietary. Exhibit 23 at 196, lines 2-11.

252. The Commission finds that since the FCC will soon assign numbering administration to an independent third party it would make no sense for this Commission to require U S WEST to assign this task to a third party prior to the FCC's decision on this issue. U S WEST shall continue to treat this information as proprietary.

UNIVERSAL SERVICE SUPPORT MECHANISM

253. U S WEST requests that the Agreement with AT&T include a statement that would recognize that U S WEST has a right to pursue a transitional charge that would apply to AT&T and other new entrants that would recover universal service support until rates are rebalanced. Exhibit 23 at 189, lines 18-23.

254. The Commission rejects U S WEST's request and finds that it is inappropriate to include such a statement in the U S WEST/AT&T Agreement.

REJECTION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission rejects the parties' proposed Findings of Fact and Conclusions of Law.

Based upon the foregoing Findings of Fact, the Commission enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-13, 49-31, and the federal Act.

2. The Federal Telecommunications Act of 1996 (federal Act) provides for the development of competition in the telecommunications industry. The federal Act opens up local markets by imposing new obligations on incumbent local exchange carriers (LECs). Under the federal Act, an incumbent LEC has the duty to interconnect with other telecommunications carriers, must provide other carriers access to the incumbent LEC's network elements on an unbundled basis, and must provide its retail services to other carriers at wholesale rates. 47 U.S.C. § 251(c). The federal Act requires an incumbent LEC to negotiate terms and conditions of service with the requesting carrier. 47 U.S.C. § 251(c)(1). If the parties are unable to reach a negotiated agreement on all areas, the federal Act provides for state Commissions to resolve any disputed issues. 47 U.S.C. § 252(b).

3. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers.

and owing AT&T plus amounts owed to U S WEST during a contract year; that there is no liability for either party for indirect, incidental, special, or consequential damages; and that the limitations do not apply to willful or intentional conduct. Parties shall be liable for lost profits.

13. U S WEST shall perform its obligations under the Agreement at no less a level than the highest level which U S WEST uses for its own operations or those of its affiliates. U S WEST shall warrant that it shall perform under this standard, in a competitively neutral fashion at technically feasible points, for all rights, products, and services AT&T purchases from U S WEST pursuant to this Agreement.

14. Remedies in the Agreement shall be cumulative and not exclusive. In those remedies, the parties shall provide that the failure of U S WEST to switch a subscriber shall be deemed an illegal change in subscriber change selection which merits the reimbursement by U S WEST to AT&T for charges paid by the subscriber during the time that the subscriber remains a U S WEST customer.

15. Informal dispute resolution under the standards of the American Arbitration Association shall be followed. An arbitrator shall not have authority to award punitive damages. Arbitrator fees shall be paid by the losing party and, at the determination of the arbitrator, if neither party has completely won or lost at arbitration, then the arbitrator shall apportion the costs. The laws of South Dakota shall govern the Agreement and the arbitration process.

16. Information transmitted from one party to the other party under the Agreement shall automatically be considered proprietary. Copies of proprietary information may be made by either party but it shall bear copyright or proprietary notices; proprietary status shall continue for a period of five years from the time of receipt of the proprietary information. Exclusions to the obligations of this provision as delineated in AT&T's proposed agreement, Section 12.4, shall be followed.

17. Consistent with 47 U.S.C. § 252(i), if U S WEST enters into an agreement with a party other than AT&T during the course of this Agreement which contains terms and conditions different from those available under this Agreement, AT&T may substitute terms and conditions of that agreement for terms and conditions contained in this Agreement.

18. The Commission finds that each party shall have an obligation to provide any customer's payment history to the other party upon request.

19. Nothing in the Agreement creates a license for a patent, trademark, or logo except that a limited license is created to use patents and copyrights necessary for the parties to use any facilities or equipment or to receive any service solely under this Agreement. Neither party shall have a right, unless otherwise agreed, to use the other party's logo, trademark, service mark, name, language, pictures or symbols, or words from which the other party's name may be inferred or implied in any product, service, advertisement, promotion or any other publicity matter. Neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims.

20. The Agreement shall contain a force majeure provision.

21. No waiver of any provision of the Agreement or consent to default under the Agreement shall be effective unless it is in writing.

22. The laws of the state of South Dakota shall govern this Agreement and U S WEST shall be responsible for maintaining such regulatory approvals as are necessary for it to perform under

to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

35. Pursuant to 47 U.S.C. § 251(c)(4)(B), the retail restrictions approved by the Commission are consistent with the regulations prescribed by the FCC.

36. The terms and conditions approved by the Commission in this docket are consistent with the obligations of all local exchange carriers pursuant to 47 U.S.C. § 251(b) and the additional obligations of incumbent local exchange carriers pursuant to 47 U.S.C. § 251(c).

37. AT&T and U S WEST shall comply with the procedures set forth for arbitration and approval of arbitrated agreements found in Docket TC96-082, In the Matter of the Request for Comments Concerning Sections 252(e) and 252(b) of the Telecommunications Act of 1996. AT&T and U S WEST shall submit a complete Agreement to the Commission for approval within 30 days after the date of this Order.

38. The Commission rejects the parties' proposed Findings of Fact and Conclusions of Law.

It is therefore

ORDERED, that AT&T and U S WEST shall incorporate the Commission's Findings of Fact in its Agreement and shall submit the completed Agreement with both the negotiated and arbitrated provisions to the Commission for approval within 30 days from the date of this Order.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that these Findings of Fact and Conclusions of Law and Order in Docket TC96-184 were duly entered on the 20th of March, 1997.

Dated at Pierre, South Dakota, this 20th day of March, 1997.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Melanie Kalbo

Date: 3/20/97

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	))))	ORDER ON RECONSIDERATION; NOTICE OF ENTRY OF ORDER TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule, Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

At its July 15, 1997, meeting, the Commission voted to grant in part and deny in part AT&T's Motion for Reconsideration/Modification of Order for the reasons set forth below.

The first issue presented by AT&T was that U S WEST's cost model was flawed and therefore should not have been used by the Commission. In the Commission's Order, the Commission recognized that both models presented by the parties were flawed. See Finding of Fact 106. Due to the significant flaws, as specified in the Commission's Order, concerning the Hatfield Model, the Commission adopted U S WEST's TELRIC cost studies with modifications. However, the Commission further found that "due to the deficiencies in both models, the Commission may open a docket to evaluate whether it shall set prices based on a different model or an improved version of the models presented in this case." Finding of Fact 107.

Upon reconsideration, the Commission finds that its decision to use U S WEST's TELRIC cost studies, with modifications, was reasonable. The Commission finds that, compared to AT&T's Hatfield model, U S WEST's cost studies, as modified, more accurately reflected the costs incurred by U S WEST. However, the Commission also finds that, given the flaws in both models and consistent with its Finding of Fact 107, that the prices, terms, and conditions as set forth in its March 20, 1997, Order shall be considered interim prices, terms, and conditions. The Commission shall open a new docket to set permanent prices, terms, and conditions for interconnection for U S WEST. This will allow the parties to present new cost models or improved versions of existing cost models to the Commission for evaluation.

AT&T's next issue is its contention that the Commission's Finding of Fact 98 was in error when it stated that AT&T had failed to show whether the additional costs of unbundling are included in the Hatfield model. The Commission finds that it properly concluded that AT&T had failed to show whether unbundling costs were included in the Hatfield Model since its witness testified that he "thought" that new state-of-the-art concentration equipment would have unbundling capabilities and did not provide any citation to material in the record that would show that new concentration equipment would in fact have unbundling capabilities.

AT&T objects to the Commission's finding that AT&T's reduction of estimated non-plant specific operating and maintenance expenses of 30% is unreasonable. U S WEST's cost studies assumed that non-plant specific operating and maintenance expenses would not drop at all. The Commission found that U S WEST must reduce its network operating expenses by 10%. The Commission affirms its finding that the 30% as advocated by AT&T was unreasonable. The Commission properly rejected the testimony of AT&T to support the 30% reduction since that testimony was based in part on testimony by Pacific Bell, not U S WEST, in a different proceeding. Although the Commission rejected AT&T's 30% reduction, it did accept the testimony of AT&T that some reduction was needed due to technology and competitive pressures. Therefore, the Commission had a sufficient evidentiary basis to reject U S WEST's proposed reduction of 0% and to find a 10% reduction was reasonable.

AT&T objects to the Commission's rejection of the Hatfield Model based in part on the lack of sufficient South Dakota state specific data. The Commission finds that this finding is reasonable since AT&T changed only 15 of the 400 user inputs, all of which related to depreciation lives.

AT&T objects to the Commission's rejection of its input which set U S WEST's corporate overhead at 10%. AT&T reduced corporate overhead to 10% from U S WEST's current 21% by using a regression analysis done on other independent local exchange companies, which were not named, and then further reducing this to 10% by looking at other industries. U S WEST did not

propose any reduction to its corporate overhead factor. Given that AT&T's reduction of U S WEST's corporate overhead by more than 50% was based on other unnamed independent LECs and further reduced by comparison to other industries, the Commission properly found that the reduction was unreasonable. The Commission's finding that U S WEST should reduce its corporate overhead by 10% due to economic efficiencies is reasonable given the evidence presented at the hearing.

AT&T objects to the Commission's finding that its Hatfield model should have used the depreciation lives approved by the Commission rather than depreciation lives approved by the FCC. AT&T points out that U S WEST's cost studies did not use Commission approved depreciation lives either. The Commission finds that it erred in not requiring U S WEST to modify its cost studies to reflect the use of the Commission's prescribed depreciation lives. Thus the Commission shall amend its decision to require that U S WEST shall use the Commission approved depreciation lives.

AT&T objects to the Commission adopting U S WEST's structure sharing model and rejecting the Hatfield Model's inputs for structure sharing. AT&T stated that it had uncontroverted evidence that U S WEST shared underground trenching in South Dakota. This so-called "uncontroverted" evidence consisted of an AT&T witness who stated that he believed he observed a joint occupancy trench situation near the Pierre Airport because there was both a power transformer and pedestal located there. Tr. at 689-698. The witness also makes the less than unequivocal statement that in a forward-looking environment "it's realistic to at least examine the possibilities of sharing that conduit, or sharing that trench, I should say." Tr. at 659 beginning at line 24 to 660, line 2. Given this type of testimony in support of underground trench sharing, it is hardly, as AT&T claims, "preposterous" to assume that no structure sharing of underground trenching will occur.

AT&T objects to the Commission's finding that the Hatfield Model over counted the number of lines by counting DS-1 and DS-3 lines as DSOs. AT&T states the Hatfield line counts were based on U S WEST's reported line counts for DS-1 and DS-3 lines as reported to the FCC. AT&T states that "U S WEST cannot criticize AT&T for using the figures that U S WEST represented as correct to a federal government agency." However, the Commission is obligated to look at the evidence presented at the hearing and, based on that evidence, correctly found that the line counts presented by the Hatfield Model were incorrect since DS-1 and DS-3 lines were not counted as single lines.

AT&T claims that its drop counts figures were the best evidence in the record and should have been accepted. The Commission found that AT&T had used an average of 73 feet for a typical drop length which was based on an estimate from a Bellcore study. This compares with U S WEST's testimony that the average drop is 170 feet. Compared with U S WEST's average drop and drop costs, the Commission could properly find that AT&T's estimates were unreasonable.

AT&T claims that there is no evidence to support the Commission's finding that the Hatfield Model, in the aggregate, understates distribution cable. AT&T neglects to mention that a U S WEST witness provided testimony and exhibits in support of U S WEST's position that the Hatfield Model underestimated distribution cable by 40 to 60 percent. Exhibit 29 at 37-40 and attached Appendix 3.

AT&T asserts that the Commission failed to order U S WEST to use modified inputs for all interconnection and unbundled network element items. In Findings of Fact 108-112, the Commission only required that U S WEST modify inputs for the local loop price. The Commission agrees with AT&T that it should have ordered U S WEST to apply the same modifications to the inputs used for prices for all interconnection and unbundled network element items. Therefore, the Commission will adopt an additional finding to require this.

AT&T claims that the Commission's failure to geographically deaverage prices for interconnection and unbundled network elements results in non-cost based prices. This assertion is incorrect. The prices set by the Commission are still cost based since they are based on the cost to U S WEST of providing the services in South Dakota.

AT&T objects to the Commission's rejection of its simplified avoided cost model used by AT&T to set the wholesale discount rate. AT&T first objects to the Commission's finding that AT&T's model fails to include any return on U S WEST's investment. AT&T states that its model "addresses" return on investment and also removes the portion that is attributable to the assets used in avoided retail activities. However, AT&T's citations to the record to support this statement fail to show where AT&T has included any return on U S WEST's investment. In fact, not only does the AT&T exhibit appear to not include a return on investment, it then appears to take out a return on investment for avoided general support and operator system investment. Exhibit 16, attached Exhibit DBS-2. Thus, AT&T's cost model appears to remove a return on some items even though it failed to first include any return.

AT&T states that the Commission's finding that AT&T's model assumes that all marketing and billing costs will be avoided is incorrect because AT&T's model did not make this assumption in all of the runs submitted. The Commission agrees that AT&T did additional runs, but the Commission's reference to AT&T's model was the model which AT&T was actually advocating at the hearing. Tr. at 925, line 23 to 926, line 1; Tr. at 928, lines 20-23.

AT&T makes the same argument with respect to the Commission's finding that AT&T's assumption that all product management expenses will be eliminated is unreasonable. As with the marketing and billing issue, the Commission relied on the run of the model which AT&T was advocating at the hearing which did, in fact, eliminate all product management expenses. Tr. at 951, lines 14-16.

AT&T objects to the Commission's finding that AT&T's model did not properly match revenues and cost elements. This objection is undercut by AT&T's next assertion of error which is that AT&T's failure to incorporate property tax expense, interarea rent, equal access depreciation, and other operating expenses was correct. AT&T provides no basis for this statement. The Commission affirms that it was error for AT&T to fail to incorporate these items and this failure means that AT&T's cost model also failed to properly match revenues and cost elements. Thus, the Commission's findings with respect to AT&T's failure to properly match expenses and costs and failure to incorporate certain expenses are correct.

AT&T contends the Commission was in error when it required that the wholesale discount must be reduced if AT&T provides its own operator services, directory assistance, and billing and collection. AT&T merely states that logic dictates that the wholesale discount should be increased if it provides its own operator services, directory assistance, and billing and collection. However, it fails to show that when U S WEST's cost model is run without operator services, directory assistance, and billing and collection, that this would in fact increase the discount percentage.

AT&T asserts that U S WEST should have been required to furnish to AT&T more than one white page listing. As explained in its Order, the Commission found that anything beyond a white page listing must be negotiated with U S WEST Direct.

AT&T objects to the Commission's failure to adopt its proposed direct measures of quality and business processes. The Commission finds that its decision not to adopt these standards

because the record was not sufficiently developed is reasonable. In addition, the Commission's position that the record concerning liquidated damages was also insufficiently developed shall stand.

AT&T contends that the requirement for AT&T to obtain written letters of authorization from any end user who wants to switch to AT&T's service is a barrier to entry and conflicts with South Dakota law. However, South Dakota law now provides that written letters of authorization are required before a telecommunications company may change customers. See SDCL 37-30A-9.

AT&T objects to the Commission prohibiting an arbitrator from awarding punitive damages. The Commission finds that this prohibition improperly limits an arbitrator's power to award relief and thus will modify this finding.

With respect to operation support systems, AT&T objects to the Commission finding that each company can assess the users of its gateway on a per transaction basis. The Commission stands by this finding since allowing a company to assess users of its gateway on a per transaction basis is consistent with cost-causation principles.

The Commission makes the following additional findings based on its reconsideration of its March 20, 1997 Order:

1. The terms, conditions, and prices, contained in its March 20, 1997, Order shall be considered interim due to the flaws in the cost models advocated by both AT&T and U S WEST. These terms, conditions, and prices shall remain in effect until such time as the Commission completes a new docket to set permanent terms, conditions, and prices for U S WEST.

2. U S WEST shall modify its cost studies and use the Commission approved depreciation lives as prescribed in Docket TC94-121.

3. U S WEST shall apply the modifications contained in Findings of Fact 109-112 to all interconnection and unbundled network elements items.

4. The second sentence in Finding of Fact 19 is modified by deleting the word "not."

It is therefore

ORDERED, that the Commission's Findings of Fact and Conclusions of Law issued March 20, 1997 in Docket TC96-184 are hereby modified by the additional findings listed above; and it is

FURTHER ORDERED, that AT&T and U S WEST shall submit a complete interconnection agreement signed by both parties to the Commission within 30 days from the date of this Order.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that these Additional Findings of Fact in Docket TC96-184 were duly entered on the 19th of August, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 13th day of August, 1997.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 8/13/97

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	ORDER FOR AND NOTICE OF PREHEARING CONFERENCE AND HEARING TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule; Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

By order dated August 13, 1997, the Commission granted in part and denied in part AT&T's Motion for Reconsideration/Modification of Order. The Commission also ordered AT&T and U S WEST to submit a complete interconnection agreement within 30 days.

On September 12, 1997, an agreement for network interconnection and service resale between AT&T and U S WEST was filed with the Commission. The agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed. On October 20, 1997, U S WEST filed a Motion for Administrative Notice of the Eighth Circuit Court Order dated October 14, 1997.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues and also considered whether to grant U S WEST's Motion for Administrative Notice. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues. AT&T did not object to the Commission granting U S WEST's Motion for Administrative Notice. The Commission unanimously voted to grant the motion.

On September 4, 1998, U S WEST and AT&T filed another interconnection agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. Both U S WEST and AT&T continued to insist that the issues can be resolved by the briefs. U S WEST took this position despite its statement in its brief that on the issue of shared transport, "the Commission must *now* develop a record sufficient to support the pricing of shared transport. Accordingly, the Commission should permit the parties to supplement the record so that any decision regarding pricing of shared transport is based upon a fully developed record incorporating the Eighth Circuit's recent decision." U S WEST's Supplemental Brief in Support of its Proposed Interconnection Agreement at 33. Moreover, U S WEST is proposing that it be allowed to use Single Point of Termination (SPOT) frame to combine unbundled network elements. However, since this method of combining was developed after the Eighth Circuit's decision concerning the combining of unbundled network elements, there is no evidence in the record to support this method. When asked at the meeting how the Commission could consider SPOT frame when there was nothing in the record about SPOT frame, U S WEST conceded that that was "a very fair point."

The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, SDCL Chapter 49-31, specifically 49-31-81, and the federal Act, specifically 47 U.S.C. §§ 251 and 252.

The Commission unanimously voted to hold a prehearing conference and hearing. In issuing this Order, the Commission wishes to make it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record. However, in this case the parties stated that although they believed the issues could be decided by the briefs, they would supply additional evidence if requested by the Commission. Moreover, U S WEST's statement in a cover letter that the issues could be decided on the briefs directly contradicts its statement in the brief that the Commission needs to develop a record sufficient to support the pricing of shared transport. U S

WEST's Supplemental Brief in Support of its Proposed Interconnection Agreement at 33. The Commission gives notice to the parties that additional evidence may be necessary if the parties want the Commission to decide all of the issues. If the parties do not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing. If no hearing is held and the Commission finds that there is insufficient evidence to decide a particular issue then it will be unable to decide that issue. Thus, unless both parties expressly waive their right to a hearing, the Commission will hold a prehearing conference to determine from the parties what issues require supplementation of the record on Wednesday, October 28, 1998, beginning at 9:00 a.m., in LCR 1 of the State Capitol, Pierre, South Dakota. The Commission further voted to set the hearing for November 17-19, 1998, beginning at 8:30 a.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre, South Dakota.

It is therefore

ORDERED, that a prehearing conference shall be held on October 28, 1998, beginning at 9:00 a.m., in LCR 1 of the State Capitol, Pierre South Dakota, and that each party shall appear with a list of issues, if any, that require supplementation of the records; and it is

FURTHER ORDERED, that a hearing shall be held on November 17-19, 1998, in Room 412 of the State Capitol, Pierre South Dakota.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 22nd day of October, 1998.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 10/22/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	ORDER FOR AND NOTICE OF HEARING TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule, Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the

date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single interconnection agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

By order dated August 13, 1997, the Commission granted in part and denied in part AT&T's Motion for Reconsideration/Modification of Order. The Commission also ordered AT&T and U S WEST to submit a complete interconnection agreement within 30 days.

On September 12, 1997, an agreement for network interconnection and service resale between AT&T and U S WEST was filed with the Commission. The agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed. On October 20, 1997, U S WEST filed a Motion for Administrative Notice of the Eighth Circuit Court Order dated October 14, 1997.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues and also considered whether to grant U S WEST's Motion for Administrative Notice. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues. AT&T did not object to the Commission granting U S WEST's Motion for Administrative Notice. The Commission unanimously voted to grant the motion.

On September 4, 1998, U S WEST and AT&T filed another interconnection agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

At the prehearing conference held October 28, 1998, the parties informed the Commission that they had agreed to withdraw all of the disputed issues relating to SPOT frame, shared transport, and recombination. The Commission pointed out that even with those issues withdrawn, other remaining issues argued by the parties in their briefs may involve facts that are not in the record. Thus, the Commission once again gives notice to the parties that additional evidence may be necessary if the parties want the Commission to decide all of the issues. If the facts recited in the briefs are already in the record, then the parties should resubmit their briefs with citations to the record. If the parties do not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing. Unless both parties expressly waive their right to a hearing, the Commission will hold a hearing on November 17-19, 1998, beginning at 1:30 p.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre, South Dakota.

The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, SDCL Chapter 49-31, specifically 49-31-81, and the federal Act, specifically 47 U.S.C. §§ 251 and 252. The issues before the Commission will be to resolve the open issues as presented to the Commission by the parties concerning an interconnection agreement to be entered into by AT&T and U S WEST.

The hearing is an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to attend and represent themselves or be represented by an attorney. However, such rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the final decision will be based solely on testimony and evidence provided, if any, during the hearing or a final decision will be issued by default pursuant to SDCL 1-26-20.

The Commission, after examining the evidence and hearing testimony presented by the parties shall make Findings of Fact, Conclusions of Law, and its final decision. As a result of the hearing, the Commission may resolve the open issues as presented to the Commission by the parties concerning an interconnection agreement to be entered into by AT&T and U S WEST. The final decision made by the Commission may be appealed by the parties.

It is therefore

ORDERED, if facts recited in the briefs are already in the record, then the parties shall resubmit their briefs with citations to the record. It is further

ORDERED, if the parties do not want to have a hearing they both shall state in writing that they expressly waive any rights to a hearing. It is further

ORDERED, that a hearing shall be held on November 17-19, 1998, beginning at 1:30 p.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre South Dakota.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 6th day of November, 1998.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 11/6/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:
Commissioners Burg, Nelson and Schoenfelder

WILLIAM BULLARD, JR.
Executive Director

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	SECOND ARBITRATION ORDER; NOTICE OF ENTRY OF ORDER TC96-184

On November 20, 1996, the Public Utilities Commission (Commission) received a filing from AT&T Communications of the Midwest, Inc. (AT&T) pursuant to 47 U.S.C. § 252(b)(1) to arbitrate open issues related to its interconnection negotiations with U S WEST Communications, Inc. (U S WEST). U S WEST filed its response on December 16, 1996.

On January 10, 1997, the Commission issued an Amended Procedural Schedule, Order for and Notice of Hearing. In the Amended Procedural Schedule, the Commission scheduled a prehearing conference for January 13, 1997. The prehearing conference was held as scheduled.

On January 17, 1997, the Commission received a Joint Procedural Agreement submitted by U S WEST. In the Joint Procedural Agreement, U S WEST stated that AT&T had approved of the Agreement and that AT&T and U S WEST requested that the Commission adopt the proposed Agreement. The Agreement set forth the dates various witnesses would testify and the issues they would address. By Order dated January 22, 1997, the Commission adopted the Joint Procedural Agreement.

The hearing was held as scheduled on February 3, 1997, through February 7, 1997, in Pierre, South Dakota.

On February 26, 1997, AT&T and U S WEST each filed a Post-Hearing Brief and a matrix of unresolved issues. On March 5, 1997, each party filed a Rebuttal Brief and Findings of Fact and Conclusions of Law.

On March 17, 1997, the Commission rendered its oral decision on the unresolved issues in this docket. The Commission issued its written decision on March 20, 1997.

On April 21, 1997, U S WEST and AT&T filed separate proposed Interconnection Agreements. AT&T also filed a Motion for Reconsideration/Modification of Order. At an April 28, 1997, meeting, the Commission considered how to proceed. After taking arguments from the parties, the Commission decided to take AT&T's Motion for Reconsideration/Modification of Order under advisement. In addition, the Commission found that the separate proposed Interconnection Agreements filed by U S WEST and AT&T failed to comply with the Commission's Order which required AT&T and U S WEST to submit a complete agreement to the Commission for approval within 30 days after the

date of the Order. The Commission further found that the separate Interconnection Agreements failed to comply with the federal Telecommunications Act of 1996 (federal Act).

On May 12, 1997, the Commission issued a procedural schedule that gave U S WEST until May 12, 1997, to file an answer to AT&T's Motion for Reconsideration/Modification of Order and allowed AT&T to reply on or before May 22, 1997. The Commission further found that it would set a new deadline for the parties to submit a single interconnection agreement signed by both parties after it had entered a decision on AT&T's Motion for Reconsideration/Modification of Order.

By order dated August 13, 1997, the Commission granted in part and denied in part AT&T's Motion for Reconsideration/Modification of Order. The Commission also ordered AT&T and U S WEST to submit a complete interconnection agreement within 30 days.

On September 12, 1997, an agreement for network interconnection and service resale between AT&T and U S WEST was filed with the Commission. The agreement contained several disputed items that the parties requested be resolved by the Commission. AT&T requested a hearing on the disputed issues; U S WEST maintained that a hearing was not needed. On October 20, 1997, U S WEST filed a Motion for Administrative Notice of the Eighth Circuit Court Order dated October 14, 1997.

At its October 28, 1997, meeting, the Commission considered whether any further hearing was needed to resolve the remaining disputed issues and also considered whether to grant U S WEST's Motion for Administrative Notice. At the meeting, AT&T asked for deferral of any evidentiary hearing pending further negotiations between U S WEST and AT&T concerning issues related to the combination of network elements as clarified by the Eighth Circuit's October 14, 1997, Order on Petitions for Rehearing. U S WEST agreed to deferral, pending further negotiations. The Commission agreed to defer action on resolution of the parties' unresolved issues. AT&T did not object to the Commission granting U S WEST's Motion for Administrative Notice. The Commission unanimously voted to grant the motion.

On September 4, 1998, U S WEST and AT&T filed another interconnection agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that the parties had agreed that the disputed issues may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

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At the prehearing conference held October 28, 1998, the parties informed the Commission that they had agreed to withdraw all of the disputed issues relating to SPOT frame, shared transport, and recombination. The Commission pointed out that even with those issues withdrawn, other remaining issues argued by the parties may involve facts that are not in the record. In its Order for and Notice of Hearing, dated November 6, 1998, the Commission once again gave notice to the parties that additional evidence may be necessary if the parties want the Commission to decide all of the issues. The Commission also ordered the parties to resubmit their briefs with citations to the record. The Commission stated that if the parties do not want to have a hearing then they both should state in writing that they expressly waive any rights to a hearing. Unless both parties expressly waived their right to a hearing, the Commission ordered that a hearing would be held on November 17-19, 1998, beginning at 1:30 p.m., on November 17, 1998, in Room 412 of the State Capitol, Pierre, South Dakota.

On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues. Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998.

At its December 14, 1998, meeting, the Commission considered this matter. The Commission unanimously voted to accept AT&T's definition of "itself" and AT&T's proposed language in section 52.3.3. The Commission also accepted U S WEST's position on the issue of intellectual property with the exception of section 5.2 which the Commission directed the parties to rewrite to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property or may choose to negotiate on its own behalf. The Commission further voted to require that the Party Requesting Access be responsible for all costs associated with obtaining the use of Third Party Intellectual Property and that AT&T's proposed language regarding indemnification be rejected.

Based on the evidence of record and the parties' briefs on these matters, the Commission makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On September 4, 1998, U S WEST and AT&T filed another Interconnection Agreement with unresolved issues. The parties requested that the Commission resolve the outstanding issues. The parties also stated that they had agreed that the disputed issues

may be resolved solely by briefs but also stated that they would supply additional information if requested by the Commission.

2. At its October 15, 1998, meeting, the Commission discussed whether it needed additional evidence in order to resolve the remaining disputed issues. The Commission unanimously voted to hold a prehearing conference and hearing. In its Order dated October 22, 1998, the Commission made it clear that it is not the responsibility of the Commission to ensure that the parties make a sufficient record.

3. On November 12, 1998, the Commission received a letter from U S WEST stating that the parties were able to reach agreement on all but two issues. The letter stated that "[t]he parties are developing a revised agreement and updated issues matrix detailing the issues that are closed, those that are 'parked' because they are pending before the United States Supreme Court, and the two open issues." The letter also stated that the parties waived their right to an evidentiary hearing on the open issues. On November 13, 1998, the Commission received AT&T's Revised Brief Regarding Disputed Issues in the Interconnection Agreement (Revised Brief) and U S WEST's Brief in Support of Remaining Interconnection Agreement Issues (Brief in Support). Based on the parties' waiver of their right to an evidentiary hearing, the Commission cancelled the hearing scheduled for November 17, 1998.

4. The first disputed issue concerns the definition of "itself." Part A, Definitions. U S WEST's definition includes the phrase "for the purposes of interconnection." AT&T's definition does not include that phrase. The effect of which definition is accepted by the Commission is found in Part A, section 52.3. As explained by AT&T, the parties agreed that if the Commission accepts AT&T's definition, the parties will capitalize the term "itself" in section 52.3. If the Commission accepts U S WEST's definition, the parties will leave the term uncapitalized. AT&T's Revised Brief at 5, footnote 1. The apparent effect of not capitalizing "itself" is that the term would be undefined. Thus, U S WEST would have agreed to provide access to its network elements that is "equal in quality" to the access that U S WEST provides to itself, with the term "itself" left undefined.

5. The Commission accepts AT&T's definition of "itself." Section 52.3 concerns the provisioning of network elements. The Commission agrees with AT&T that "U S WEST's proposal to not define the term "itself" when used in the context of performance standards for network elements would seemingly allow U S WEST to afford "Affiliates" or "Subsidiaries" unequal and preferential access to unbundled network elements." AT&T's Revised Brief at 7. Since U S WEST has agreed to provide access to network elements that is "equal in quality" to the access U S WEST provides to itself, that same standard should be equally applicable to its subsidiaries and affiliates. U S WEST should not be allowed to provide preferential access to network elements to its subsidiaries and affiliates.

6. A related issue is the language to be included in section 52.3.3. The Commission first finds that U S WEST's proposed language is ambiguous and vague and can be construed

to conflict with the language of sections 52.3.1 and 52.3.2. The Commission further finds that AT&T's language which defines the words "equal in quality" is reasonable and adds needed specificity to the Interconnection Agreement.

7. Another unresolved issue concerns intellectual property. The Commission accepts Part A, section 5.3 of U S WEST's proposed provision since that is virtually identical to the first three sentences of AT&T's Part A, section 5.1. The Commission also accepts Part A, section 5.1 of U S WEST's proposed provision. The Commission finds that the Party Requesting Access should be responsible for all costs associated with obtaining the use of Third Party Intellectual Property since that is the party that will receive the benefits of the requested access. Thus, the Commission rejects AT&T's proposed language for Part A, section 5.1 because it requires the Party Providing Access to provide any necessary licenses at no cost to the Party Requesting Access.

8. With respect to Part A, section 5.2 of U S WEST's proposed provision, the Commission directs the parties to rewrite the section to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property. The Commission finds that the Party Providing Access may be in a better position to negotiate with its existing vendors to obtain the use of Third Party Intellectual Property for use by the Party Requesting Access. It will be up to the Party Requesting Access to decide whether it will negotiate on its own behalf or ask the Party Providing Access to negotiate.

9. In order to implement Finding of Fact 8, the Commission suggests that section 5.2 may be rewritten as follows:

> Obligations of Party Providing Access. The Party Providing Access shall provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party. The Party Requesting Access may request that the Party Providing Access negotiate any necessary licenses. If that request is made, the Party Providing Access shall enter into good faith negotiations with the owner of the intellectual property to obtain any necessary licenses. Any costs associated with obtaining the necessary licenses are the responsibility of the Party Requesting Access. If no request is made, it is the responsibility of the Party Requesting Access to obtain any necessary licenses and pay any costs associated with obtaining any necessary licenses. The treatment of Third Party licenses shall be in accordance with FCC rules and regulations and/or judicial determination.

This language is a suggestion and is not mandatory. The parties may develop their own language consistent with Finding of Fact 8.

10. On the related issue of indemnification, the Commission rejects Part A, sections 5.2 and 18.2 as proposed by AT&T. The Commission has already found in its Arbitration

Order issued March 20, 1997, in Finding of Fact 23, "that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims." The Commission accepts U S WEST's proposed section 18.2 as being consistent with the Commission's prior decision on this issue. The Commission further finds that it is reasonable to expect that a Party Requesting Access who is made aware of the need to obtain permission or a license and then fails to obtain such license or permission, is liable to the third party for that failure.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 1-26, SDCL Chapter 49-31, specifically 49-31-81, and the federal Act, specifically 47 U.S.C. §§ 251 and 252.

2. The Commission accepts AT&T's proposed definition of "itself" as found in Part A, Definitions. The Commission rejects U S WEST's proposed definition of "itself" since the effect may be to allow U S WEST to give preferential access to its subsidiaries and affiliates.

3. The Commission accepts AT&T's proposed language in Part A, section 52.3.3 as a reasonable definition of the term "equal in quality." The Commission rejects U S WEST's proposed language in Part A, section 52.3.3 because it is ambiguous, vague, and can be construed to conflict with sections 52.3.1 and 52.3.2.

4. The Commission accepts Part A, section 5.3 of U S WEST's proposed provision since that is virtually identical to the first three sentences of AT&T's section 5.1.

5. The Commission accepts Part A, section 5.1 of U S WEST's proposed provision, finding that the Party Requesting Access should be responsible for all costs associated with obtaining the use of Third Party Intellectual Property since that is the party that will receive the benefits of the requested access.

6. The Commission further concludes that the parties shall rewrite section 5.2 of U S WEST's proposed provision to provide that the Party Requesting Access has the option of having the Party Providing Access negotiate for the use of Third Party Intellectual Property or may choose to negotiate on its own behalf. However, consistent with U S WEST's section 5.1, the Party Requesting Access shall be responsible for all costs associated with obtaining the use of Third Party Intellectual Property. The Commission suggests, but does not require, that section 5.2 be rewritten as stated in Finding of Fact 9.

7. The Commission rejects Part A, sections 5.2 and 18.2 as proposed by AT&T. The Commission has already found in its Arbitration Order issued March 20, 1997, in Finding

of Fact 23, "that neither party has an obligation to defend or save harmless the other party based on a claim, demand, or proceeding by any third party for patent, trademark, or copyright infringement claims." The Commission accepts U S WEST's proposed language for Part A, section 18.2 as consistent with the Commission's prior order.

It is therefore

ORDERED, that AT&T and U S WEST shall incorporate the Commission's Findings of Fact and Conclusions of Law in its Interconnection Agreement.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 30th day of December, 1998. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 30th day of December, 1998.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 12/30/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner

RECEIVED
FEB 03 1998
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	DOCKET NO. TC96-184

JOINT REQUEST FOR APPROVAL OF THE ARBITRATED INTERCONNECTION AGREEMENT BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND U S WEST COMMUNICATIONS, INC.

Pursuant to 47 U.S.C. § 252(e)(1) and Commission Rule 20:10:32:33, AT&T Communications of the Midwest, ("AT&T) and U S WEST Communications, Inc. ("U S WEST") hereby submit this Joint Request for Approval of the Arbitrated Interconnection Agreement between AT&T and U S WEST. As grounds for approval, the Parties state as follows:

INTRODUCTION

On November 20, 1996, AT&T filed a request for arbitration under 47 U.S.C. § 252(b)(1). That request sought Commission assistance in the resolution of disputed issues between the parties. On March 20, 1997, the Commission issued its decision and on April 21, 1997, the parties submitted separate interconnection agreements for Commission approval. The Commission, however, rejected both parties' requests for approval of either agreement. On September 12, 1997, the parties re-submitted a single agreement and requested further Commission assistance in resolving disputed issues. The Commission deferred action on this agreement pending the outcome of the Eighth

that adjudication.[1] The parties agree, however, that the Interconnection Agreement can be approved and become effective at this time without the requested modifications and further negotiation toward resolution of the parked issues.

STATEMENTS

I. AT&T'S STATEMENTS REGARDING ADOPTION, MODIFICATION AND COMPLIANCE WITH SECTIONS 251 AND 252.

A. ADOPTION OR MODIFICATION

Throughout the course of this arbitration, AT&T has advocated and continues to advocate positions that are in compliance with §§ 251 and 252. Thus, AT&T requests modification to the contract that conforms to its previous advocacy throughout the arbitration. Therefore, without re-arguing its positions, AT&T incorporates by reference its previous pleadings, briefs and other materials in support of its request for modification.

Should the Commission determine that its previous decisions shall remain unmodified, AT&T requests that the Commission adopt and approve the attached Interconnection Agreement between AT&T and U S WEST. Insofar as there remain "parked" issues that have not yet been renegotiated between the parties, the parties will attempt to negotiate resolutions in light of the recent Supreme Court decision. *See* AT&T Corp. v. Iowa Utilities Board, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 1999 WL 24568 (January 25, 1999), attached hereto as **Exhibit B**.

B. COMPLIANCE WITH SECTIONS 251 AND 252

Because the parties have entered into the attached Agreement without prejudice to

[1] The Agreement contains highlighting that contains those issues that have been "parked.". In addition, Part B to the Agreement is a Status Sheet that lists all the parked issues.

AT&T/U S WEST Interconnection Agreement meets the requirements of 47 U.S.C. §§ 251 and 252.

Further, U S WEST reserves its appellate rights as stated under the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

6855

CONCLUSION

For the foregoing reasons, the parties request that the Commission approve the Interconnection Agreement between AT&T and U S WEST.

Respectfully submitted this 2nd day of February, 1999.

AT&T	U S WEST
Name	Name
Lesly S. D. Fresen	Todd Lundy
Type Name	Type Name
Attorney	Attorney
Title	Title
Date	Date

0950

EXHIBIT A

AGREEMENT
FOR LOCAL WIRELINE NETWORK INTERCONNECTION
AND
SERVICE RESALE

Between

AT&T Communications of the Midwest, Inc.

and

U S WEST Communications, Inc.

[NOTE: In this Agreement, *italicized language* corresponds to language agreed to by the Parties; Courier New pt. 10 font language corresponds to U S WEST proposed language; Times New Roman pt. 11 font language corresponds to AT&T proposed language; **bold language** corresponds to language included to comply with the Commission's Order; bracketed [ ] language corresponds to language proposed to be deleted by a Party]. Issues identified as "Packard" are pending before the United States Supreme Court and will be resolved in accordance with the Court's ruling.

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Attachment 2	Resale
Attachment 3	Unbundled Access/Elements
Attachment 4	Interconnection
Attachment 5	Business Process Requirements
Attachment 6	Electronic Interface
Attachment 7	Implementation Schedule

This Interconnection Agreement (this "Agreement"), effective _____ (the "Effective Date"), is entered into by and between AT&T Communications of the Midwest, Inc., a New York corporation, and U S WEST Communications, Inc., a Colorado corporation, to establish the rates, terms and conditions for local interconnection, local resale, and the purchase of unbundled network elements (individually referred to as the "service" or collectively as the "services").

RECITALS

WHEREAS, pursuant to this Agreement, AT&T and U S WEST will extend certain arrangements to one another within each LATA in which they both operate within South Dakota. This Agreement is a combination of agreed terms and terms imposed by arbitration under Section 252 of the Communications Act of 1934, as modified by the Telecommunications Act of 1996, the rules and regulations of the Federal Communications Commission, and the orders, rules and regulations of the Public Utilities Commission of the State of South Dakota; and as such does not necessarily represent the position of either Party on any given issue; and

WHEREAS, the Parties wish to interconnect their local exchange networks in a technically and economically efficient manner for the transmission and termination of calls, so that subscribers of each can seamlessly receive calls that originate on the other's network and place calls that terminate on the other's network, and for AT&T's use in the provision of exchange access ("Local Interconnection"); and

WHEREAS, AT&T wishes to purchase Telecommunications Services for resale to others, and U S WEST is willing to provide such services; and

Issue A-1 - Parked

U S WEST proposes the following.

WHEREAS, AT&T wishes to purchase on an unbundled basis Network Elements, Ancillary Services and Functions and additional features separately and to use such services for itself or for the provision of its Telecommunications Services to others, and U S WEST is willing to provide such services;

AT&T proposes the following.

WHEREAS, AT&T wishes to purchase on an unbundled basis Network Elements, Ancillary Services and Functions and additional features separately or in any Combination that U S WEST chooses to provide and to use such services for itself or for the provision of its Telecommunications Services to others, and U S WEST is willing to provide such services;

Now, therefore, in consideration of the terms and conditions contained herein, AT&T and U S WEST hereby mutually agree as follows:

SCOPE OF AGREEMENT

A. This Agreement specifies the rights and obligations of each Party with respect to the purchase and sale of Local Interconnection, Local Resale and Network Elements in the LATAs in South Dakota where U S WEST operates.

B. In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement) such action shall not be unreasonably delayed, withheld or conditioned.

C. U S WEST will provide interconnection, network elements and other services to AT&T with the level of service quality or performance of obligations set forth in Part A, Section 52 of this Agreement.

D. U S WEST shall provide to AT&T Services for Resale that are equal in quality, subject to the same conditions (including the conditions in U S WEST's effective tariffs which are not otherwise inconsistent

with the terms and conditions contained herein), within the same provisioning time intervals that U S WEST provides these services to itself, its Affiliates and others, including end users, and in accordance with any applicable Commission service quality standards, including standards the Commission may impose pursuant to Section 252 (e)(3) of the Act.

E. [Intentionally left blank for numbering consistency]

F. The Parties agree to work jointly and cooperatively in testing and implementing processes for pre-ordering, ordering, maintenance, provisioning and billing and in reasonably resolving issues which result from such implementation on a timely basis.

G. If a Party makes a change in its network which it believes will materially affect the interoperability of its network with that of the other Party, the Party making the change shall provide advance notice of such change to the other Party in accordance with applicable FCC or Commission regulations.

H. In accordance with Section 251(c)(5) of the Act and the rules and regulations established by the FCC and the Commission, the Parties shall provide reasonable notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or network, as well as of any other changes that would affect the interoperability of those facilities and networks.

I. Except as otherwise provided for in Section 8 of Attachment 2, U S WEST shall not discontinue or refuse to provide any service required hereunder without AT&T's prior written agreement in accordance with Section 17 of this Part A, nor shall U S WEST reconfigure, reengineer or otherwise redeploy its network in a manner which would materially impair AT&T's ability to offer Telecommunications Services in the manner contemplated by this Agreement, the Act or the FCC's rules and regulations. U S WEST agrees that all obligations undertaken pursuant to this Agreement, including, without limitation, performance standards, intervals, and technical requirements are material obligations hereof and that time is of the essence.

DEFINITIONS

Certain terms used in this Agreement shall have the meanings set forth herein or as otherwise elsewhere defined throughout this Agreement. Other terms used but not defined herein will have the meanings ascribed to them in the Act and the FCC's rules and regulations.

"911 Service" means a universal telephone number which gives the public direct access to the Public Safety Answering Point (PSAP). Basic 911 service collects 911 calls from one or more local exchange switches that serve a geographic area. The calls are then sent to the correct authority designated to receive such calls.

"911 Site Administrator" is a person assigned by AT&T to establish and maintain 911 service location information for its subscribers.

"Access Services" refers to interstate and intrastate switched access and private line transport services.

"Act" means the Communications Act of 1934 (47 U.S.C. Section 151 et seq.), as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or by the Commission.

"ADSL" or "Asymmetrical Digital Subscriber Line" means a transmission technology which transmits an asymmetrical digital signal using one of several transmission methods (for example, carrier-less AM/PM discrete multi-tone, or discrete wavelet multi-tone).

"Affiliate" is an entity that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another entity. For the purposes of this Agreement, the term "own" means to own an equity interest (or equivalent) of more than ten percent (10%).

"AIN" ("Advanced Intelligent Network") is a network functionality that permits specific conditions to be programmed into a switch which, when met, directs the switch to suspend call processing and to receive special instructions for further call handling instructions in order to enable carriers to offer advanced features and services.

"AIN Services" means architecture and configuration of the AIN Triggers within the SCP as developed and/or offered by U S WEST to its customers.

"ALI" (Automatic Location Identification) is a database developed for E911 systems that provides for a visual display of the caller's telephone number and address, and the names of the emergency response agencies responsible for that address. The ALI also shows an Interim Number Portability (INP) number, if applicable.

"ALI/DMS" (Automatic Location Identification/Data Management System) means the emergency service (E911/911) database containing subscriber location information (including name, address, telephone number, and sometimes special information from the local service provider) used to determine to which Public Safety Answering Point (PSAP) to route the call.

"AMA" means the Automated Message Accounting structure that initially records telecommunication message information. AMA format is contained in the Automated Message Accounting document, published by Bellcore as GR-1100-CORE, which defines the industry standard for message recording.

"Ancillary Services" or "Ancillary Functions" means, collectively, the following: (1) Collocation as described in Section 40; (2) access to poles, ducts, conduits and rights of way as described in Section 47; (3) unused transmission media as described in Section 51; (4) Directory Listings as described in Section 44; (5) E911 as described in Section 50.1; (6) Directory Assistance Service as described in Section 50.2; (7) Operator Services as described in Section 50.3; (8) Directory Assistance and Listings services requests as described in Section 50.4; and (9) Directory Assistance data as described in Section 50.5.

"ANI" (Automatic Number Identification) is a feature that identifies and displays the number of a telephone that originates a call.

"ARS" (Automatic Route Selection) is a service feature that provides for automatic selection of the least expensive or most appropriate transmission facility for each call based on criteria programmed into the system.

"ASR" (Access Service Request) means the industry standard forms and supporting documentation used for ordering Access Services. The ASR may be used to order trunking and facilities between AT&T and U S WEST for Local Interconnection.

"AT&T" means AT&T and any Affiliates, subsidiary companies or other entities performing any of the obligations of AT&T set forth in this Agreement. For purposes of Section 47 of this Part A of this Agreement, the obligations of AT&T shall be limited to those facilities of AT&T Communications of the Midwest, Inc. that are used for the purpose of providing local services under the terms of this Agreement.

"BLV/BLI" (Busy Line Verify/Busy Line Interrupt) means an operator call in which the end user inquires as to the busy status of, or requests an interruption of, a telephone call.

"Business Day" means any day Monday through Friday except for mutually agreed to holidays.

"CABS" means the Carrier Access Billing System which is defined in a document prepared by the Billing Committee of the OBF. The Carrier Access Billing System document is published by Bellcore in Volumes 1, 1A, 2, 3, 3A, 4 and 5 as Special Reports SR-OPT-001868, SR-OPT-0011869, SR-OPT-001871, SR-OPT-001872, SR-OPT-001873, SR-OPT-001874, and SR-OPT-001875, respectively, and contains the recommended guidelines for the billing of access and other connectivity services.

"Calling Party Number" or "CPN" is a CCS parameter which refers to the number transmitted through a network identifying the calling party.

"CCS" (Common Channel Signaling) means a method of digitally transmitting call set-up and network control data over a digital signaling network fully separate from the public switched telephone network that carries the actual call.

"Central Office Switch" means a switch used to provide Telecommunications Services, including, but not limited to:

a) "End Office Switches" which are used to terminate Customer station loops for the purpose of interconnecting to each other and to trunks;

b) "Tandem Office Switches" which are used to connect and switch trunk circuits between and among other Central Office Switches. Access tandems provide connections for exchange access and toll traffic while local tandems provide connections for local/EAS traffic; or

c) Combination End Office/Tandem Office Switches.

"Centrex", including Centrex Plus, means a Telecommunications Service that uses central office switching equipment for call routing to handle direct dialing of calls and to provide numerous private branch exchange-like features.

"Charge Number" is a CCS parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

"CLASS" (Bellcore Service Mark) is a set of call-management service features that utilize the capability to forward a calling party's number between end offices as part of call setup. Features include Automatic Call-back, Automatic Recall, Caller ID, Call Trace, and Distinctive Ringing.

"CLEC" (Competitive Local Exchange Carrier) means an entity authorized to provide Local Exchange Service that does not otherwise qualify as an incumbent LEC.

"Combination" consist of two or more connected Network Elements that are reasonably related to provide Telecommunications Service in a geographic area or to a specific customer.[1]

"Commission" means the Public Utilities Commission of the State of South Dakota.

"Conduit" means a tube or protected pathway that may be used to house communication or electrical cables. Conduit may be underground or above ground (for example, inside buildings) and may contain one or more innerducts.

"Confidential Information" has the meaning set forth in Section 28 of Part A of this Agreement.

"Contract Year" means a twelve (12) month period during the term of this Agreement commencing on the Effective Date and each anniversary thereof.

"Control Office" is an exchange carrier center or office designated as its company's single point of contact for the provisioning and maintenance of its portion of local interconnection arrangements.

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[1] Pursuant to the Eighth Circuit DecisionPer Iowa Utilities Bd., et al. v. FCC, 120 F.3d 753 (8th Cir. 1997), the Parties agree to this change.

"Custom Calling Features" is a set of call-management service features available to residential and business subscribers including call-waiting, call-forwarding and three-party calling.

"Customer" means a third-party (residence or business) that subscribes to Telecommunications Services provided by either of the Parties.

"DBMS" (Database Management System) is a computer system used to store, sort, manipulate and update the data required to provide, for example, selective routing and ALI.

"Databases" are the Network Elements that provide the functionality for storage of, access to, and manipulation of information required to offer a particular service and/or capability. Databases include, but are not limited to: Number Portability, LIDB, Toll Free Number Database, Automatic Location Identification/Data Management System, and AIN.

"Digital Signal Level" means one of several transmission rates in the time division multiplexing hierarchy, including, but not limited to:

> "Digital Signal Level 0" or "DS-0" means the 56 or 64 Kbps zero-level signal in the time-division multiplex hierarchy.
>
> "Digital Signal Level 1" or "DS-1" means the 1.544 Mbps first-level signal in the time-division multiplex hierarchy. In the time-division multiplexing hierarchy of the telephone network, DS-1 is the initial level of multiplexing.
>
> "Digital Signal Level 3" or "DS-3" means the 44.736 Mbps third-level in the time-division multiplex hierarchy. In the time-division multiplexing hierarchy of the telephone network, DS-3 is defined as the third level of multiplexing.

"Directory Assistance Database" refers to any set of subscriber records used by U S WEST in its provision of live or automated operator-assisted directory assistance including, but not limited to, 411, 555-1212, NPA-555-1212.

"Directory Assistance Services" provides listings to callers. Directory Assistance Services may include the option to complete the call at the caller's direction.

"Directory Listings" or "Listings" refers to subscriber information, including, but not limited to, name, address and phone numbers, in Directory Assistance Services or directory products.

"Discloser" means that Party to this Agreement which has disclosed Confidential information to the other Party.

"E911" (Enhanced 911 Service) means a telephone communication service which will automatically route a call dialed "911" to a designated Public Safety Answering Point (PSAP) attendant and will provide to the attendant the calling party's telephone number and, when possible, the address from which the call is being placed, and the emergency response agencies responsible for the location from which the call was dialed.

"E911 Message Trunk" is a dedicated line, trunk or channel between two central offices or switching devices which provides a voice and signaling path for E911 calls.

"EAS" (Extended Area Service) is intraLATA traffic treated as "local" traffic between exchanges (rather than as "toll" traffic) as established by the Commission and as reflected in the effective U S WEST tariffs.

"Effective Date" is the date, indicated in the Preamble, on which this Agreement shall become effective.

"Emergency Response Agency" is a governmental entity authorized to respond to requests from the public to meet emergencies.

"EMR" means the Exchange Message Record System used among LECs for exchanging telecommunications message information for billable, non-billable, sample, settlement and study data. EMR format is contained in BR-010-200-010 CRIS Exchange Message Record, published by Bellcore, which defines the industry standard for exchange message records.

"ESN" (Emergency Service Number) is a number assigned to the ALI and selective routing databases for all subscriber telephone numbers. The ESN designates a unique combination of fire, police and emergency medical service response agencies that serve the address location of each in-service telephone number.

"FCC" means the Federal Communications Commission.

"FCC Interconnection Order" is the Federal Communications Commission's First Report and Order in CC Docket No. 96-98 released August 8, 1996, as effective.

"Fiber-Meet" means an Interconnection architecture method whereby the Parties physically interconnect their networks via an optical fiber interface (as opposed to an electrical interface) at a mutually agreed upon location.

"Gateway" (ALI Gateway) is a telephone company computer facility that interfaces with AT&T's 911 administrative site to receive ALI data from AT&T. Access to the Gateway will be via a dial-up modem using a common protocol.

"HDSL" (High-Bit Rate Digital Subscriber Line) means a two-wire or four-wire transmission technology which typically transmits a DS1-level signal (or, higher level signals with certain technologies), using, for example, 2 Binary / 1 Quartenary ("2B1Q").

"IDLC" (Integrated Digital Loop Carrier) means a digital subscriber loop carrier system which interfaces with the switch digitally at a DS1 (1.544Mbps) or higher level.

"ILEC" means the incumbent local exchange carrier.

"Information Service Traffic" means traffic which originates on a local access line and which is addressed to an information service provider.

"INP" (Interim Number Portability) is a service arrangement whereby subscribers who change local service providers may retain existing telephone numbers with minimal impairment of quality, reliability, or convenience when remaining at their current location or changing their location within the geographic area served by the initial carrier's serving central office.

"Interconnection" is as described in the Act and refers to the connection of separate pieces of equipment, facilities, or platforms between or within networks for the purpose of transmission and routing of telephone exchange service traffic and exchange access traffic.

"ISDN" (Integrated Services Digital Network) means a switched network service that provides end-to-end digital connectivity for the simultaneous transmission of voice and data. Basic Rate Interface-ISDN (BRI-ISDN) provides for a digital transmission of two 64 Kbps bearer channels and one 16 Kbps data channel (2B+D). Primary Rate Interface-ISDN (PRI-ISDN) provides for a digital transmission of twenty-three (23) 64 Kbps bearer channels and one 64 Kbps data channel (23B+D).

"Itself" shall mean U S WEST Communications Inc. or any Affiliate or Subsidiary thereof.[2]

"IXC" (Interexchange Carrier) means a provider of interexchange Telecommunications Services.

"LATA" means Local Access Transport Area.

"LEC" means local exchange carrier.

"LIDB" (Line Information Data Base(s)) is an SCP database that provides for such functions as calling card validation for telephone line number cards issued by LECs and other entities and validation for collect and billed-to-third services.

"Local Interconnection" shall have the meaning set forth in the Recitals to this Agreement.

"Local Resale" or "Services for Resale" means, collectively, Telecommunications Services and service functions provided by U S WEST to AT&T pursuant to Attachment 2 of this Agreement.

"Local Traffic" is intraLATA traffic within an exchange that is treated as toll free traffic as established by the Commission and as reflected in the effective tariffs of U S WEST.

"Loop" is a transmission facility between a distribution frame, or its equivalent, in a U S WEST central office or wire center, and the Network Interface Device (as defined herein) or network interface at a subscriber's premises, to which AT&T is granted exclusive use. This includes, but is not limited to, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide ISDN, ADSL, HDSL, and DS-1 level signals. A Loop may be composed of the following components:

Loop Concentrator / Multiplexer
Loop Feeder
Network Interface Device (NID)
Distribution

"Main Distribution Frame" or "MDF" means the distribution frame of the Party providing the Loop used to interconnect cable pairs and line and trunk equipment terminals on a switching system or transmission facility.

"MECAB" refers to the Multiple Exchange Carrier Access Billing (MECAB) document prepared by the Billing Committee of the OBF, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS). The MECAB document, published by Bellcore as Special Report SR-BDS-000983, contains the recommended guidelines for the billing of an Access Service provided by two or more LECs (including a LEC and a CLEC), or by one LEC in two or more states within a single LATA.

"MECOD" refers to the Multiple Exchange Carriers Ordering and Design (MECOD) Guidelines for Access Services - Industry Support Interface, a document developed by the Ordering/Provisioning Committee under the auspices of the OBF, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS). The MECOD document, published by Bellcore as Special Report SR STS-002643, establishes recommended guidelines for processing orders for Access Service which is to be provided by two or more LECs (including a LEC and a CLEC). It is published by Bellcore as SRBDS 00983.

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[2] Per Second Arbitration Order at page 4, ¶4.

"Meet-Point Billing" or "MPB" refers to an arrangement whereby two LECs (including a LEC and AT&T) jointly provide Switched Access Service to an Interexchange Carrier, with each LEC (or AT&T) receiving an appropriate share of the access element revenues.

"Mid-Span Meet" is a point of interconnection between two networks, designated by two Telecommunications Carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

"MSAG" (Master Street Address Guide) is a database defining the geographic area of an E911 service. It includes an alphabetical list of the street names, high-low house number ranges, community names, and emergency service numbers provided by the counties or their agents to U S WEST.

"NANP" (North American Numbering Plan) means the numbering plan used in the United States that also serves Canada, Bermuda, Puerto Rico and certain Caribbean Islands. The NANP format is a 10-digit number that consists of a 3-digit NPA code (commonly referred to as the area code), followed by a 3-digit NXX code and 4-digit line number.

"NENA" (National Emergency Number Association) is an association with a mission to foster the technological advancement, availability and implementation of 911 nationwide.

"Network Element" means a facility or equipment used in the provision of a telecommunications service, including features, functions, and capabilities that are provided by means of such facility or equipment, including **Operational Support Systems**[3]*, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a Telecommunications Service.*

"NP" (Number Portability) means the use of the Location Routing Number (LRN) database solution to provide fully transparent NP for all subscribers and all providers without limitation.

"NPA" (Numbering Plan Area) (sometimes referred to as an area code) is the three digit indicator which is designated by the first three digits of each 10-digit telephone number within the NANP. Each NPA contains 792 possible NXX Codes. There are two general categories of NPA, "Geographic NPAs" and "Non-Geographic NPAs." A "Geographic NPA" is associated with a defined geographic area, and all telephone numbers bearing such NPA are associated with services provided within that geographic area. A "Non-Geographic NPA," also known as a "Service Access Code (SAC Code)" is typically associated with a specialized Telecommunications Service which may be provided across multiple geographic NPA areas; 500, 800, 900, 700, and 888 are examples of Non-Geographic NPAs.

"NXX" means the fourth, fifth and sixth digits of a ten-digit telephone number within the NANP.

"OBF" means the Ordering and Billing Forum, which functions under the auspices of the Carrier Liaison Committee (CLC) of the Alliance for Telecommunications Industry Solutions (ATIS).

"Operator Services" includes, but is not limited to, (1) operator handling for call completion (e.g., collect calls); (2) operator or automated assistance for billing after the subscriber has dialed the called number (e.g., credit card calls); and (3) special services (e.g. emergency agency call).

"P.01 Transmission Grade of Service" (GOS) means a trunk facility provisioning standard with the statistical probability of no more than one call in 100 blocked on initial attempt during the average busy hour.

"PLU" (Percent Local Usage) is a calculation which represents the ratio of the local minutes to the sum of local and intraLATA toll minutes between exchange carriers sent over Local Interconnection trunks. Directory assistance, BLV/BLI, 900, 976, transiting calls from other exchange carriers and switched access calls are not included in the calculation of PLU.

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3 Pursuant to the Eighth Circuit Decision, the Parties agree to this change.

"Party" means either U S WEST or AT&T and "Parties" means U S WEST and AT&T.

"Person" means, collectively, an Affiliate, subsidiary, Customer, end user and subscriber of U S WEST.

"POI" (Point of Interconnection) means the physical point that establishes the technical interface, the test point, where applicable, and the operational responsibility hand-off between AT&T and U S WEST for the local interconnection of their networks for the mutual exchange of traffic.

"Point of Interface" is the physical point where AT&T hands off transmission media to the U S WEST provided entrance facility associated with a Collocation arrangement for the purpose of connecting the entrance facility to some point located within U S WEST's premises.

"Pole Attachment" means the connection of a facility to a utility pole. Some examples of facilities are mechanical hardware, grounding and transmission cable, and equipment boxes.

"POP" means an IXC's point of presence.

"Premium Listing", such as additional, foreign, cross reference, informational, non-listed, privacy, etc., are as described in the U S WEST general exchange listing tariff.

"Primary Listing" (for example, main list, additional main, joint user, client main list or answering service list) shall mean the one appearance of an end user telephone subscriber's main telephone number and other content such as name and address, which each AT&T residence or business subscriber is entitled to receive in the White Pages Directory published by U S WEST Dex at no charge from U S WEST Communications. Where U S WEST business end users are entitled to receive a courtesy listing in the yellow pages section of any directory published on U S WEST's behalf, AT&T's business customers will receive the same entitlement.

"Proprietary Information" shall have the same meaning as Confidential Information.

"PSAP" (Public Safety Answering Point) is the public safety communications center where 9-1-1 calls placed by the public for a specific geographic area will be answered.

"Rate Center" means the geographic point and corresponding geographic area which are associated with one or more particular NPA-NXX codes which have been assigned to U S WEST or AT&T for its provision of basic exchange Telecommunications Services. The "Rate Center Point" is the finite geographic point identified by a specific V&H coordinate, which is used to measure distance-sensitive end user traffic to/from the particular NPA-NXX designations associated with the specific Rate Center. The "Rate Center Area" is the exclusive geographic area identified as the area within which U S WEST or AT&T will provide basic exchange Telecommunications Services bearing the particular NPA-NXX designations associated with the specific Rate Center. The Rate Center Point must be located within the Rate Center Area.

"Rating Point" means the point at which transport mileage is calculated for the termination of calls. Each Party shall establish its own Rating Point(s) for its own services.

"Real Time" means the actual time in which an event takes place, with the reporting on or the recording of the event simultaneous with its occurrence.

"Recipient" means that Party to this Agreement (1) to which Confidential Information has been disclosed by the other Party, or (2) who has obtained Confidential Information in the course of providing services under this Agreement.

"Reseller" is a category of Telecommunications Services providers who obtain Telecommunications Services from another provider through the purchase of wholesale priced services for resale to their end user subscribers.

"Routing Point" means a location which U S WEST or AT&T has designated on its own network as the homing (routing) point for traffic inbound to basic exchange Telecommunications Services provided by U S WEST or AT&T which bear a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access Services. Pursuant to Bellcore Practice BR 795-100-100, the Routing Point may be an "End Office" location, or a "LEC Consortium Point of Interconnection." Pursuant to that same Bellcore Practice, examples of the latter shall be designated by a common language location identifier (CLLI) code with (x)KD in positions 9, 10, 11, where (x) may by any alphanumeric A-Z or 0-9. The Routing Point need not be the same as the Rate Center Point, nor must it be located within the Rate Center Area, but must be in the same LATA as the NPA-NXX.

"ROW" (Right of Way) means the right to use the land or other property owned, leased, or controlled by another party to place poles, conduits, cables, other structures and equipment, or to provide passage to access such structures and equipment. A ROW may run under, on, or above public or private property (including air space above public or private property) and may include the right to use discrete space in buildings, building complexes or other locations.

"SAG" (Street Address Guide) is a database containing an alphabetical list of street names, high-low house number ranges, descriptive addresses, community names, tax codes, subscriber names, telephone numbers, NXXs, central office names, CLLI and other information maintained by U S WEST.

"SCP" (Service Control Point) is a specific type of Database Network Element functionality deployed in a Signaling System 7 (SS7) network that executes service application logic in response to SS7 queries sent to it by a switching system also connected to the SS7 network. SCPs also provide operational interfaces to allow for provisioning, administration and maintenance of subscriber data and service application data (e.g., a toll free database stores subscriber record data that provides information necessary to route toll free calls).

"SECAB" means the Small Exchange Carrier Access Billing document prepared by the Billing Committee of the OBF. The Small Exchange Carrier Access Billing document, published by Bellcore as Special Report SR OPT-001856, contains the recommended guidelines for the billing of access and other connectivity services.

"Selective Routing" is a service which automatically routes an E911 call to the PSAP that has jurisdictional responsibility for the service address of the telephone from which 911 is dialed, irrespective of telephone company exchange or wire center boundaries.

"STPs" (Signaling Transfer Points) provide functionality that enable the exchange of SS7 messages among and between switching elements, database elements and Signaling Transfer Points.

"Subsidiary" shall mean any company in which an entity owns directly or indirectly 50% or more of the voting stock or 50% or more of the equity; or any other venture in which it owns either 50% or more of the voting rights or 50% or more of the equity.

"Switch" -- See Central Office Switch.

"Switched Access", "Switched Access Service", "Switched Exchange Access Service" or "Switched Access Traffic" are as defined in the Parties' applicable tariffs.

"Tandem Office Switches" are Class 4 switches which are used to connect and switch trunk circuits between and among end office switches and other tandems.

"Tariff Services" as used throughout this Agreement refers to the applicable Party's interstate tariffs and state tariffs, price lists, price schedules and catalogs.

"Technically Feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations, in accordance with the rules and regulations of the FCC and the Commission.

"Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

"Telecommunications Carrier" means any provider of Telecommunications Services, except that such term does not include aggregators of Telecommunications Services (as defined in Section 226 of the Act). A Telecommunications Carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing Telecommunications Services, except that the FCC shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

"Telecommunications Services" means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

"Toll Traffic" is traffic that originates in one Rate Center and terminates in another Rate Center with the exception of traffic that is rated as EAS.

"Transit Service" provides the ability for a Telecommunications Carrier to use its connection to a local or access tandem for delivery of calls that originate with a Telecommunications Carrier and terminate to a company other than the tandem company, such as another CLEC, an existing LEC, or a wireless carrier. In these cases, neither the originating nor terminating end user is a customer of the tandem Telecommunications Carrier. The tandem Telecommunications Carrier will accept traffic originated by a Party and will terminate it at a Point of Interconnection with another local, intraLATA or interLATA network Telecommunications Carrier. This service is provided through local and access tandem switches.

"Transit Traffic" is any traffic, other than Switched Access Traffic, that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Carrier's network.

"TRCO" means Trouble Reporting Control Office.

"U S WEST" means U S WEST Communications, Inc. and any Affiliates, subsidiary companies or other entities performing any of the obligations of U S WEST set forth in this Agreement.

"Voluntary Federal Subscriber Financial Assistance Programs" are Telecommunications Services provided to low-income subscribers, pursuant to requirements established by the appropriate federal or state regulatory body.

"Wire Center" denotes, for the purposes of Collocation, a building or space within a building, that serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched. Wire Center can also denote a building where one or more central offices, used for the provision of Telecommunications Services and Access Services, are located. Wire Center shall mean those points eligible for such connections as specified in FCC Docket No. 91-141, and rules adopted pursuant thereto.

TERMS AND CONDITIONS

1. General Provisions

1.1 *Each Party is individually responsible to provide facilities within its network which are necessary for routing, transporting, measuring, and billing traffic from the other Party's network and for delivering such traffic to the other Party's network in the standard format compatible with AT&T's network and to terminate the traffic it receives in that standard*

format or the proper address on its network. The Parties are each solely responsible for participation in and compliance with national network plans, including the National Network Security Plan and the Emergency Preparedness Plan.

1.2 *Neither Party shall impair the quality of service to other carriers or to either Party's Customers, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation, at the earliest practicable time.*

1.3 *[Intentionally left blank for numbering consistency]*

2. Most Favored Nation Terms and Treatment

2.1 *Until such time as there is a final court determination interpreting Section 252(i) of the Act, U S WEST shall make available to AT&T the terms and conditions of any other agreement for Interconnection, unbundled Network Elements and resale services approved by the Commission under Section 252 of the Act, in that agreement's entirety. If AT&T selects the terms and conditions of another agreement in that agreement's entirety, AT&T may do so only after expiration of this Agreement. After there is a final court determination interpreting Section 252(i) of the Act, the Parties agree to revise this Section 2.1 to reflect such interpretation.*[4]

3. Payment

3.1 *In consideration of the services provided by U S WEST under this Agreement, AT&T shall pay the charges set forth in Attachment 1. The billing procedures for charges incurred by AT&T hereunder are set forth in Attachment 5 to this Agreement.*

3.2 *Amounts payable under this Agreement, unless reasonably disputed,* **are due and payable within thirty (30) days after the date of U S WEST's invoice**[5] *or within twenty (20) days after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.*

3.3 **A late payment charge**[6] *of 1.5% applies to all billed balances, not reasonably disputed, which are not paid within the applicable time period set forth in Section 3.2 above. To the extent AT&T pays the billed balance on time, but the amount of the billed balance is reasonably disputed by AT&T, and, it is later determined that a refund is due AT&T, interest shall be payable on the refunded amount in the amount of 1.5% per month. To the extent AT&T pays the billed balance on time, but the amount of the billed balance is reasonably disputed by AT&T, and, it is later determined that no refund is due AT&T, no interest shall be payable on the disputed amount.*

3.4 *Late payment charges shall not be used as a "credit" to a deposit, if any, without the express approval of U S WEST.*

3.5 *Unless specified otherwise in this Agreement, U S WEST shall bill all amounts due from AT&T for each resold service in accordance with the terms and conditions as specified in the U S WEST tariff.*

4. Taxes

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[4] Per Commission Order in Docket TC96-184, March 20, 1997 ("First Order") Per First Order at page 5, Paragraph 21.

[5] Per First Order at page 4, Paragraph 13.

[6] Per First Order at page 4, Paragraph 13.

4.1 *Any federal, state or local excise, sales, or use taxes (excluding any taxes levied on income) resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. Any such taxes shall be shown as separate items on applicable billing documents between the Parties. The Party so obligated to pay any such taxes may contest the same in good faith, at its own expense, and shall be entitled to the benefit of any refund or recovery, provided that such Party shall not permit any lien to exist on any asset of the other Party by reason of the contest. The Party obligated to collect and remit taxes shall cooperate fully in any such contest by the other Party by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Failure to timely provide said resale tax exemption certificate will result in no exemption being available to the purchasing Party during the applicable reporting period.*

5. Intellectual Property.

5.1 **Obligations of Party Requesting Access. As a condition to the access or use of patents, copyright, trade secrets, and other intellectual property (including software) owned or controlled by a third party to the extent necessary to implement this Agreement or specifically required by the then applicable federal and state rules and regulations relating to interconnection and access to telecommunications facilities and services ("Third Party Intellectual Property"), the Party providing access may require the other, upon written notice from time to time, to obtain a license or permission for such access or use of Third Party Intellectual Property, make all payment, if any, in connection with obtaining such license, and provide evidence of such license.[7]**

5.2 **Obligations of Party Providing Access. The party Providing Access shall provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party. The Party Requesting Access may request that the Party Providing Access negotiate any necessary licenses. If that request is made, the party providing Access shall enter into good faith negotiations with the owner of the intellectual property to obtain any necessary licenses. Any costs associated with obtaining the necessary licenses are the responsibility of the party Requesting Access. If no request is made, it is the responsibility of the Party Requesting Access to obtain any necessary licenses. The treatment of Third party licenses shall be in accordance with FCC rules and regulations and/or judicial determination.[8]**

5.3 **Any intellectual property jointly developed in the course of performing this Agreement shall belong to both Parties who shall have the right to grant non-exclusive licenses to third parties except as otherwise designated in writing by one Party to another. Any intellectual property which originates from or is developed by a Party shall remain the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property presently or hereafter owned,**

[7] Per Second Order at page 5, ¶7.
[8] Per Second Order at page 5, ¶9.

controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.[9]

6. Severability

6.1 *In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable or invalid in any respect under law or regulation, the Parties will negotiate in good faith for replacement language. If any part of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will affect only the portion of this Agreement which is invalid or unenforceable. In all other respects this Agreement will stand as if such invalid or unenforceable provision had not been a part hereof, and the remainder of this Agreement shall remain in full force and effect.*

7. Responsibility for Environmental Contamination

7.1 *AT&T shall in no event be liable to U S WEST for any costs whatsoever resulting from the presence or release of any environmental hazard AT&T did not introduce to the affected work location. U S WEST shall, at AT&T's request, indemnify, defend, and hold harmless AT&T, and each of its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) arising out of or resulting from (a) any environmental hazard U S WEST, its contractors or agents introduce to the work location, or (b) the presence or release of any environmental hazard for which U S WEST is responsible under applicable law.*

7.2 *U S WEST shall in no event be liable to AT&T for any costs whatsoever resulting from the presence or release of any environmental hazard U S WEST did not introduce to the affected work location. AT&T shall, at U S WEST's request, indemnify, defend, and hold harmless U S WEST, and each of its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) arising out of or resulting from (a) any environmental hazard AT&T, its contractors or agents introduce to the work location, or (b) the presence of release of any environmental hazard for which AT&T is responsible under applicable law.*

7.3 *In the event any suspect materials within U S WEST-owned, operated or leased facilities are identified to be asbestos-containing, AT&T will ensure that, to the extent any activities which it undertakes in the facility disturb such suspect materials, such AT&T activities will be in accordance with applicable local, state and federal environmental and health and safety statutes and regulations. Except for abatement activities undertaken by AT&T or equipment placement activities that result in the generation of asbestos containing material, AT&T shall not have any responsibility for managing, nor be the owner of, not have any liability for, or in connection with, any asbestos containing material. U S WEST agrees to immediately notify AT&T if U S WEST undertakes any asbestos control or asbestos abatement activities that potentially could affect AT&T equipment or operations, including, but not limited to, contamination of equipment.*

7.4 *Each Party will be solely responsible, at its own expense, for proper handling, storing, transport and disposal of all (a) substances or materials that it or its contractors or agents bring to, create or assume control over at work locations, or (b) waste resulting therefrom or otherwise generated in connection with its or its contractors' or agents' activities at the work locations.*

8. Branding

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[9] Per Second Order at page 6, ¶4.

8.1 *At the request of AT&T and where technically feasible, U S WEST will rebrand operator services and directory assistance in AT&T's name, provided the costs associated with such rebranding are paid by AT&T. Where not technically feasible to add AT&T's brand, U S WEST will unbrand. U S WEST may not unreasonably interfere with branding by AT&T.*

8.2 *Branding includes front-end branding, back-end branding, and unbranding to be determined by AT&T. Where services are to be rebranded, AT&T shall have the option of providing its own branding materials or audio announcements, as appropriate. U S WEST will provide comprehensive unbranding of a service when U S WEST can demonstrate that the cost of rebranding such service is unreasonably expensive and when the failure to comprehensively unbrand is competitively discriminatory.*

8.3 *[Intentionally left blank for numbering consistency.]*

8.4 *[Intentionally left blank for numbering consistency.]*

8.5 *[Intentionally left blank for numbering consistency.]*

8.6 **With respect to resold repair and maintenance service, U S WEST's personnel shall inform AT&T Customers that such service is being provided on behalf of AT&T. Informational materials (including repair receipts and bills) distributed by repair and maintenance personnel shall be in a generic, carrier-neutral form.**[10]

8.7 *U S WEST shall provide, for AT&T's review, the methods and procedures, training and approaches to be used by U S WEST to assure that U S WEST meets AT&T's branding requirements.*

8.8 *This Section 8 shall confer on U S WEST no rights to the servicemarks, trademarks and tradenames owned by or used in connection with services by AT&T or its Affiliates, except as expressly permitted by AT&T.*

8.9 *At the request of AT&T and where technically feasible, U S WEST will rebrand operator services and directory assistance in AT&T's name.*

9. Independent Contractor Status

9.1 *Nothing contained herein shall constitute the Parties as joint venturers, partners, employees or agents of one another, and neither Party shall have the right or power to bind or obligate the other.*

9.2 *Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement and retains full control over the employment, direction, compensation and discharge of all employees assisting in the performance of such obligations. Each Party will be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes, and other payroll taxes with respect to their respective employees, as well as any taxes, contributions or other obligations imposed by applicable state unemployment or workers' compensation acts and all other regulations governing such matters. Each Party has sole authority and responsibility to hire, fire and otherwise control its employees.*

9.3 *Subject to the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (a) its own acts and performance of all obligations*

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10 Per First Order at page 21, Paragraphs 169, 171.

imposed by applicable law in connection with its activities, legal status and property, real or personal, and (b) the acts of its own Affiliates, employees, agents and contractors during the performance of that Party's obligations hereunder. Except for provisions herein expressly authorizing one Party to act for the other, nothing in this Agreement shall constitute a Party as a legal representative or agent of the other Party, nor shall a Party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name or on behalf of the other Party unless otherwise expressly permitted by such other Party. Except as otherwise expressly provided in this Agreement, neither Party shall undertake to perform any obligation of the other Party, whether regulatory or contractual, or to assume any responsibility for the management of the other Party's business.

10. Referenced Documents

10.1 All references to Sections, Exhibits, and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. Whenever any provision of this Agreement refers to a technical reference, technical publication, AT&T practice, U S WEST practice, any publication of telecommunications industry administrative or technical standards, or any other document specifically incorporated into this Agreement, it will be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) or such document that is in effect, and will include the most recent version or edition (including any amendments, supplements, addenda, or successors) of each document incorporated by reference in such a technical reference, technical publication, AT&T practice, U S WEST practice, or publication of industry standards, unless the parties agree otherwise.

11. Publicity and Advertising

11.1 Neither Party shall publish or use any advertising, sales promotions or other publicity materials that use the other Party's logo, trademarks or service marks without the prior written approval of the other Party.

12. Executed In Counterparts

12.1 This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but such counterparts shall together constitute one and the same instrument.

13. Headings Not Controlling

13.1 The headings and numbering of Sections, Parts, Appendices and Attachments in this Agreement are for convenience only and shall not be construed to define or limit any of the terms herein or affect the meaning or interpretation of this Agreement.

14. Joint Work Product

14.1 This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

15. Survival

15.1 *Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement; any obligation of a Party under the provisions regarding indemnification, confidential information, limitation of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive, or to be performed after termination of this Agreement, shall survive cancellation or termination thereof.*

16. Effective Date

16.1 *This Agreement shall become effective pursuant to Sections 251 and 252 of the Act, on _____, 1998.*

17. Amendment of Agreement

17.1 *Except as otherwise provided in this Agreement, no amendment or waiver of any provision of this Agreement, and no consent to any default under this Agreement, shall be effective unless the same is in writing and signed by an officer of the Party against whom such amendment, waiver or consent is claimed. If either Party desires an amendment to this Agreement during the term of this Agreement, it shall provide written notice thereof to the other Party describing the nature of the requested amendment. If the Parties are unable to agree on the terms of the amendment within thirty (30) days after the initial request therefor, the Party requesting the amendment may invoke the dispute resolution process under Section 27 of this Part A of this Agreement to determine the terms of any amendment to this Agreement.*

18. Indemnification

18.1 *Notwithstanding any limitations in remedies contained in this Agreement, each Party (the "Indemnifying Party") will indemnify and hold harmless the other Party ("Indemnified Party") from and against any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the libel, slander, invasion of privacy, misappropriation of a name or likeness, actual or alleged infringement or other violation or breach of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now existing or later created, negligence or willful misconduct by the Indemnifying Party, its employees, agents, or contractors in the performance of this Agreement or the failure of the Indemnifying Party to perform its obligations under this Agreement. In addition, the Indemnifying Party will, to the extent of its obligations to indemnify hereunder, defend any action or suit brought by a third party against the Indemnified Party.*

18.2 **If, after the Party providing access under this Agreement gives written notice to the other Party pursuant to Section 5.1, the other Party fails to obtain a license or permission for access or use of Third Party Intellectual Property, the Party providing access shall have no indemnification obligation hereunder for any loss, cost, claim, liability, damage and expense, including reasonable attorney's fees, to third parties, relating to or arising out of the failure of the other Party to obtain such license or permission.**[11]

18.3 *The Indemnified Party also will cooperate in every reasonable manner with the defense or settlement of such claim, demand, or lawsuit. The Indemnifying Party shall keep the Indemnified Party reasonably and timely apprised of the status of the claim, demand or lawsuit. The Indemnified Party shall have the right to retain its own counsel, including in-house counsel, at its expense, and participate in but not direct the defense; provided, however, that if there are reasonable defenses in addition to those asserted by the Indemnifying Party, the*

[11] Per Second Order at page 5-6, ¶10.

Indemnified Party and its counsel may raise and direct such defenses, which shall be at the expense of the Indemnifying Party.

18.4 The Indemnifying Party will not be liable under this Section 18 for settlements or compromises by the Indemnified Party of any claim, demand or lawsuit unless the Indemnifying Party has approved the settlement or compromise in advance or unless the defense of the claim, demand or lawsuit has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to timely undertake the defense. In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party.

19. Limitation of Liability

19.1 Except as otherwise provided in the indemnity section, no Party shall be liable to the other Party for any Loss, defect or equipment failure caused by the conduct of the other Party, the other Party's agents, servants, contractors or others acting in aid or concert with the other Party.

19.2 [Intentionally left blank for numbering consistency.]

19.3 In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including, but not limited to revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, "Consequential Damages"), even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation to indemnify, defend and hold the other Party harmless against any amounts payable to a third party, including any losses, costs, fines penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third party. Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence); (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such party's negligent act or omission or that of their respective agents, subcontractors or employees, nor shall anything contained in this section limit the Parties indemnification obligations, as specified above.

19.4 [Intentionally left blank for numbering consistency.]

19.5 Notwithstanding the provisions of Section 19.3, to the extent that U S WEST tariffs contain limitations on liability, AT&T shall submit language for inclusion in its Intrastate retail tariffs, that is substantially similar to the limitation of liability language contained in U S WEST's tariffs, and such limitations of liability shall govern for Customer claims. In addition, notwithstanding the provisions of Section 19.3, to the extent that the Commission's quality of service rules provide for remedies to AT&T or its Customers for Customer claims, then those remedies shall govern as to such claims.

20. Term of Agreement

20.1 This Agreement shall be effective for a period of three (3) years, and thereafter shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties shall commence negotiations on a new agreement no later than one year prior to the expiration of the term of this Agreement. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with Section

27 of this Agreement and the resulting contract shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

21. Governing Law

21.1 This Agreement shall be governed by and construed in accordance with the Act and FCC rules and regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of South Dakota, without regard to its conflicts of laws principles, shall govern.

22. Cancellation Charges

22.1 Except as provided pursuant to a Bona Fide Request, or as otherwise provided in any applicable tariff or contract referenced herein, no cancellation charges shall apply.

23. Regulatory Approvals

23.1 This Agreement, and any amendment or modification hereof, will be submitted to the Commission for approval in accordance with Section 252 of the Act. In the event any governmental authority or agency rejects any provision hereof, the Parties shall negotiate promptly and in good faith such revisions as may reasonably be required to achieve approval.

23.2 U S WEST shall provide AT&T a summary describing the proposed change(s) to each Telecommunications Service which is available pursuant to this Agreement. U S WEST shall also provide AT&T a summary describing the proposed change(s) of each intrastate and interstate tariff which provides for an Interconnection, unbundled Network Element or Ancillary Service that is available pursuant to this Agreement. Such summaries shall be available through an Internet Web page to be posted on the same day the proposed change is filed with the Commission or the FCC or at least thirty (30) days in advance of its effective date, whichever is earlier.

23.3 In the event any governmental authority or agency orders U S WEST to provide any service covered by this Agreement in accordance with any terms or conditions that individually differ from one or more corresponding terms or conditions of this Agreement, AT&T may elect to amend this Agreement to reflect any such differing terms or conditions contained in such decision or order, with effect from the date AT&T makes such election. The other services covered by this Agreement and not covered by such decision or order shall remain unaffected and shall remain in full force and effect.

23.4 The Parties intend that any additional services requested by either Party relating to the subject matter of this Agreement will be incorporated into this Agreement by amendment.

23.5 **Each Party shall be responsible for maintaining such regulatory approvals as necessary for it to perform under this Agreement. Each Party shall have an obligation to cooperate with the other Party in obtaining and maintaining necessary regulatory approvals.**[12]

24. Compliance

24.1 Each Party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.

24.2 Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with the Communications Law Enforcement

12 Per First Order at page 5, Paragraph 26.

Act of 1994 ("CALEA"). Each Party (the "Indemnifying Party") shall indemnify and hold the other Party (the "Indemnified Party") harmless from any and all penalties imposed upon the Indemnified Party for such noncompliance and shall, at the Indemnifying Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the Indemnified Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

24.3 All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders. Each Party shall be responsible for obtaining and keeping in effect all FCC, Commission, franchise authority and other regulatory approvals that may be required in connection with the performance of its obligations under this Agreement. In the event the Act or FCC or Commission rules and regulations applicable to this Agreement are held invalid, this Agreement shall survive, and the Parties shall promptly renegotiate any provisions of this Agreement which, in the absence of such invalidated Act, rule or regulation, are insufficiently clear to be effectuated, violate, or are either required or not required by the new rule or regulation. During these negotiations, each Party will continue to provide the same services and elements to each other as are provided for under this Agreement. Provided, however, that either Party shall give ten (10) Business Days notice if it intends to cease any development of any new element or service that is not at that time being provided pursuant to this Agreement. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute, including liability for non-compliance with the new clause or the cost, if any, of performing activities no longer required by the rule or regulation during the renegotiation of the new clause under the applicable procedures set forth in Section 27 herein.

25. Force Majeure

25.1 Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, equipment failure, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers. No delay or other failure to perform shall be excused pursuant to this Section 25 unless such delay or failure and consequences thereof are beyond the control and without the fault or negligence of the Party claiming excusable delay or other failure to perform. In the event of any such excused delay in the performance of a Party's obligation(s) under this Agreement, the due date for the performance of the original obligation(s) shall be extended by a term equal to the time lost by reason of the delay. In the event of such delay, the delaying Party shall perform its obligations at a performance level no less than that which it uses for its own operations. In the event of a labor dispute or strike, the Parties agree to provide service to each other at a level equivalent to the level they provide themselves. In the event of a labor dispute or strike or work stoppage that continues for a period in excess of forty-eight (48) hours, AT&T may obtain replacement services for those services affected by such labor dispute or strike or work stoppage, in which event any liability of AT&T for the affected services shall be suspended for the period of the work stoppage or labor dispute or strike. In the event of such performance delay or failure by U S WEST, U S WEST agrees to resume performance in a nondiscriminatory manner and not favor its own provision of Telecommunications Services above that of AT&T.

26. Escalation Procedures

26.1 AT&T and U S WEST agree to exchange escalation lists which reflect contact personnel including vice president-level officers. These lists shall include name, department, title, phone number, and fax number for each person. AT&T and U S WEST agree to exchange up-to-date lists as reasonably necessary.

27. Dispute Resolution

27.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it may be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof and shall be noticed to the Commission. The arbitrator shall determine which Party or Parties will bear the costs of arbitration, including apportionment, if appropriate. The arbitration shall occur in Denver, Colorado and the governing law shall be in accordance with Section 21.1 above.

27.2 In the event AT&T and U S WEST are unable to agree on certain issues during the term of the Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.

27.3 If a Dispute is submitted to arbitration pursuant to Section 27.1 above, the procedures described in this Section 27.3 shall apply, notwithstanding the then current rules of the AAA. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set forth below. Each Party may submit in writing to a Party, and that Party shall so respond, to an agreed amount of the following: interrogatories, demands to produce documents, and requests for admission. Not less than ten (10) days prior to the arbitration hearing, the Parties shall exchange witness and exhibit lists. Deposition discovery shall be controlled by the arbitrator. Additional discovery may be permitted upon mutual agreement of the Parties or the determination of the arbitrator. The arbitration hearing held in accordance with the provisions of Section 27.1 shall be commenced within thirty (30) days after a demand for arbitration by either Party, and shall be held in Denver, Colorado. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within seven (7) days after the close of hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. The decision of the arbitrator shall be final and entered in a court having jurisdiction. The decision shall also be submitted to the Commission.

28. Nondisclosure

28.1 All information, including, but not limited to, specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data, (a) furnished by one Party to the other Party dealing with Customer specific, facility specific, or usage specific information, other than Customer information communicated for the purpose of publication or directory database inclusion, or (b) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (c) disclosed orally or in writing to the Recipient at the time of delivery, or by written notice given to the Recipient within ten (10) days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the Discloser. A Party who receives Proprietary Information via an oral communication may request written confir-

mation that the material is Proprietary Information. A Party who delivers Proprietary Information via an oral communication may request written confirmation that the Party receiving the information understands that the material is Proprietary Information.

28.2 Upon request by the Discloser, the Recipient shall return all tangible copies of Proprietary Information, whether written, graphic or otherwise, except that the Recipient's legal counsel may retain one (1) copy for archival purposes.

28.3 Each Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

28.4 Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Agreement do not apply to such Proprietary Information as:

28.4.1 was, at the time of receipt, already known to the Recipient free of any obligation to keep it confidential evidenced by written records prepared prior to delivery by the Discloser; or

28.4.2 is or becomes publicly known through no wrongful act of the Recipient; or

28.4.3 is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the Discloser with respect to such information; or

28.4.4 is independently developed by an employee, agent, or contractor of the Recipient which individual is not involved in any manner with the provision of services pursuant to this Agreement and does not have any direct or indirect access to the Proprietary Information; or

28.4.5 is approved for release by written authorization of the Discloser; or

28.4.6 required by law, a court, or governmental agency, provided that the Discloser has been notified of the requirement promptly after the Recipient becomes aware of the requirement, and provided that the Recipient undertakes all lawful measures to avoid disclosing such information until the Discloser has had reasonable time to obtain a protective order. The Recipient agrees to comply with any protective order that covers the Proprietary Information to be disclosed.

28.5 For a period of ten (10) years from receipt of Proprietary Information, the Recipient shall (a) use it only for the purpose of performing under this Agreement, (b) hold it in confidence and disclose it only to employees, authorized contractors and authorized agents who have a need to know it in order to perform under this Agreement, and (c) safeguard it from unauthorized use or disclosure using no less than the degree of care with which the Recipient safeguards its own Proprietary Information. Any authorized contractor or agent to whom Proprietary Information is provided must have executed a written agreement comparable in scope to the terms of this Section. Notwithstanding the foregoing, each Party shall provide advance notice of three (3) Business Days to the other of the intent to provide Proprietary information to a governmental authority and the Parties shall cooperate with each other in attempting to obtain a suitable protective order. The Recipient agrees to comply with any protective order that covers the Proprietary Information to be disclosed.

28.6 Each Party agrees that the Discloser would be irreparably injured by a breach of this Section 28 by the Recipient or its representatives and that the Discloser shall be entitled to

seek equitable relief, including injunctive relief and specific performance, in the event of any breach of this Section 28. Such remedies shall not be exclusive but shall be in addition to all other remedies available at law or in equity.

28.7 CPNI related to either Party's subscribers obtained by virtue of Local Interconnection or any other service provided under this Agreement shall be the Discloser's Proprietary Information and may not be used by the Recipient for any purpose except performance of its obligations under this Agreement, and in connection with such performance, shall be disclosed only to employees, authorized contractors and authorized agents with a need to know, unless the subscriber expressly directs the Discloser to disclose such information to the Recipient pursuant to the requirements of Section 222(c)(2) of the Act. If the Recipient seeks and obtains written approval to use or disclose such CPNI from the Discloser, such approval shall be obtained only in compliance with Section 222(c)(2) and, in the event such authorization is obtained, the Recipient may use or disclose only such information as the Discloser provides pursuant to such authorization and may not use information that the Recipient has otherwise obtained, directly or indirectly, in connection with its performance under this Agreement.

28.8 Except as otherwise expressly provided in this Section 28, nothing herein shall be construed as limiting the rights of either Party with respect to its subscriber information under any applicable law, including, without limitation, Section 222 of the Act.

28.9 Notwithstanding any other provision of this Agreement, the Proprietary Information provisions of this Agreement shall apply to all Proprietary Information furnished by either Party with a claim of confidentiality or proprietary nature at any time.

29. Notices

29.1 Except as otherwise provided herein, all notices or other communication hereunder shall be deemed to have been duly given when made in writing and delivered in person or deposited in the United States mail, certified mail, postage prepaid, return receipt requested, or delivered by prepaid overnight express mail, and addressed as follows:

To AT&T:
Vice President, Local Services
AT&T Corp.
1875 Lawrence Street
Denver, Colorado 80202

Copy to:
General Counsel
AT&T Corp.
1875 Lawrence Street
Denver, Colorado 80202

To U S WEST:
Director - Interconnect Compliance
1801 California Street, 24th Floor
Denver, CO 80202

Copy to:
Vice President-U S WEST, Sioux Falls
125 S. Dakota Avenue
Sioux Falls, SD 57194

Copy to:
U S WEST, Inc. Law Department
Attention: General Counsel Interconnection
1801 California Street, 51st floor
Denver, CO 80202

29.2 If personal delivery is selected to give notice, a receipt of such delivery shall be obtained. The address to which notices or communications may be given to either Party may be changed by seven (7) days written notice given by such Party to the other pursuant to this Section 29.

30. Assignment

30.1 Neither Party may assign, transfer (whether by operation of law or otherwise) or delegate this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, provided that each Party may assign this Agreement to an Affiliate or an entity under its common control or an entity acquiring all or substantially all of its assets or equity by providing prior written notice to the other Party of such assignment or transfer. Any attempted assignment or transfer that is not permitted under the provisions of this Section 30 is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement.

30.2 If any obligation of U S WEST under this Agreement is performed by a subcontractor or Affiliate, U S WEST shall remain fully responsible for the performance of this Agreement in accordance with its terms and U S WEST shall be solely responsible for payments due to its subcontractors.

30.3 If any obligation of AT&T under this Agreement is performed by a subcontractor or Affiliate, AT&T shall remain fully responsible for the performance of this Agreement in accordance with its terms, and AT&T shall be solely responsible for payments due to its subcontractors.

31. Warranties

31.1 U S WEST shall conduct all activities and interfaces which are provided for under this Agreement with AT&T Customers in a carrier-neutral, nondiscriminatory manner.

31.2 U S WEST warrants that it has provided, and during the term of this Agreement it will continue to provide, to AT&T true and complete copies of all material agreements in effect between U S WEST and any third party (including Affiliates) providing any services to AT&T on behalf of or under contract to U S WEST in connection with U S WEST's performance of this Agreement, or from whom U S WEST has obtained licenses or other rights used by U S WEST to perform its obligations under this Agreement, provided, however, that U S WEST may provide such agreements under appropriate protective order.

32. Default

32.1 In the event of a breach of any material provision of this Agreement by either Party, the non-breaching Party shall give the other Party and the Commission written notice thereof, and:

32.1.1 if such material breach is for non-payment of amounts due hereunder pursuant to Section 3.2 of Part A of this Agreement, the breaching Party shall cure such breach within thirty (30) calendar days of receiving such notice. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Amounts disputed in good faith and withheld or set off shall not be deemed "amounts due hereunder" for the purpose of this provision.

32.1.2 if such material breach is for any failure to perform in accordance with this Agreement, which, in the sole judgment of the non-breaching Party, adversely affects the non-breaching Party's subscribers, the non-breaching Party shall give notice of the

breach and the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within ten (10) calendar days or within a period of time equivalent to the applicable interval required by this Agreement, whichever is shorter. If the breaching Party does not cure such breach within the applicable time period, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Notice under this Subsection 32.1.2 may be given electronically or by facsimile, provided that a hard copy or original of such notice is sent by overnight delivery service.

32.1.3 if such material breach is for any other failure to perform in accordance with this Agreement, the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within forty-five (45) calendar days, and if it does not, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach.

32.2 **This Agreement may be terminated by either party in whole at any time only for cause upon sixty (60) calendar days' prior written notice.**[13]

32.3 In the event of any termination under this Section 32, U S WEST and AT&T agree to cooperate to provide for an uninterrupted transition of services to AT&T or another vendor designated by AT&T to the extent that U S WEST has the ability to provide such cooperation.

32.4 Notwithstanding any termination hereof, the Parties shall continue to comply with their obligations under the Act.

33. Remedies

33.1 In the event U S WEST fails to switch a subscriber to AT&T service as provided in this Agreement, U S WEST shall reimburse AT&T in an amount equal to all fees paid by such subscriber to U S WEST for such failed-to-be-transferred services from the time of such failure to switch to the time at which the subscriber switch is accomplished. This remedy shall be in addition to all other remedies available to AT&T under this Agreement or otherwise available.

33.2 All rights of termination, cancellation or other remedies prescribed in this Agreement, or otherwise available, are cumulative and are not intended to be exclusive of other remedies to which the injured Party may be entitled at law or equity in case of any breach or threatened breach by the other Party of any provision of this Agreement. Use of one or more remedies shall not bar use of any other remedy for the purpose of enforcing the provisions of this Agreement.

34. Waivers

34.1 No waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed.

34.2 No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right or condition.

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13 Per First Order at page 3, Paragraph 12.

34.3 Waiver by either Party of any default or breach by the other Party shall not be deemed a waiver of any other default or breach.

34.4 By entering into this Agreement, neither Party waives any right granted to it pursuant to the Act.

35. No Third Party Beneficiaries

35.1 The provisions of this Agreement are for the benefit of the Parties hereto and not for any other person; provided, however, that this shall not be construed to prevent AT&T from providing its Telecommunications Services to other carriers. This Agreement shall not provide any person not a Party hereto with any remedy, claim, liability, reimbursement, claim of action, or other right in excess of those existing without reference hereto.

36. Physical Security

36.1 U S WEST shall exercise the same degree of care to prevent harm or damage to AT&T or its employees, agents or subscribers, or their property as U S WEST provides itself. AT&T shall exercise the same degree of care to ensure the security of its equipment physically collocated within U S WEST's space as AT&T provides such security to itself.

36.1.1 U S WEST will restrict access to approved personnel to U S WEST's buildings. AT&T is responsible for the action of its employees and other authorized non-AT&T personnel; U S WEST is responsible for the action of its employees and other authorized non-U S WEST personnel.

36.1.2 U S WEST will furnish to AT&T the current name(s) and telephone number(s) of those central office supervisor(s) where a physical Collocation arrangement exists. The central office supervisor(s) will be the only U S WEST employee(s) with access to AT&T Collocation space.

36.1.3 U S WEST will comply at all times with U S WEST security and safety procedures at the individual central office locations where AT&T has physical Collocation arrangements. The Parties will cooperate to analyze security procedures of each company to evaluate ways in which security procedures of U S WEST may be enhanced.

36.1.4 U S WEST will allow AT&T to inspect or observe its physical spaces which house or contain AT&T equipment or equipment enclosures at any time upon completion of the physical Collocation quotation. Upon completion of the build out of the physical space, U S WEST will furnish AT&T with all keys, entry codes, lock combinations, or other materials or information which may be needed to gain entry via direct access to AT&T's physical space.

36.1.5 U S WEST agrees to logically partition any U S WEST owned access device systems, whether biometric or card reader, or types which are encoded identically or mechanical coded locks on external and or internal doors to spaces which house AT&T equipment.

36.1.6 U S WEST agrees to limit the keys used in its keying systems for spaces which contain AT&T equipment to the U S WEST supervisor for the specific facility to emergency access only. AT&T shall further have the right to change locks where deemed necessary for the protection and security of its physical spaces and will provide the U S WEST supervisor with the current key.

36.1.8 U S WEST shall control unauthorized access from passenger and freight elevators, elevator lobbies and spaces which contain or house AT&T equipment or equipment space in the same manner as U S WEST provides such control for itself.

36.1.9 U S WEST will provide notification to designated AT&T personnel to indicate an actual or attempted security breach of AT&T physical space in the same time frame as U S WEST provides such notification to itself.

37. Network Security

37.1 U S WEST shall provide an appropriate and sufficient back-up and recovery plan to be used in the event of a system failure or emergency.

37.2 U S WEST shall install controls to (a) disconnect a user for a pre-determined period of inactivity on authorized ports; (b) protect subscriber proprietary information; and (c) ensure both ongoing operational and update integrity.

37.3 Each Party shall be responsible for the security arrangements on its side of the network to the Point of Interconnection. The Parties shall jointly cooperate to analyze network security procedures and cooperate to ensure the systems, access and devices are appropriately secured and compatible.

38. Revenue Protection

38.1 U S WEST shall make available to AT&T all present and future fraud prevention or revenue protection features that U S WEST provides to itself or others. These features include, but are not limited to, operator screening codes, information digits 29 and 70 which indicate prison and COCOT pay phone originating line types respectively, in accordance with the requirements established by the FCC, call blocking of domestic, international blocking for business and residence, 900, NPA-976, and specific line numbers. U S WEST shall additionally provide partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems ("OSS") which include, but are not limited to, Line Information Data Base Fraud monitoring systems. Fraud prevention upgrades as part of the normal

38.2 Uncollectible or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the Party causing such error.

38.3 Uncollectible or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their supporting operational support systems by unauthorized third parties shall be the responsibility of the Party having administrative control of access to said Network Element or operational support system software.

38.4 Each Party shall be responsible for any uncollectible or unbillable revenues resulting from the unauthorized use of facilities under its control or services it provides, including clip-on fraud.

38.5 The Parties shall work cooperatively to minimize fraud associated with third-number billed calls, calling card calls, and any other services related to this Agreement.

39. Law Enforcement Interface

39.1 U S WEST shall provide all necessary assistance to facilitate the execution of wiretap or dialed number recorder orders from law enforcement authorities.

40. Collocation

40.1 General Description

40.1.1 *"Collocation" is the right of AT&T to obtain dedicated space in U S WEST Local Serving Office (LSO) or other U S WEST locations, including, but not limited to, U S WEST serving wire center and tandem offices, as well as all buildings or similar structures owned or leased by U S WEST, including those on public rights-of-way, that house U S WEST network facilities, including, but not limited to, vaults containing loop concentrators or similar structures, and the right to place equipment in such spaces for the purposes of interconnection with U S WEST's network or access to U S WEST's unbundled Network Elements. Collocation also includes U S WEST providing resourcesnecessary for the operation and economical use of collocated equipment, as provided below in this Section 40, and by the Act and FCC rules.*

40.1.2 *Collocation is offered for network interconnection between the Parties. AT&T may cross connect to other collocated parties via facilities provided by U S WEST, provided that AT&T's collocated equipment is also used for interconnection with U S WEST or access to U S WEST's unbundled Network Elements.*

40.1.3 *AT&T is responsible for bringing its own or leased facilities to the U S WEST-designated Point of Interface ("POI"). U S WEST will extend AT&T's facilities from the POI to the cable vault within the wire center. If necessary, U S WEST may bring the facilities into compliance with U S WEST internal fire code standards and extend the facilities to the collocated space.*

40.1.4 *AT&T will be provided two (2) points of entry into the U S WEST wire center only when there are at least two (2) existing entry points for U S WEST cable and when there are vacant entrance ducts in both.*

40.1.5 **AT&T may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Units (RSUs)) to terminate basic transmission facilities. U S WEST is not required to permit Collocation of equipment used to provide enhanced services.**[14] *AT&T must identify what equipment will be installed, to allow for U S WEST to use this information in engineering the power, floor loading, heat release, environmental particulant level, and HVAC.*

40.1.6 **AT&T may collocate the amount and type of equipment it deems necessary in its collocated space in accordance with FCC Rules and Regulations. U S WEST shall not restrict the types of equipment to be installed except to the extent that U S WEST may demonstrate to the Commission that a particular request is not technically feasible.**[15]

40.1.7 *Expanded Interconnection Channel Termination (EICT). Telecommunications interconnection between AT&T's collocated equipment and U S WEST's network may be accomplished via an Expanded Interconnection Channel Termination (EICT). This element can be at the DS-3, DS-1, DS-0, or any other technically feasible level, subject to network disclosure requirements of the FCC, depending on the U S WEST service to which it is connected. The terms and conditions of the tariff for EICT are incorporated only to the extent that they are agreed to by the*

[14] Per First Order at page 9, Paragraph 55.
[15] Per First Order at page 8, Paragraph 49.

Parties. Within ninety (90) days of a request by either Party the Parties will meet to review the tariff and seek resolution on disagreed items.

40.1.8 Consistent with U S WEST's internal practice, within ten (10) Business Days of AT&T's request for any space, U S WEST shall provide information available to it regarding the environmental conditions of the space provided for placement of equipment and interconnection, including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in U S WEST's possession or files, or the possession of an agent, contractor, employee, lessee, or tenant of U S WEST's that holds such information on U S WEST's behalf.

40.1.9 U S WEST shall allow AT&T to perform any environmental site investigations, including, but not limited to, asbestos surveys, which AT&T deems to be necessary in support of its Collocation needs. AT&T shall advise U S WEST in writing of its intent to conduct such investigation, and shall receive written approval from U S WEST to proceed. AT&T shall indemnify U S WEST according to Section 18 of this Agreement for any loss or claim for damage suffered by U S WEST as a result of AT&T's actions during any site inspection.

40.1.10 If the space provided for the placement of equipment, interconnection, or provision of service contains environmental contamination or hazardous material, particularly, but not limited to, asbestos, lead paint or radon, which makes the placement of such equipment or interconnection hazardous, U S WEST shall offer an alternative space, if available, for AT&T's consideration.

Issue A-4 - Parked

[U S WEST proposed language]

40.1.11 AT&T may utilize its collocated space for the purpose of combining two or more unbundled Network Elements it has purchased from U S WEST. AT&T may combine unbundled Network Elements within AT&T's physical collocation space. Alternatively, AT&T may combine unbundled network elements by placing jumpers on a SONET frame as described in Section 13 of Attachment 2 of this Agreement. U S WEST and AT&T shall have access to a common demarcation point for test purposes.

[AT&T proposed language]

40.1.11 [Intentionally left blank for numbering consistency.]

40.2 Virtual Collocation

40.2.1 U S WEST shall provide virtual Collocation for the purpose of interconnection or access to unbundled Network Elements subject to the rates, terms and conditions of this Agreement.

40.2.2 Upon mutual agreement, AT&T will have physical access to the U S WEST wire center building pursuant to a virtual Collocation arrangement.

40.2.3 AT&T will be responsible for obtaining and providing to U S WEST administrative codes, e.g., common language codes, for all equipment specified by AT&T and installed in wire center buildings.

40.2.4 AT&T will be responsible for payment of training of U S WEST employees for the maintenance, operation and installation of AT&T's virtually collocated equipment when that equipment is different than the equipment used by U S WEST. Training conditions are further described in the Virtual Collocation Rate Element section following.

40.2.5 AT&T will be responsible for payment of reasonable charges incurred as a result of agreed upon maintenance and/or repair of AT&T's virtually collocated equipment.

40.2.6 U S WEST does not guarantee the reliability of AT&T's virtually collocated equipment, but U S WEST is responsible for proper installation, maintenance and repair of such equipment, including the change out of electronic cards provided by AT&T.

40.2.7 AT&T is responsible for ensuring the functionality and interoperability of virtually collocated SONET equipment provided by different manufacturers.

40.2.8 AT&T, as bailor, will transfer possession of AT&T's virtually collocated equipment to U S WEST, as bailee, for the sole purpose of providing U S WEST with the ability to install, maintain and repair AT&T's virtually collocated equipment. Title to the AT&T virtually collocated equipment shall not pass to U S WEST.

40.2.9 AT&T shall ensure that upon receipt by U S WEST of AT&T's virtually collocated equipment, AT&T will make available all access to ongoing technical support to U S WEST, as available under the equipment warranty or other terms and conditions, all at AT&T's expense. AT&T shall advise the manufacturer and seller of the virtually collocated equipment that it will be installed, maintained and repaired by U S WEST.

40.2.10 AT&T's virtually collocated equipment must comply with the Bellcore Network Equipment Building System (NEBS) Generic Equipment Requirements TR-NWT-000063, electromagnetic compatibility (EMC) per GR-1089-CORE, Company wire center environmental and transmission standards and any statutory (local, state or federal) and/or regulatory requirements, all of the foregoing which may be in effect at the time of equipment installation or which may subsequently become effective. AT&T shall provide U S WEST interface specifications (e.g., electrical, functional, physical and software) of AT&T's virtually collocated equipment.

40.2.11 AT&T must specify all software options and associated plug-ins for its virtually collocated equipment.

40.2.12 AT&T is responsible for purchasing and maintaining a supply of spares. Upon failure of the AT&T virtually collocated equipment, AT&T is responsible for transportation and delivery of maintenance spares to U S WEST at the wire center housing the failed equipment.

40.2.13 Where AT&T is virtually collocated in a premises which was initially prepared for Virtual Collocation, AT&T may elect to retain its virtual Collocation in that premises and expand that virtual Collocation according to the rates, terms and conditions of this Agreement.

40.3 Physical Collocation

40.3.1 U S WEST shall provide to AT&T physical Collocation of equipment necessary for Interconnection or for access to unbundled Network Elements, except that U S WEST shall provide for virtual Collocation where space is available or expan-

sion or rearrangement is possible if U S WEST demonstrates to the Commission that physical Collocation is not practical for technical reasons or because of space limitations, as provided in Section 251(c)(6) of the Act. AT&T shall pay a prorated amount for expansion of said space. U S WEST shall provide such Collocation for the purpose of interconnection or access to unbundled Network Elements, except as otherwise mutually agreed to in writing by the Parties or as required by the FCC or the Commission subject to the rates, terms and conditions of this Agreement.[16]

40.3.1.1 U S WEST shall permit AT&T to use vendors for all required engineering and installation services associated with its collocated equipment which are being collocated by AT&T pursuant to this Agreement. Within one hundred and twenty (120) days of a request by either U S WEST and AT&T shall compose and agree on a list of approved vendors and/or agree on minimum qualifications for such contractors consistent with industry standards, such agreement not to be unreasonably withheld. In the event such agreement cannot be reached and the dispute resolution process as outlined herein was not concluded on the issue of approved vendors, the list of approved vendors maintained by U S WEST as of the Effective Date of the Agreement shall be the default list until the conclusion of the dispute resolution process. **If U S WEST objects to a vendor, U S WEST shall have the burden of proof as to why the vendor is unacceptable.**[17]

40.3.2 Where AT&T is virtually collocated in a premises which was initially prepared for virtual Collocation, AT&T may elect, unless it is not practical for technical reasons or because of space limitations, to convert its virtual Collocation to physical Collocation at such premises in which case AT&T shall coordinate the construction and rearrangement with U S WEST of its equipment (IDLC and transmission) and circuits for which AT&T shall pay U S WEST at applicable rates, and pursuant to the other terms and conditions in this Agreement. In addition, all applicable physical Collocation recurring charges shall apply.

40.3.3 AT&T will be allowed access to the POI on non-discriminatory terms. AT&T owns and is responsible for the installation, maintenance and repair of its equipment located within the space rented from U S WEST.

40.3.4 AT&T must use leased space as soon as reasonably possible and may not warehouse space for later use or sublease to another provider. Physical Collocation is offered on a space-available, first-come, first-served basis.

40.3.5 The minimum standard leasable amount of floor space is one hundred (100) square feet. AT&T must efficiently use the leased space and no more than fifty percent (50%) of the floor space may be used for storage cabinets and work surfaces. AT&T and U S WEST may negotiate other storage arrangements on a case by case basis. AT&T may store spares within its collocated space.

40.3.6 AT&T's leased floor space will be separated from other competitive providers and U S WEST space through cages or hard walls. AT&T may elect to have U S WEST construct the cage, or choose from U S WEST approved contractors to

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16 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: U S WEST will enable AT&T to combine two or more unbundled Network Elements through physical collocation arrangements consistent with the re-bundling provisions of this Agreement.

17 Per First Order at page 9, Paragraph 57.

construct the cage, meeting U S WEST's installation Technical Publication 77350. Any deviation to AT&T's request must be approved.

40.3.7 The following standard features will be provided by U S WEST:

(a) Heating, ventilation and air conditioning.

(b) Smoke/fire detection and any other building code requirement.

40.3.8 U S WEST Responsibilities

(a) Design the floor space within each location which will constitute AT&T's leased space.

(b) Ensure that the necessary construction work is performed on a timely basis to build AT&T's leased physical space and the riser from the vault to the leased physical space.

(c) Develop a quotation specific to AT&T's request.

(d) Extend U S WEST-provided and owned fiber optic cable from the POI through the cable vault and extend the cable to AT&T's leased physical space or place the cable in fire retardant tubing prior to extension to AT&T's leased physical space.

(e) Installation and maintenance and all related activity necessary to provide Channel Termination between U S WEST's and AT&T's equipment.

(f) Work cooperatively with AT&T in matters of joint testing and maintenance.

40.3.9 AT&T Responsibilities

(a) Determine the type of enclosure for the physical space.

(b) Procure, install and maintain all fiber optic facilities of AT&T up to the U S WEST designated POI.

(c) Provide for installation, maintenance, repair and service of all AT&T's equipment located in the leased physical space.

(d) Ensure that all equipment installed by AT&T complies with Bellcore Network Equipment Building System Generic Equipment requirements, U S WEST environmental and transmission standards, and any statutory (local, federal, or state) or regulatory requirements in effect at the time of equipment installation or that subsequently become effective.

40.3.10 The installation of any interconnection service will be coordinated between the Parties so that AT&T may utilize those services once AT&T has accepted its leased physical space.

40.3.11 If, at any time, U S WEST reasonably determines that the equipment or the installation does not meet standard industry requirements, such failure being due to actions of AT&T or its agents, AT&T will be responsible for the costs associated with the removal, modification to, or installation of the equipment to bring it into compliance. If AT&T fails to correct any non-compliance within thirty (30) calen-

dar days or as soon as reasonably practical after the receipt of written notice of non-compliance, U S WEST may have the equipment removed or the condition corrected at AT&T's expense.

40.3.12 If, during installation, U S WEST reasonably determines that AT&T activities or equipment are unsafe, non-industry standard or in violation of any applicable laws or regulations, U S WEST has the right to stop work until the situation is remedied. If such conditions pose an immediate threat to the safety of personnel, interfere with the performance of U S WEST's service obligations, or pose an immediate threat to the physical integrity of the conduit system or the cable facilities, U S WEST may perform such work and/or take action as is necessary to correct the condition at AT&T's expense.

40.3.13 U S WEST shall provide basic telephone service with a connection jack as requested by AT&T from U S WEST for the collocated space. Upon AT&T's request and following the normal provisioning process, this service shall be available at the AT&T collocated space on the day the space is turned over to AT&T by U S WEST.

40.3.14 Where available, U S WEST shall provide access to restroom stations, break rooms, and drinking water within the collocated facility on a twenty four (24) hours per day, seven (7) days per week basis for AT&T personnel and its designated agents.

40.3.15 U S WEST shall provide AT&T with written notice five (5) Business Days prior to those instances where U S WEST or its subcontractors may be performing work that could reasonably potentially affect AT&T's service. U S WEST will make reasonable efforts to inform AT&T by telephone of any emergency related activity prior to the start of the activity that U S WEST or its subcontractors may be performing that could reasonably potentially affect AT&T's service, so that AT&T can take any action required to monitor or protect its service.

40.3.16 U S WEST shall provide information regarding the location, type, and cable termination requirements (i.e., connector type, number and type of pairs, and naming convention) for U S WEST point of termination to AT&T within five (5) Business Days of AT&T's acceptance of U S WEST's quote for collocated space.

40.3.17 U S WEST shall provide the dimensions for AT&T outside plant fiber ingress and egress into AT&T collocated space within five (5) Business Days of AT&T's acceptance of U S WEST's quote for collocated space.

40.3.18 U S WEST shall provide the sizes and number of power feeders to the collocated space to AT&T within ten (10) Business Days of AT&T's acceptance of U S WEST's quote for collocated space.

40.3.19 U S WEST shall provide positive confirmation to AT&T when construction of AT&T collocated space is fifty percent (50%) completed. This confirmation shall also include confirmation of the scheduled completion and turnover dates.

40.3.20 [Intentionally left blank for numerical consistency.]

40.3.21 With the exception of Subparagraph (b) below, U S WEST shall provide the following information to AT&T within five (5) Business Days or as reasonably necessary upon receipt of a written request from AT&T.

(a) additional work restriction guidelines.

(b) U S WEST or industry technical publication guidelines that impact the design of U S WEST collocated equipment, unless such documents are already in the possession of AT&T. The following U S WEST Technical Publications provide information regarding central office equipment and Collocation guidelines:

77350 Central Office Telecommunications Equipment Installation and Removal Guidelines
77351 Central Office Telecommunications Equipment Engineering Standards
77355 Grounding - Central Office and Remote Equipment Environment
77386 Expanded Interconnection and Collocation for Private Line Transport and Switched Access Services.

AT&T may obtain the above documents from

Faison Office Products Company
3251 Revere St. Suite 200
Aurora, Colorado 80011
(303) 340-3672

(c) appropriate U S WEST contacts (names and telephone numbers) for the following areas:

Engineering
Physical & Logical Security
Provisioning
Billing
Operations
Site and Building Managers
Environmental and Safety

(d) escalation process for the U S WEST employees (names, telephone numbers and the escalation order) for any disputes or problems that might arise pursuant to AT&T's Collocation.

40.3.22 Power as referenced in this Agreement refers to any electrical power source supplied by U S WEST for AT&T equipment. U S WEST will supply power to support AT&T equipment at equipment specific DC and AC voltages. [18] U S WEST shall supply power to AT&T at parity with that provided by U S WEST to itself. If U S WEST performance, availability or restoration falls below industry standards, U S WEST shall bring itself into compliance with such industry standards as soon as technologically feasible.

(a) Central office power supplied by U S WEST into the AT&T equipment area, shall be supplied in the form of power feeders (cables) on cable racking into the designated AT&T equipment area. The power feeders (cables) shall efficiently and economically support the requested quantity and

[18] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "at a minimum".

capacity of AT&T equipment. The termination location shall be mutually agreed upon by the Parties.

(b) U S WEST power equipment supporting AT&T's equipment shall:

i. comply with applicable industry standards (e.g., Bellcore, NEBS, IEEE, UL, and NEC) or manufacturer's equipment power requirement specifications for equipment installation, cabling practices, and physical equipment layout;

ii. have redundant power feeds with physical diversity and battery back-up as required by the equipment manufacturer's specifications for AT&T equipment, or,[19] at parity with that provided for similar U S WEST equipment at that location;

iii. provide central office ground, connected to a ground electrode located within the AT&T collocated space, at a level above the top of AT&T equipment plus or minus two (2) feet to the left or right of AT&T's final request;

iv. provide an installation sequence and access that will allow installation efforts in parallel without jeopardizing personnel safety or existing services of either Party;

v. provide cabling that adheres to Bell Communication Research (Bellcore) Network Equipment-Building System (NEBS) standards TR-EOP-000063;

vi. provide Lock Out-Tag Out and other electrical safety procedures and devices in conformance with the most stringent of OSHA or industry guidelines; and

vii. ensure that installed equipment meets Bellcore specifications.

40.4 Collocation Rate Elements

40.4.1 Common Rate Elements

The following rate elements are common to both virtual and physical Collocation:

(a) Quote Preparation Fee. This covers the work involved in developing a quotation for AT&T for the total costs involved in its Collocation request.

(b) Entrance Facility. Provides for fiber optic cable on a per two (2) fiber increment basis from the point of interconnection utilizing U S WEST owned, conventional single mode type of fiber optic cable to the collocated equipment (for virtual collocation) or to the leased space (for physical Collocation). Entrance facility includes riser, fiber placement, entrance closure, conduit/innerduct, and core drilling.

(c) Cable Splicing. Represents the labor and equipment to perform a subsequent splice to the AT&T provided fiber optic cable after the initial installation splice. Includes a per-setup and a per-fiber-spliced rate elements.

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19 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "at a minimum".

(d) *48 Volt Power. Provides 48 volt power to the AT&T collocated equipment. Charged on a per ampere basis.*

(e) *48 Volt Power Cable. Provides for the transmission of -48 Volt DC power to the collocated equipment. It includes engineering, furnishing and installing the main distribution bay power breaker, associated power cable, cable rack and local power bay to the closest power distribution bay. It also includes the power cable (feeders) A and B from the local power distribution bay to the leased physical space (for physical Collocation) or to the collocated equipment (for virtual collocation).*

(f) *Inspector Labor. Provides for the U S WEST qualified personnel necessary when AT&T requires access to the POI after the initial installation or access to its physical Collocation floor space, where an escort is required. A call-out of an inspector after business hours is subject to a minimum charge of four (4) hours. Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8:00 am to 5:00 pm and after business hours are after 5:00 pm and before 8:00 am, Monday through Friday, all day Saturday, Sunday and holidays.*

(g) *Expanded Interconnection Channel Regeneration. Required when the distance from the leased physical space (for physical Collocation) or from the collocated equipment (for virtual Collocation) to the U S WEST network is of sufficient length to require regeneration.*

(h) *U S WEST will provide external synchronization when available.*

(i) *U S WEST will provide 20 hertz ringing supply when available.*

40.4.2 Physical Collocation Rate Elements

The following rate elements apply only to physical Collocation arrangements:

(a) *Enclosure Buildout. The Enclosure Buildout element, either Cage or Hardwall, includes the material and labor to construct the enclosure specified by AT&T or AT&T may choose from U S WEST approved contractors to construct the cage, meeting U S WEST's installation Technical Publication 77350. It includes the enclosure (cage or hardwall), air conditioning (to support AT&T loads specified), lighting (not to exceed 2 watts per square foot), and convenience outlets (3 per cage or number required by building code for the hardwall enclosure). Also provides for humidification, if required. Pricing for Enclosure Buildout will be provided on an individual basis due to the uniqueness of AT&T's requirements, central office structure and arrangements.*

(b) *Floor Space Rental. This element provides for the rental of the floor space provided to AT&T pursuant to physical Collocation arrangement.*

40.4.3 Virtual Collocation Rate Elements

The following rate elements apply only to virtual Collocation arrangements:

(a) *Maintenance Labor. Provides for the labor necessary for repair of out of service and/or service-affecting conditions and preventative maintenance of the AT&T virtually collocated equipment. AT&T is responsible for ordering maintenance spares. U S WEST will perform maintenance and/or repair work upon receipt of the replacement maintenance spare and/or equipment for AT&T. A call-out of a maintenance technician after business hours is subject to a minimum charge of four (4) hours. Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8:00 am to 5:00 pm and after business hours are after 5:00 pm and before 8:00 am, Monday through Friday, all day Saturday, Sunday and holidays.*

(b) *Training Labor. Provides for the billing of vendor-provided training for U S WEST personnel on a metropolitan service area basis, necessary for AT&T virtually collocated equipment which is different from equipment used by U S WEST. U S WEST will require three (3) U S WEST employees to be trained per metropolitan service area in which the AT&T virtually collocated equipment is located. If, by an act of U S WEST, trained employees are relocated, retired, or are no longer available, U S WEST will not require AT&T to provide training for additional U S WEST employees for the same virtually collocated equipment in the same metropolitan area. Fifty percent (50%) of the amount of training billed to AT&T will be refunded to AT&T should a second collocator or U S WEST in the same metropolitan area select the same virtually collocated equipment as AT&T. The second collocator or U S WEST will be charged one half of the original amount paid by AT&T for the same metropolitan area.*

(c) *Equipment Bay. Provides mounting space for the AT&T virtually collocated equipment. Each bay includes the seven (7) foot bay, its installation, and all necessary environmental supports. Mounting space on the bay, including space for the fuse panel and air gaps necessary for heat dissipation is limited to 78 inches. The monthly rate is applied per shelf.*

(d) *Engineering Labor. Provides the planning and engineering of the AT&T virtually collocated equipment at the time of installation, change or removal.*

(e) *Installation Labor. Provides for the installation, change or removal of the AT&T virtually collocated equipment.*

40.5. Collocation Installation Intervals

40.5.1 U S WEST shall have a period of thirty (30) calendar days after receipt by AT&T of a Request for Collocation to provide AT&T with a written quotation containing all nonrecurring charges and fees for the requested Collocation (the "Quotation Preparation Period"). AT&T shall make payment of fifty (50) percent of the nonrecurring charges and fees upon acceptance of the quotation ("Initial Payment") with the remainder due upon completion of the construction. In the event AT&T disputes the amount of U S WEST's proposed nonrecurring charges and fees, AT&T shall deposit fifty percent (50%) of the nonrecurring charges and fees to an interest bearing escrow account prior to the commencement of construction ("Initial Deposit"). The remainder of the nonrecurring charges and fees shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance with the resolution of such dispute and any interest that has accrued with respect to amounts of the account shall be distributed proportionately to the Parties. U S

WEST shall complete installation pursuant to the AT&T Request for Collocation within a maximum of three (3) months after the Initial Payment or Initial Deposit for physical or virtual Collocation. If there is a dispute between U S WEST and AT&T regarding the amount of any nonrecurring charges and fees, such dispute shall be resolved in accordance with Section 27. The pendency of any such dispute shall not affect the obligation of U S WEST to complete Collocation within the installation intervals described above.

41. Technical References - Collocation

Subject to Sections 52.5.1 and 52.5.2 of this Part A of this Agreement, U S WEST shall provide collocation in accordance with the following standards:

41.1 Institute of Electrical and Electronics Engineers (IEEE) Standard 383, IEEE Standard for Type Test of Class 1 E Electric Cables, Field Splices, and Connections for Nuclear Power Generating Stations;

41.2 National Electrical Code (NEC), use most recent issue;

41.3 TA-NPL-000286, NEBS Generic Engineering Requirements for System Assembly and Cable Distribution, Issue 2 (Bellcore, January 1989);

41.4 TR-EOP-000063 Network Equipment-Building System (NEBS) Generic Equipment Requirements, Issue 3, March 1988;

41.5 TR-EOP-000151, Generic Requirements for 24-, 48-, 130-, and 140- Volt Central Office Power Plant Rectifiers, Issue 1 (Bellcore, May 1985);

41.6 TR-EOP-000232, Generic Requirements for Lead-Acid Storage Batteries, Issue 1 (Bellcore, June 1985);

41.7 TR-NWT-000154, Generic Requirements for 24-, 48-, 130, and 140- Volt Central Office Power Plant Control and Distribution Equipment, Issue 2 (Bellcore, January 1992);

41.8 TR-NWT-000295, Isolated Ground Planes: Definition and Application to Telephone Central Offices, Issue 2 (Bellcore, July 1992);

41.9 TR-NWT-000840, Supplier Support Generic Requirements (SSGR), (A Module of LSSGR, TR-NWT-000064), Issue 1 (Bellcore, December 1991);

41.10 TR-NWT-001275 Central Office Environment Installations/Removal Generic Requirements, Issue 1, January 1993; and

41.11 Underwriters' Laboratories Standard, UL 94.

42. Number Portability

42.1 Interim Number Portability (INP)

42.1.1 General Terms.

(a) The Parties shall provide Interim Number Portability (INP) on a reciprocal basis to the extent technically feasible.

(b) Until permanent number portability is implemented by the industry pursuant to regulations issued by the FCC or the Commission, the Parties agree to

provide INP to each other through Remote Call Forwarding, Direct Inward Dialing, or other appropriate means as agreed to by the Parties.

(c) Once permanent number portability is implemented pursuant to FCC or Commission regulation, either Party may withdraw, at any time and at its sole discretion, its INP offerings, subject to advance notice to the other Party with sufficient time to allow for coordination to allow the seamless and transparent conversion of INP Customer numbers to permanent number portability. Upon implementation of permanent number portability pursuant to FCC regulations, both Parties agree to conform and provide such permanent number portability. Parties agree to expeditiously convert Customers from interim number portability to permanent number portability provided that the interim service is not removed until the Customer has been converted.

(d) U S WEST will update and maintain its Line Information Database ("LIDB") listings for numbers retained by AT&T and its Customer, and restrict or cancel calling cards associated with these forwarded numbers as directed by AT&T. Further, U S WEST will not block third party and collect calls to those numbers unless requested by AT&T.

(e) The ordering Party shall specify on a per telephone number basis which method of INP is to be employed and the providing Party shall provide such method to the extent technically feasible.

(f) Where either Party has activated an entire NXX, or activated a substantial portion of an NXX with the remaining numbers in that NXX either reserved for future use or otherwise unused, if these Customer(s) choose to receive service from the other Party, the first Party shall cooperate with the second Party to have the entire NXX reassigned in the LERG (and associated industry databases, routing tables, etc.) to an End Office operated by the second Party. Such transfer will be accomplished with appropriate coordination between the Parties and subject to appropriate industry lead-times for movement of NXXs from one switch to another.

42.1.2 Description Of Service

(a) Interim Number Portability Service ("INP") is a service arrangement that can be provided by U S WEST to AT&T or by AT&T to U S WEST.

(b) INP applies to those situations where an end-user Customer elects to change service providers, and such Customer also wishes to retain its existing or reserved telephone number(s). INP consists of providing the capability to route calls placed to telephone numbers assigned to one Party's switches to another Party's switches.

(c) INP is available as INP-Remote Call Forwarding ("INP-RCF") permitting a call to a U S WEST assigned telephone number to be translated to AT&T's dialable local number. AT&T may terminate the call as desired. Additional capacity for simultaneous call forwarding is available where technically feasible on a per path basis. AT&T will need to specify the number of simultaneous calls to be forwarded for each number ported.

(d) DID is another INP method that makes use of direct inward dialing trunks. Each DID trunk group used for INP is dedicated to carrying DID INP traffic.

between the U S WEST end office and the AT&T switch. Traffic on these trunks cannot overflow to other trunks, so the number of trunks shall be conservatively engineered by U S WEST. Also, inter-switch signaling is usually limited to multi-frequency (MF). This precludes passing Calling Line ID to the AT&T switch.

(e) RI-PH will route a dialed call to the U S WEST switch associated with the NXX of the dialed number. The U S WEST switch shall then insert a prefix onto the dialed number which identifies how the call is to be routed to AT&T. The prefixed dialed number is transmitted to the U S WEST tandem switch to which AT&T is connected. Route indexing is only available with seven digit local dialing.

(f) The prefix is removed by the operation of the tandem switch and the dialed number is routed to AT&T's switch so the routing of the call can be completed by AT&T.

i. DN-RI is a form of RI-PH that requires direct trunking between the U S WEST switch to which the ported number was originally assigned and the AT&T switch to which the number has been ported. The U S WEST switch shall send the originally dialed number to the AT&T switch without a prefix.

ii. U S WEST shall provide RI-PH or DN-RI on an individual telephone number basis, as designated by AT&T. Where technically feasible, calls to ported numbers are first directed to the AT&T switch over direct trunks but may overflow to tandem trunks if all trunks in the direct group are occupied.

iii. For both RI-PH and DN-RI the trunks used may, at AT&T's option, be the same as those used for exchange of other local traffic with U S WEST. At AT&T's option, the trunks shall employ SS7 or in band signaling and may be one way or two way.

(g) INP is subject to the following restrictions:

i. An INP telephone number may be assigned by AT&T only to AT&T's Customers located within U S WEST's local calling area and toll rating area that is associated with the NXX of the ported number. This is to prevent the possibility of Customers using number portability to extend the local calling area.

ii. INP is applicable only if AT&T is engaged in a reciprocal traffic exchange arrangement with U S WEST.

iii. INP is not offered for NXX Codes 555, 976, 960 and 1+ sent-paid telephones, and Service Access Codes (i.e. 500, 700, 800/888, 900). INP is not available for FGA seven-digit numbers (including foreign exchange (FEX), FX and FX/ONAL and foreign Central Office Service),. Furthermore, INP numbers may only be used consistent with network efficiency and integrity, i.e., inhibitions on mass calling events.

iv. The ported telephone number will be returned to the switch which originally had the ported number when the ported service is dis-

connected. The normal interrupt announcement will be provided by the porting company for the period of time until the telephone number is reassigned.

v. Within thirty (30) days of a request of either AT&T U S WEST shall provide AT&T a list of those features that are not available for INP telephone numbers due to technical limitations.

42.1.3 Ordering and Maintenance

(a) AT&T is responsible for all direct interactions with AT&T's end users with respect to ordering and maintenance.

(b) U S WEST shall exchange with AT&T SS7 TCAP messages as required for the implementation of Custom Local Area Signaling Services (CLASS) or other features available in the U S WEST network.

(c) Each Party's designated INP switch must return answer and disconnect supervision to the other Party's switch.

(d) U S WEST shall disclose to AT&T any technical or capacity limitations that would prevent use of a requested INP in a particular switching office.

(e) The Parties will develop and implement an efficient deployment process to ensure call routing integrity for toll and local calls, with the objective to eliminate Customer downtime.

(f) For INP, AT&T shall have the right to use the existing U S WEST 911 interface structure for all 911 capabilities. When RCF is used for AT&T subscribers, both the ported numbers and shadow numbers shall be stored in ALI databases. AT&T shall have the right to verify the accuracy of the information in the ALI databases via direct connection to the SCC ALI database pursuant to the same process and procedures SCC makes available to U S WEST.

42.2 Permanent Number Portability (PNP)

42.2.1 Upon implementation of Permanent Number Portability (PNP) pursuant to FCC regulations, both Parties agree to conform and provide such Permanent Number Portability. To the extent consistent with the FCC rules as amended from time to time, the requirements for PNP shall include the following:

42.2.2 Subscribers must be able to change local service providers and retain the same telephone number(s) consistent with FCC rules and regulations and the Western Region LLC agreements as amended from time to time.

42.2.3 The PNP network architecture shall not subject alternate local exchange carriers to any degradation of service compared to U S WEST in any relevant measure, including transmission quality, switching and transport costs, increased call set-up time and post-dial delay, and AT&T shall not be required to rely on the U S WEST network for calls completing to its ported Customers.

42.2.4 When an office is equipped with PNP, in accordance with the procedures specified by the North American Numbering Council, the NXXs in the office shall be defined as portable and translations will be changed in the Parties' switches to open those NXXs for database queries.

42.2.5 When an NXX is defined as portable, it shall also be defined as portable in all PNP-capable offices which have direct trunks to the given switch.

42.2.6 Upon introduction of PNP in a Metropolitan Statistical Area ("MSA"), the applicable switches will be converted according to a published schedule with no unreasonable delay. All portable NXXs shall be recognized as portable, with queries launched from these switches.

42.2.7 Prior to implementation of PNP, the Parties agree to develop, implement, and maintain efficient methods to maintain 911 database integrity when a subscriber ports to another service provider. The Parties agree that the Customer should not be dropped from the 911 database during the transition.

42.2.8 When a subscriber ports to another service provider and has previously secured a reservation of line numbers from the donor provider for possible activation at some future point, these reserved but inactive numbers shall "port" along with the active numbers being ported by the subscriber. So long as AT&T maintains the reserved numbers, U S WEST shall not reassign said numbers. Upon request by either Party, the Parties will allocate the revenue generated from number reservations in accordance with a schedule to be mutually agreed upon. U S WEST shall provide AT&T the ability to reserve numbers.

42.2.9 During the process of porting a subscriber, the donor service provider shall implement the 10-Digit trigger feature, when the technology is made available in each switch in accordance with the schedules adopted by the FCC. When the donor provider receives the porting request, the unconditional trigger shall be applied to the subscriber's line at the time that has been agreed to via the Western Region LNP Operations Guidelines in order to overcome donor network time delays in the disconnection of the subscriber. Alternatively, when an activation notice is sent to an NPAC to trigger a broadcast to service provider databases, the donor switch shall have its translations changed to disconnect the subscriber's line within four hours or less after the donor network Local SMS's has received the broadcast. Porting requests that require coordination between service providers, in accordance with the guidelines, will be handled on a case-by-case basis and will not be covered by the above.

42.2.10 Both AT&T and U S WEST shall:

(a) support all emergency and Operator Services.

(b) use scarce numbering resources efficiently and administer such resources in a competitively neutral manner.

(c) jointly cooperate with each other to provide the information necessary to rate and bill all types of calls.

(d) jointly cooperate with each other to apply PNP consistently on a nationwide basis, and in accordance with all FCC directives.

42.2.11 A ten-digit code, consistent with the North American Numbering Plan, shall be used as a network address for each switch that terminates subscriber lines, i.e., an end office. This address shall support existing six-digit routing and may be implemented without changes to existing switch routing algorithms. In existing end offices, this

address shall be selected from one of its existing NPA-NXXs. New end offices shall be assigned an address through normal administrative processes.

42.2.12 PNP employs an "N-1" (N minus 1) Query Strategy for interLATA or intraLATA toll calls, by which the originating carrier will pass the call to the appropriate toll carrier who will perform a query to an external routing database and efficiently route the call to the appropriate terminating local carrier either directly or through an access tandem office.

42.2.13 U S WEST shall furnish AT&T with the first six digits of the originating address when it supplies AT&T with the Jurisdiction Information Parameter for the originating address message.

42.2.14 U S WEST agrees to begin the introduction of PNP to end user subscribers who may begin changing local service providers and retaining their existing telephone number based on the time line set out by the FCC in its Telephone Number Portability Order (CC Docket No. 95-116), or in accordance with a Commission order if such time for introduction of PNP set by the Commission is earlier than would result under the FCC Order.

42.2.15 The generic requirements for the PNP alternative will be implemented in accordance with industry-standard specifications.

42.2.16 For a local call to a ported number, the originating carrier is the "N-1" carrier. It will perform an external database query as soon as the call reaches the first PNP-capable switch in the call path and pass the call to the appropriate terminating carrier. A PNP-capable originating switch shall query on a local call to a portable NXX as soon as it determines that it (the originating switch) does not serve the dialed number.

42.2.17 U S WEST shall be the default carrier for database queries where AT&T is unable to perform its own query due to abnormal conditions. AT&T shall be the default carrier for database queries where U S WEST is unable to perform its own query due to abnormal conditions.

42.2.18 U S WEST will provide AT&T PNP for subscribers moving to a different location, or staying at the same location, within the same rate center area.

42.2.19 U S WEST will work cooperatively with other local service providers to establish the Western Region Number Portability Administration Center/Service Management System (SMS). The SMS shall be administered by a neutral third party to provide for the efficient porting of numbers between carriers. There must be one (1) exclusive NPAC per portability State or region, and U S WEST shall provide all information uploads and downloads regarding ported numbers to/from, respectively, the exclusive NPAC. U S WEST and AT&T shall cooperate to facilitate the expeditious deployment of PNP through the process prescribed by the FCC, including, but not limited to, participation in the selection of a neutral third party and development of SMS, as well as SMS testing for effective procedures, electronic system interfaces and overall readiness for use consistent with that specified for provisioning in this Agreement.

42.3 Requirements for INP and NP

42.3.1 *[Intentionally left blank for numbering consistency.]*

42.3.2 Cut-Over Process

The Parties shall cooperate in the process of porting numbers from one carrier to another so as to limit service outage for the ported subscriber. This shall include, but not be limited to, each Party updating its respective network element translations within fifteen (15) minutes following notification by the industry SMS, or ported-to local service provider, and deploying such temporary translations as may be required to minimize service outage, e.g., unconditional triggers. In addition, AT&T shall have the right to determine who initiates the order for INP in specific cut-over situations. The timeframes in this paragraph shall be pursuant to Generic Requirements for SCP Application and GTT Function for Number Portability, Issue 0.93, January 6, 1997 and subsequent versions which may be adopted from time to time. The Parties shall cooperate to review, and if necessary, adjust the above time frame based on their actual experiences.

42.3.3 Testing

U S WEST and AT&T shall cooperate in conducting AT&T's testing to ensure interconnectivity between systems. U S WEST shall inform AT&T of any system updates that may affect the AT&T network and U S WEST shall, at AT&T's request, perform tests to validate the operation of the network. Additional testing requirements may apply as specified by this Agreement.

42.3.4 Engineering and Maintenance

(a) U S WEST and AT&T will cooperate to ensure that performance of trunking and signaling capacity is engineered and managed at levels which are at least the same level of service as provided by U S WEST to its subscribers and to ensure effective maintenance testing through activities such as routine testing practices, network trouble isolation processes and review of operational elements for translations, routing and network fault isolation.

(b) Additional specific engineering and maintenance requirements shall apply as specified in this Agreement.

42.3.5 Recording and Billing

The Parties shall provide each other with accurate billing and subscriber account record exchange data necessary for billing their subscribers whose numbers have been ported.

42.3.6 Operator Services and Directory Assistance

With respect to Operator Services and Directory Assistance associated with NP for AT&T subscribers, U S WEST shall provide the following:

(a) While INP is deployed and prior to conversion to PNP:

i. The Parties acknowledge that technology, as of the Effective Date of this Agreement, does not permit the provision of BLV/BLI to ported numbers. When such becomes available in the U S WEST network, such technology shall be made available to AT&T.

ii. U S WEST shall allow AT&T to order provisioning of Telephone Line Number (TLN) calling cards and Billed Number Screening (BNS), in its

LIDB, for ported numbers, as specified by AT&T. U S WEST shall continue to allow AT&T access to its LIDB. Other LIDB provisions are specified in this Agreement.

iii. Where U S WEST has control of Directory Listings for NXX codes containing ported numbers, U S WEST shall maintain entries for ported numbers as specified by AT&T in accordance with the Listings Section of this Agreement.

(b) When PNP is in place:

i. The provisions in Section 42.3.6 preceding, shall apply when PNP is in place.

ii. If Integrated Services Digital Network User Part (ISUP) signaling is used, U S WEST shall provide the Jurisdiction Information Parameter in the SS7 Initial Address Message. (See Generic Switching and Signaling Requirements for Number Portability, Issue 1.0, February 12, 1996 (Editor - Lucent Technologies, Inc.)).

iii. The Parties shall provide, when received from the NPAC, a 10-Digit Global Title Translation (GTT) Node for routing queries for TCAP-based Operator Services (e.g., LIDB). The acquiring company will provide the GTT to the NPAC. The NPAC will distribute this information to the donor company and all other parties.

iv. U S WEST OSS shall meet all requirements specified in "Generic Operator Services Switching Requirements for Number Portability," Issue 1.1, June 20, 1996 as updated from time to time.

43. Dialing Parity

43.1 The Parties shall provide dialing parity to each other as required under Section 251(b)(3) of the Act or state law or regulation as appropriate.

43.2 U S WEST shall ensure that all AT&T Customers experience the same dialing parity as similarly-situated Customers of U S WEST services, such that, for example, for all call types: (a) an AT&T Customer is not required to dial any greater number of digits than a similarly-situated U S WEST Customer, and (b) the AT&T Customer may retain its local telephone number, so long as the Customer continues receiving service in the same central office serving area.

44. Directory Listings

44.1 Directory Listings General Requirements

44.1.1 This Section 44 pertains to Directory Listings requirements for the appearance of AT&T end user Directory Listings in Directory Assistance service or directory product.

44.1.2 U S WEST shall include in its master Directory Listing database all list information for AT&T Customers.

44.1.3 U S WEST shall not sell or license, nor allow any third party, the use of AT&T Customer Listings without the prior written consent of AT&T. U S WEST shall not disclose nor allow any third party to disclose non-listed name or address

information for any purpose other than what may be necessary to complete directory distribution.

44.1.4 AT&T Customer Listings in the U S WEST Directory Assistance database and Directory Listing database shall be co-mingled with listings of U S WEST and other CLEC Customers.

44.1.5 Each AT&T Customer Primary Listing shall be provided, at no charge, the same white page listings that U S WEST provides its Customers.[20]

44.1.5 Each AT&T business Customer Primary Listing shall be provided, at no charge, the same yellow page classified courtesy listings that U S WEST provides its Customers.

44.1.7 U S WEST shall also ensure that its directory publisher publishes all types of listings for AT&T Customers that are available to U S WEST Customers under the same terms, and conditions, including but not limited to:

(a) Foreign Listings
(b) Reference Listings
(c) Information Listings
(d) Alternate call Listings
(e) Multi-line Listings
(f) Multi-line/Multi-owner Listings

44.1.8 AT&T end user Listings properly identified by AT&T as State, Local, and Federal government Listings shall be appropriately coded in the U S WEST Directory Listing database. U S WEST will provide government code information to AT&T.

44.1.9 The listing and handling of AT&T listed and non-listed telephone numbers shall be at least at parity with that provided by U S WEST to its own Customers, including AT&T customers who have ported telephone numbers from U S WEST.

44.1.10 U S WEST shall ensure that its directory publisher publishes AT&T sales, service, billing, and repair information for business and residential Customers, along with the AT&T logo in the customer information/guide pages of each directory at no charge to AT&T.

44.1.11 U S WEST is responsible for maintaining Listings, including entering, changing, correcting, rearranging and removing listings in accordance with AT&T's orders. Upon request, and at least one (1) month prior to a given white page directory close, a method of reviewing and correcting Listings will be provided.

44.1.12 Any other issues with respect to directory listings must be negotiated with U S WEST Dex.[21]

44.1.13 U S WEST will permit AT&T Customers to place orders for Premium Listings and privacy listings. AT&T will be charged for Premium Listings and privacy listings at U S WEST's general exchange tariff rates less the wholesale discount rate. The Premium and privacy listing charges will be billed to AT&T and itemized at the telephone number sub-account level.

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20 Per First Order at page 30, Paragraph 246.
21 Per First Order at page 30, Paragraph 246.

44.1.14 U S WEST shall ensure a third party distributes appropriate alphabetical and classified directories (white and yellow pages) and recycling services to AT&T Customers at parity with U S WEST end users, including providing directories, a) upon establishment of new service; b) during annual mass distribution; and c) upon Customer request.

44.1.15 [Intentionally left blank for numbering consistency.]

44.1.16 U S WEST will provide the option of having CENTREX users listed when AT&T purchases CENTREX type services for resale.

44.1.17 [Intentionally left blank for numbering consistency.]

44.2 Scope

44.2.1 AT&T grants U S WEST a non-exclusive license to incorporate Listings information into its Directory Assistance database. AT&T shall select one of two options for U S WEST's use of Listings and dissemination of Listings to third parties.

EITHER:

a Treat the same as U S WEST's end user Listings - No prior authorization is needed for U S WEST to release Listings to directory publishers or other third parties. U S WEST will incorporate Listings information in all existing and future Directory Assistance applications developed by U S WEST. AT&T authorizes U S WEST to sell and otherwise make Listings available to directory publishers. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

OR:

b. Restrict to U S WEST's Directory Assistance services -- Prior authorization required from AT&T for all other uses. AT&T makes its own, separate agreements with U S WEST, third Parties and directory publishers for all uses of its Listings beyond Directory Assistance. U S WEST will sell or provide Listings to directory publishers (including U S WEST's publisher affiliate) or other third Parties only after the third party presents proof of AT&T's authorization. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

(c) U S WEST shall be entitled to retain all revenue associated with any sales pursuant to subparagraphs (a) and (b) above.

44.3 U S WEST will take reasonable steps in accordance with industry practices to accommodate non-published and non-listed Listings provided that AT&T has supplied U S WEST the necessary privacy indicators on such Listings.

44.4 AT&T Responsibilities

44.4.1 AT&T agrees to provide to U S WEST its end user names, addresses and telephone numbers in a standard mechanized format, as utilized by U S WEST.

44.4.2 AT&T will supply its ACNA/CIC or CLCC/OCN, as appropriate, with each order to provide U S WEST the means of identifying Listings ownership.

44.4.3 *AT&T represents the end user information provided to U S WEST is accurate and correct. AT&T further represents that it has reviewed all Listings provided to U S WEST, including end user requested restrictions on use such as non-published and non-listed.*

44.4.4 *AT&T is responsible for dealings with, and on behalf of, AT&T's end users on the following subjects:*

a) *All end user account activity, e.g., end user queries and complaints.*

b) *All account maintenance activity, e.g., additions, changes, issuance of orders for Listings to U S WEST.*

c) *Determining privacy requirements and accurately coding the privacy indicators for AT&T's end user information. If end user information provided by AT&T to U S WEST does not contain a privacy indicator, no privacy restrictions will apply.*

45. *[Intentionally left blank for numbering consistency.]*

46. **U S WEST Dex Issues**

46.1 **U S WEST and AT&T agree that certain issues, such as yellow page advertising, directory distribution, access to call guide pages, and yellow page listings, will be the subject of negotiations between AT&T and U S WEST Dex or other directory publishers.**[22] *U S WEST acknowledges that AT&T may request U S WEST to facilitate discussions between AT&T and U S WEST Dex.*

47. **Access to Poles, Ducts, Conduits, and Rights of Way**

47.1 **Each Party shall provide the other Party nondiscriminatory access to its poles, ducts, rights-of-way and conduits it controls on terms, conditions and prices as described herein. While the language in Section 47 describes the provision of poles, ducts, rights-of-way and conduits by U S WEST to AT&T, the language in this Section shall apply reciprocally to the provision of poles, ducts, rights-of-way and conduits by AT&T to U S WEST when AT&T becomes a local exchange carrier.**[23]

47.2 **U S WEST shall provide AT&T nondiscriminatory access to poles, ducts, rights-of-way and conduits it owns or controls, except where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.**[24]

U S WEST may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business. U S WEST shall provide nondiscriminatory access on a first come, first served basis.[25] **U S WEST shall take all reasonable steps to accommodate requests for access.**[26] **Before denying access based on lack of capacity, U S WEST must explore potential accommodations in good faith with the party seeking access.**[27]

47.3 **Definitions**

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22 Per First Order at Page 30, Paragraph 246.
23 Per First Order at page 27, Paragraph 223.
24 Per First Order at page 27, Paragraph 221.
25 Per First Order at page 27, Paragraph 222.
26 Per First Order at page 27, Paragraph 224.
27 Per First Order at page 27, Paragraph 224.

"Poles, ducts, conduits and ROW" refer to all the physical facilities and legal rights which provide for access to pathways across public and private property. These include poles, pole attachments, ducts, innerducts, conduits, building entrance facilities, building entrance links, equipment rooms, remote terminals, cable vaults, telephone closets, building risers, rights of way, or any other requirements needed to create pathways. These pathways may run over, under, across or through streets, traverse private property, or enter multi-unit buildings. A Right of Way ("ROW") is the right to use the land or other property owned, leased, or controlled by any means by U S WEST to place poles, ducts, conduits and ROW or to provide passage to access such poles, ducts, conduits and ROW. A ROW may run under, on, or above public or private property (including air space above public or private property) and shall include the right to use discrete space in buildings, building complexes, or other locations.

47.4 Requirements

47.4.1 U S WEST shall make poles, ducts, conduits and ROW available to AT&T upon receipt of a request for use within the time periods provided in this Section, providing all information necessary to implement such a use and containing rates, terms and conditions, including, but not limited to, maintenance and use in accordance with this Agreement and at least equal to those which it affords itself, its Affiliates and others. Other users of these facilities, including U S WEST, shall not interfere with the availability or use of the facilities by AT&T.

47.4.2 Within ten (10) Business Days of AT&T's request for specific poles, ducts, conduits, or ROW, U S WEST shall provide any information in its possession or available to it regarding the environmental conditions of such requested poles, ducts, conduits or ROW route or location including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in U S WEST's possession or files, or if reasonably obtainable, in the possession of an agent, contractor, employee, lessor, tenant of U S WEST's that holds such information on U S WEST's behalf. If the poles, ducts, conduits or ROW contain such environmental contamination, making the placement of equipment hazardous, U S WEST shall offer alternative poles, ducts, conduits or ROW for AT&T's consideration. U S WEST shall allow AT&T to perform any environmental site investigations, including, but not limited to, Phase I and Phase II environmental site assessments, as AT&T may deem to be necessary.

47.4.3 U S WEST shall not prevent or delay any third party assignment of ROW to AT&T.

47.4.4 U S WEST shall offer the use of such poles, ducts, conduits and ROW it has obtained from a third party to AT&T, to the extent such agreement does not prohibit U S WEST from granting such rights to AT&T. They shall be offered to AT&T on the same terms as are offered to U S WEST. **U S WEST shall exercise its eminent domain power to expand an existing ROW, to the extent permitted by law, when necessary to accommodate AT&T's request for access.**[28] *If U S WEST exercises its eminent domain authority on behalf of AT&T at AT&T's request, then AT&T shall reimburse U S WEST for U S WEST's reasonable costs, if any, incurred as a result of such exercise of its eminent domain authority.*

47.4.5 U S WEST shall provide AT&T non-discriminatory access to poles, ducts, conduit and ROW and any other pathways on terms and conditions equal to that provided by U S WEST to itself or to any other Person. Further, U S WEST shall not

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28 Per First Order at page 27, Paragraph 225.

preclude or delay allocation of these facilities to AT&T because of the potential needs of itself or of other Person, except a maintenance spare may be retained as described below.

47.4.6 U S WEST shall not attach, or permit other entities to attach facilities on, within or overlashed to existing AT&T facilities without AT&T's prior written consent.

47.4.7 On a timely basis, U S WEST agrees to provide immediately necessary information, on a case-specific route basis, current detailed engineering and other plant records and drawings for specific requests for poles, ducts, conduit and ROW, including facility route maps at a city level, and the fees and expenses incurred in providing such records and drawings on the earlier of twenty (20) Business Days from AT&T request or the time within which U S WEST provides this information to itself or any other Person. If U S WEST is unable to provide this information within the twenty (20) day period, it shall immediately advise AT&T of the expected delay, the reason for such delay, and the expected date on which AT&T will receive the information requested. AT&T may request an earlier response time. Such information shall be of equal type and quality as that which is available to U S WEST's own engineering and operations staff. U S WEST shall also allow personnel designated by AT&T to jointly examine with U S WEST personnel, at no cost to AT&T for such personnel, such engineering records and drawings for a specific routing at U S WEST Central Offices and U S WEST Engineering Offices upon ten (10) days' written notice to U S WEST. U S WEST acknowledges that the request for information and the subject matter related to the request made under this Section shall be treated as Proprietary Information.

47.4.8 U S WEST shall provide to AT&T a Single Point of Contact for negotiating all structure lease and ROW agreements.

47.4.9 U S WEST shall provide information regarding the availability and condition of poles, ducts, conduits and ROW within five (5) Business Days of AT&T's request if that information then exists in U S WEST's records (a records based answer) and within twenty (20) Business Days of AT&T's request if U S WEST must physically examine the poles, ducts, conduits and ROW (a field based answer) ("Request"). AT&T shall have the option to be present at the field based survey and U S WEST shall provide AT&T at least twenty-four (24) hours' notice prior to the start of such field survey. During and after this period, U S WEST shall allow AT&T personnel to enter manholes and equipment spaces and view pole structures to inspect such structures in order to confirm usability or assess the condition of the structure. U S WEST shall send AT&T a written notice confirming availability pursuant to the Request within such twenty (20) day period ("Confirmation").

47.4.10 **US WEST may not reserve space for its local exchange service to the detriment of an entrant in the local exchange business. U S WEST shall provide nondiscriminatory access on a first come, first served basis."**[29] For the period beginning at the time of the Request and ending ninety (90) days following Confirmation, U S WEST shall reserve such poles, ducts, conduits and ROW for AT&T and shall not allow any use thereof by any Party, including U S WEST. AT&T shall elect whether or not to accept such poles, ducts, conduits and ROW within the ninety (90) day period following Confirmation. AT&T may accept such facilities by sending written notice to U S WEST ("Acceptance"). From the time of the Request pursuant to Section 47.4.9 above until ninety (90) days after Confirmation, U S WEST shall reserve any

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29 Per First Order at page 27, Paragraph 222.

such requested poles, ducts, conduits and/or ROW for AT&T's use, provided, however, that if another party makes a bona fide request in writing to use any such requested poles, ducts, conduits and/or ROW, including U S WEST, U S WEST shall so inform AT&T. U S WEST shall not allow the requesting party, including itself, to use the requested poles, ducts, conduits and/or ROW without first giving AT&T the right to continue its reservation of such poles, ducts, conduits and/or ROW. If AT&T chooses to exercise its right of first refusal, it shall compensate U S WEST in a manner equal to the amount the requesting party would have otherwise paid U S WEST for AT&T's reserved facilities.

47.4.11 Reservation. After Acceptance by AT&T, AT&T shall have six (6) months to begin attachment and/or installation of its facilities to the poles, ducts, conduits and ROW or request U S WEST to begin make ready or other preparation[30] activities. Any such construction, installation or make ready by AT&T shall be completed by the end of one (1) year after Acceptance. AT&T shall not be in default of the 6-month or 1-year requirement above if such default is caused in any way by any action, inaction or delay on the part of U S WEST or its Affiliates or subsidiaries.

47.4.12 Make Ready. U S WEST shall rearrange, modify and/or make ready existing poles, ducts, conduits and ROW where necessary and feasible to provide space for AT&T's requirements. Subject to the requirements above, the Parties shall endeavor to mutually agree upon the time frame for the completion of such work within five (5) days following AT&T's request; provided, however, that any such work required to be performed by U S WEST shall be completed within sixty (60) days or a reasonable period of time based on standard[31] intervals in the industry, unless otherwise agreed by AT&T in writing.

47.4.13 Construction After Acceptance. U S WEST shall complete any new construction, relocation or installation of poles, ducts, conduits or ROW required to be performed by U S WEST or any U S WEST construction, relocation or installation requested by AT&T within a reasonable period of time based on standard construction intervals in the industry or sixty (60) days after obtaining all governmental authority or permits necessary to complete such construction, relocation or installation. If U S WEST anticipates that construction, relocation or installation will go beyond standard industry intervals or the sixty (60) day period, U S WEST shall immediately notify AT&T and the Parties shall mutually agree on a completion date.

47.4.14 AT&T shall begin payment for the use of newly constructed poles, ducts, conduits, and ROW upon completion of such construction and installation and confirmation by appropriate testing methods that the facilities are in a condition ready to operate in AT&T's network or upon use (other than for testing) by AT&T, whichever is earlier.

47.4.15 AT&T shall make payment for construction, relocation, rearrangements, modifications and make ready in accordance with Section 3, Construction and Implementation Costs of Attachment 1 of this Agreement.

47.4.16 [Intentionally left blank for numbering consistency.]

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30 Pursuant to the Eighth Circuit Decision, the Parties agree to add "preparation" and delete the following: "construction".

31 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "construction".

47.4.17 AT&T may, at its option, install its facilities on poles, ducts, conduits and ROW and use AT&T or AT&T designated personnel to attach its equipment to such U S WEST poles, ducts, conduits and ROW.

47.4.18 If available, U S WEST shall provide AT&T space in manholes for racking and storage of cable and other materials as requested by AT&T.

47.4.19 U S WEST shall rearrange, modify and/or make ready any conduit system or poles with retired cable by removing such retired cable from conduit systems or poles to allow for the efficient use of conduit space and pole space. Before denying access based on a lack of capacity, U S WEST must explore potential accommodations with AT&T.

47.4.20 Where U S WEST has innerducts which are not, at that time, being used or are not reserved as emergency or maintenance spare in accordance with FCC rules and regulations, U S WEST shall offer such ducts for AT&T's use.

47.4.21 Where a spare innerduct does not exist, U S WEST shall allow AT&T to install an innerduct in U S WEST conduit, at AT&T's cost and expense. U S WEST must review and approve any installation of innerduct in any U S WEST's duct prior to the start of construction. Such approval shall not be unreasonably delayed, withheld or conditioned. AT&T shall provide notice to U S WEST of any work activity not less than twenty-four (24) hours prior to the start of construction.

47.4.22 Where U S WEST has any ownership or other rights to ROW to buildings or building complexes, or within buildings or building complexes, U S WEST shall offer such ROW to AT&T:

(a) Subject to the approval of the building owner, if required, the right to use any available space owned or controlled by U S WEST in the building or building complex to install AT&T equipment and facilities;

(b) Subject to the approval of the building owner, if required, ingress and egress to such space; and

(c) Subject to the approval of the building owner, if required, the right to use electrical power at parity with U S WEST's rights to such power.

47.4.23 Whenever U S WEST intends to modify or alter any poles, ducts, conduits or ROW which contain AT&T's facilities, U S WEST shall provide written notification of such action to AT&T so that AT&T may have a reasonable opportunity to add to or modify its facilities. AT&T shall advise U S WEST, in writing, of its intentions to add or modify the facilities within fifteen (15) Business Days of U S WEST's notification. If AT&T adds to or modifies its facilities according to this paragraph, AT&T shall bear a proportionate share of the costs incurred by U S WEST in making such facilities accessible.

47.4.24 AT&T shall not be required to bear any of the costs of rearranging or replacing its facilities, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any entity other than AT&T, including U S WEST.

47.4.25 U S WEST shall maintain the poles, ducts, conduits and ROW at its sole cost. AT&T shall maintain its own facilities installed within the poles, ducts, conduits and ROW at its sole cost. In the event of an emergency, U S WEST shall begin repair

of its facilities containing AT&T's facilities within a reasonable time frame based on industry standards or a time frame requested by AT&T. If U S WEST cannot begin repair within the requested time frame, upon notice and approval of U S WEST, which shall not be unreasonably withheld, AT&T may begin such repairs without the presence of U S WEST personnel. AT&T may climb poles and enter the manholes, handholds, conduits and equipment spaces containing U S WEST's facilities in order to perform such emergency maintenance, but only until such time as qualified personnel of U S WEST arrives ready to continue such repairs. For both emergency and non-emergency repairs, AT&T may use spare innerduct or conduits, including the innerduct or conduit designated by U S WEST as emergency spare for maintenance purposes; provided, however, that AT&T may only use such spare conduit or innerduct for a maximum period of ninety (90) days.

47.4.26 In the event of a relocation necessitated by a governmental entity exercising the power of eminent domain, when such relocation is not reimbursable, all parties shall share pro rata in costs for relocating the base conduit or poles and shall each pay its own cost of cable and installation of the facilities in the newly rebuilt U S WEST poles, ducts, conduits and ROW.

48. Bona Fide Request Process

48.1 Any request for Interconnection or access to an unbundled Network Element not already available via price lists, tariff, or as described herein shall be treated as a "Request" under this Section.

48.2 USWC shall use the Bona Fide Request (BFR) process, as described in this Section 48, to determine the technical feasibility of the requested interconnection or Network Element(s) and, for those items found to be technically feasible, to provide the terms and timetable for providing the requested items. Additionally, elements, services and functions which are materially or substantially different from those services, elements or functions already provided by USWC to itself, its Affiliates, Customers, or end users may, at the discretion of AT&T, be subject to this BFR process.

48.3 A Request shall be submitted in writing and, at a minimum, shall include: (a) a complete and accurate technical description of each requested Network Element or interconnection; (b) the desired interface specifications; (c) a statement that the interconnection or Network Element will be used to provide a telecommunications service; (d) the quantity requested; (e) the location(s) requested; and (f) whether AT&T wants the requested item(s) and terms made generally available. AT&T may designate a Request as Confidential.

48.4 Within forty-eight (48) hours of receipt of a Request, USWC shall acknowledge receipt of the Request and review such request for initial compliance with Subsection 48.3 above. In its acknowledgment, USWC shall advise AT&T of any missing information reasonably necessary to move the Request to the preliminary analysis described in Subsection 48.5 below.

48.5 Unless otherwise agreed to by the Parties, within thirty (30) calendar days of its receipt of the Request and all information necessary to process it, USWC shall provide to AT&T a preliminary analysis of the Request. As reasonably requested by AT&T, USWC agrees to provide weekly status updates to AT&T. USWC will notify AT&T if the quote preparation fee, if any, will exceed $5,000. AT&T will approve the continuation of the development of the quote prior to USWC incurring any reasonable additional expenses. The preliminary analysis shall specify whether or not the requested interconnection or access to an unbundled Network Element is technically feasible and otherwise qualifies as a Network Element or interconnection as defined under the Act.

48.5.1 *If USWC determines during the thirty (30) day period that a Request is not technically feasible or that the Request otherwise does not qualify as a Network Element or interconnection required to be provided under the Act, USWC shall so advise AT&T as soon as reasonably possible of that fact, and promptly provide a written report setting forth the basis for its conclusion in no case later than ten (10) calendar days after making such determination.*

48.5.2 *If USWC determines during the thirty (30) day period that the Request is technically feasible and otherwise qualifies under the Act, it shall notify AT&T in writing of such determination in no case later than ten (10) calendar days after making such determination.*

48.5.3 *Unless otherwise agreed to by the Parties, as soon as feasible, but no more than ninety (90) calendar days after USWC notifies AT&T that the Request is technically feasible, USWC shall provide to AT&T a Request quote which will include, at a minimum, a description of each interconnection and Network Element, the quantity to be provided, the installation intervals (both initial and subsequent), the impact on shared systems software interfaces, the ordering process changes, the functionality specifications, any interface specifications, and either:*

(a) *the applicable rates (recurring and nonrecurring), including the amortized development costs, as appropriate pursuant to Section 48.5.4 below, of the interconnection or Network Element; or*

(b) *the payment for development costs, as appropriate per Section 48.5.4, of the interconnection or Network Element and the applicable rates (recurring and nonrecurring), excluding the development costs.*

48.5.4 *The choice of using either option (a) or (b) above shall be at USWC's sole discretion. A payment for development cost, however, is appropriate only where AT&T is the only conceivable user of the functionality (including consideration of USWC as a potential user) or where the requested quantity is insufficient to provide amortization.*

48.6 *If USWC has used option (a) above in its Request quote, then, within thirty (30) days of its receipt of the Request quote, AT&T must indicate its nonbinding interest in purchasing the interconnection or Network Element at the stated quantities and rates, cancel it Request, or seek remedy under the Dispute Resolution Section of this Agreement.*

48.7 *If USWC has used option (b) above in its Request quote, then, within thirty (30) days of its receipt of the Request quote, AT&T must either agree to pay the development costs of the interconnection or Network Element, cancel its Request, or seek remedy under the Dispute Resolution Section of this Agreement.*

48.8 *If USWC has used option (b) in its Request quote and AT&T has accepted the quote, AT&T may cancel the Request at any time, but will pay USWC's reasonable development costs of the interconnection or Network Element up to the date of cancellation.*

48.9 *USWC will use reasonable efforts to determine the technical feasibility and conformance with the Act of the Request within the first thirty-two (32) days of receiving the Request. In the event USWC has used option (b) above in its Request quote and USWC later determines that the interconnection or Network Element requested in the Request is not technically feasible or otherwise does not qualify under the Act, USWC shall notify AT&T*

within ten (10) business days of making such determination and AT&T shall not owe any compensation to USWC in connection with the Request. Any quotation preparation fees or development costs paid by AT&T to the time of such notification shall be refunded by USWC.

48.10 To the extent possible, USWC will utilize information from previously developed BFRs to address similar arrangements in order to shorten the response times for the currently requested BFR. In the event AT&T has submitted a BFR and USWC determines in accordance with the provisions of this Section 48 that the Request is technically feasible, the Parties agree that AT&T's subsequent request or order for the identical type of Interconnection or Network Element shall not be subject to the BFR process. To the extent USWC has deployed an identical Network Element under a previous BFR, a subsequent BFR is not required. For purposes of this Section 48.10, an "identical" request shall be one that is materially identical to a previous request with respect to the information provided pursuant to Subsections (a) through (e) of Section 48.3 above.

48.11 In the event of a dispute under this Section 48, the Parties agree to seek expedited Commission resolution of the dispute, to be completed within twenty (20) days of U S WEST's response denying AT&T's BFR, and in no event more than thirty (30) days after the filing of AT&T's petition. Alternatively, the Parties may mutually agree to resolve any disputes under this section through the Dispute Resolution process pursuant to Section 27, Part A of this Agreement.

48.12 All time intervals within which a response is required from one Party to another under this Section 48 are maximum time intervals. The Parties agree that they will provide all responses to the other Party as soon as the Party has the information and analysis required to respond, even if the time interval stated herein for a response is not over.

49. Audit Process

49.1 As used herein "Audit" shall mean a comprehensive review of services performed under this Agreement. Either Party (the "Requesting Party") may perform up to three (3) Audits per 12-month period commencing with the Effective Date.

49.2 Upon thirty (30) days' written notice by the Requesting Party to the other Party (the "Audited Party"), the Requesting Party shall have the right, through its authorized representative, to make an Audit, during normal business hours, of any records, accounts and processes which contain information related to the services provided and performance standards agreed to under this Agreement. Within the above-described 30-day period, the Parties shall reasonably agree upon the scope of the Audit, the documents and processes to be reviewed, and the time, place and manner in which the Audit shall be performed. The Audited Party agrees to provide Audit support, including appropriate access to and use of the Audited Party's facilities (e.g., conference rooms, telephones, copying machines).

49.3 Each Party shall bear its own expenses in connection with the conduct of the Audit. The reasonable cost of special data extractions required by the Requesting Party to conduct the Audit will be paid for by the Requesting Party. For purposes of this Section 49.3, a "Special Data Extraction" shall mean the creation of an output record or informational report (from existing data files) that is not created in the normal course of business. If any program is developed to the Requesting Party's specifications and at the Requesting Party's expense, the Requesting Party shall specify at the time of request whether the program is to be retained by the Audited Party for reuse for any subsequent Audit. Notwithstanding the foregoing, the Audited Party shall pay all of the Requesting Party's external expenses (including, without limitation, the fees of any independent auditor), in the event an Audit results in an adjustment in the charges or in any invoice paid or payable by the Requesting

Party hereunder in an amount that is, on an annualized basis, more than the greater of (a) one percent (1%) of the amount in dispute or (b) $10,000.

49.4 Adjustments, credits or payments shall be made and any corrective action shall commence within thirty (30) days from the Audited Party's receipt of the final audit report to compensate for any errors or omissions which are disclosed by such Audit and are agreed to by the Parties. The highest interest rate allowable by law for commercial transactions shall be assessed and shall be computed by compounding daily from the time of the original due date of the amount of dispute.

49.5 Neither such right to examine and audit nor the right to receive an adjustment shall be affected by any statement to the contrary appearing on checks or otherwise.

49.6 This Section 49 shall survive expiration or termination of this Agreement for a period of two (2) years after expiration or termination of this Agreement.

49.7 All transactions under this Agreement which are over thirty-six (36) months old are no longer subject to Audit.

49.8 All information received or reviewed by the Requesting Party or the independent auditor in connection with the Audit is to be considered Proprietary Information as defined by this Agreement. The Audited Party reserves the right to require any non-employee who is involved directly or indirectly in any Audit or the resolution of its findings as described above to execute a nondisclosure agreement satisfactory to the Audited Party. To the extent an Audit involves access to information of third parties, the Audited Party will aggregate such competitors' data before release to the Requesting Party, to insure the protection of the proprietary nature of information of other competitors. To the extent a competitor is an Affiliate of the Audited Party (including itself and its subsidiaries), the Parties shall be allowed to examine such Affiliate's disaggregated data, as required by reasonable needs of the Audit.

49.9 "Examination" shall mean an inquiry reasonably requested by either Party into a specific element of or process where the requesting Party raises a dispute concerning services performed by the other Party under this Agreement and such dispute has not been resolved through the escalation process described in this Agreement. Only that information that is necessary to resolve the dispute in issue must be provided in the course of an Examination and the total time involved for each Party may not exceed three people for three days and no more than 10,000 pages of documents may be reviewed. Appropriate provisions of Section 49 that apply to Audits shall also apply to Examinations, except that either Party may conduct only a total of six (6) Examinations and Audits per year, with a maximum of three (3) Audits per year.

50. Miscellaneous Services

50.1 Basic 911 and E911 General Requirements

50.1.1 Basic 911 and E911 provides a caller access to the appropriate emergency service bureau by dialing a 3-digit universal telephone number (911). Basic 911 and E911 access from Local Switching shall be provided to AT&T in accordance with the following:

50.1.2 Each Party will be responsible for those portions of the 911 System for which it has reasonable control, including any necessary maintenance to each Party's portion of the 911 System.

50.1.3 E911 shall provide additional routing flexibility for 911 calls. E911 shall use Customer data, contained in the Automatic Location Identification/Data Management System (ALI/DMS), to determine to which Public Safety Answering Point (PSAP) to route the call.

50.1.4 If available in the U S WEST network, U S WEST shall offer a third type of 911 service, S911. All requirements for E911 also apply to S911 with the exception of the type of signaling used on the interconnection trunks from the local switch to the E911 Tandem.

50.1.5 Basic 911 and E911 functions provided to AT&T shall be at least at parity with the support and services that U S WEST provides to its Customers for such similar functionality.

50.1.6 Basic 911 and E911 access from Local Switching shall be provided to AT&T in accordance with the following:

50.1.6.1 U S WEST shall conform to all state regulations concerning emergency services.

50.1.6.2 For E911 provided to resold lines or in association with unbundled switching, U S WEST shall use its service order process to update and maintain Customer information in the ALI/DMS data base. Through this process, U S WEST shall provide and validate Customer information resident or entered into the ALI/DMS data base.

50.1.7 U S WEST shall provide for overflow 911 traffic consistent with U S WEST policy and procedure.

50.1.8 Basic 911 and E911 access from the AT&T local switch shall be provided to AT&T in accordance with the following:

50.1.8.1 If required by AT&T, U S WEST shall interconnect direct trunks from the AT&T network to the E911 Tandem for connection to the PSAP. Such trunks to the E911 Tandem may alternatively be provided by AT&T.

50.1.8.2 In government jurisdictions where U S WEST has obligations under existing agreements as the primary provider of the 911 System to the county, AT&T shall participate in the provision of the 911 System as follows:

(a) Each Party shall be responsible for those portions of the 911 System for which it has control, including any necessary maintenance to each Party's portion of the 911 System.

(b) U S WEST shall be responsible for maintaining the E-911 database.

50.1.8.3 If a third party is the primary service provider to a government agency, AT&T shall negotiate separately with such third party with regard to the provision of 911 service to the agency. All relations between such third party and AT&T are totally separate from this Agreement and U S WEST makes no representations on behalf of the third party.

50.1.8.4 If AT&T or Affiliate is the primary service provider to a government agency, AT&T and U S WEST shall negotiate the specific provisions necessary for providing 911 service to the agency and shall include such provisions in an amendment to this Agreement.

50.1.8.5 Interconnection and database access shall be priced as specified in Attachment 1 to this Agreement or at any rate charged to other interconnected carriers, whichever is lower.

50.1.8.6 AT&T will separately negotiate with each county regarding the collection and reimbursement to the county of applicable Customer taxes for 911 service.

50.1.8.7 U S WEST shall comply with established, competitively neutral intervals for installation of facilities, including any Collocation facilities, diversity requirements, etc.

50.1.8.8 In a resale situation, where it may be appropriate for U S WEST to update the ALI database, U S WEST shall update such database with AT&T data in an interval no less than is experienced by U S WEST Customers, or than for other carriers, whichever is faster, at no additional cost.

50.1.9 The following are Basic 911 and E911 Database Requirements:

50.1.9.1 The ALI database shall be managed by U S WEST, but is the property of U S WEST and any participating telephone company and CLEC for those records provided by the company.

50.1.9.2 U S WEST, or its agent, will be responsible for maintaining the E-911 Database. U S WEST, or its agent, will provide a copy of the Master Street Address Guide ("MSAG"), and periodic updates, to AT&T.

50.1.9.3 Copies of the MSAG shall be provided within twenty-one (21) calendar days from the time requested and shall be provided on diskette, magnetic tape, or in a format suitable for use with desktop computers.

50.1.9.4 AT&T assumes all responsibility for the accuracy of the data that AT&T provides to U S WEST for MSAG preparation and E-911 Database operation.

50.1.9.5 AT&T shall be solely responsible for providing AT&T database records to U S WEST for inclusion in U S WEST's ALI database on a timely basis.

50.1.9.6 AT&T will provide end user data to the U S WEST ALI database that are Master Street Address Guide (MSAG) valid.

50.1.9.7 AT&T will update its end user records provided to the U S WEST ALI database to agree with the 911 MSAG standards for its service areas.

50.1.9.8 U S WEST and AT&T shall arrange for the automated input and periodic updating of the E911 database information related to AT&T end users for resold lines in accordance with Attachment 2 to this Agreement. AT&T may request, through the BFR process, similar

arrangements for AT&T customers served on a non-resale basis. U S WEST will furnish AT&T any variations to NENA recommendations required for ALI database input. The cost of magnetic tape transfer shall be borne by AT&T.

50.1.9.9 U S WEST and AT&T shall arrange for the automated input and periodic updating of the E911 database information related to AT&T end users. For resold services, U S WEST shall work cooperatively with AT&T to ensure the accuracy of the data transfer by verifying it against the Master Street Address Guide (MSAG). For AT&T's customers served by unbundled Network Elements or through AT&T's own facilities, AT&T shall ensure the accuracy of its 911 data by verifying it against the MSAG.

50.1.9.10 AT&T shall assign an E911 database coordinator charged with the responsibility of forwarding AT&T end user ALI record information to U S WEST or via a third-party entity, charged with the responsibility of ALI record transfer. AT&T assumes all responsibility for the accuracy of the data that AT&T provides to U S WEST.

50.1.9.11 The Parties shall maintain a single point of contact to coordinate all E911 activities under this Agreement.

50.1.9.12 For resold services, AT&T shall provide information on new Customers to U S WEST within one (1) Business Day of the order completion. U S WEST shall update the database within two (2) Business Days of receiving the data from AT&T. If U S WEST detects an error in the AT&T provided data, the data shall be returned to AT&T within two (2) Business Days from when it was provided to U S WEST. AT&T shall respond to requests from U S WEST to make corrections to database record errors by uploading corrected records within two (2) Business Days. Manual entry shall be allowed only in the event that the system is not functioning properly. AT&T may request, through the BFR process, similar services from U S WEST for their customers who are served on a non-resale basis.

50.1.9.13 The Parties will cooperate to implement the adoption of a Carrier Code (NENA standard five-character field) on all ALI records received from AT&T, when those standards, NENA-02-00N, are adopted by the industry standards process. U S WEST will furnish AT&T any variations from NENA recommendations required for ALI database input. The Carrier Code will be used to identify the carrier of record in INP configurations.

50.1.9.14 AT&T will provide end user data to the U S WEST ALI database utilizing NENA-02-001 Recommended Formats For Data Exchange, and Recommended Standard For Street Thoroughfare Abbreviations and Protocols For Data Exchange and Data Quality utilizing NENA Recommended Formats for Data Exchange document dated June 1993.

50.1.9.15 U S WEST shall identify which ALI databases cover which states, counties or parts thereof, and identify and communicate a point of contact for each.

50.1.9.16 U S WEST will provide AT&T with the identification of the U S WEST 911 controlling office that serves each geographic area served by AT&T.

50.1.9.17 U S WEST shall provide to AT&T, for AT&T Customers, E911/911 call routing to the appropriate Public Safety Answering Point ("PSAP") for resold lines. U S WEST shall provide and validate AT&T Customer information to the PSAP in the same fashion as it does for its own Customers. U S WEST shall use its service order process to update and maintain, on the same schedule that it uses for its end users, the AT&T Customer service information in the ALI/DMS used to support E911/911 services. AT&T may request, through the BFR process, similar services from U S WEST for their customers who are served on a non-resale basis.

50.1.9.18 AT&T exchanges to be included in U S WEST's E-911 Database will be indicated via written notice and will not require an amendment to this Agreement.

50.1.10 The following are Basic 911 and E911 Network Requirements:

50.1.10.1 U S WEST, at AT&T option, shall provide a minimum of two (2) E911 trunks per jurisdictional area, or that quantity which will maintain P.01 transmission grade of service, or the level of service provided by U S WEST to itself, whichever is the higher grade of service. These trunks will be dedicated to routing 911 calls from AT&T switch to a U S WEST E911 tandem.

50.1.10.2 U S WEST shall provide AT&T a data link to the ALI/DMS database or permit AT&T to provide its own data link to the ALI/DMS database. U S WEST shall provide error reports from the ALI/DMS database to AT&T immediately after AT&T inputs information into the ALI/DMS database. Alternately, AT&T may utilize U S WEST or a third party entity to enter Customer information into the database on a demand basis, and validate Customer information on a demand basis.

50.1.10.3 U S WEST shall provide the selective routing of E911 calls received from AT&T switching office. This includes the ability to receive the ANI of AT&T Customer, selectively route the call to the appropriate PSAP, and forward the Customer's ANI to the PSAP. U S WEST shall provide AT&T with the appropriate CLLI codes and specifications regarding the tandem serving area associated addresses and meet points in the network.

50.1.10.4 Copies of E911 Tandem Boundary Maps shall be available to AT&T. Each map shows the areas served by that E91 tandem. The map provides AT&T the information necessary to set up its network to route E911 callers to the correct E911 tandem.

50.1.10.5 AT&T shall ensure that its switch provides an eight-digit ANI consisting of an information digit and the seven-digit exchange code. AT&T shall also ensure that its switch provides the line number of the calling station. In the event of a change in industry standards, the Parties shall cooperate to incorporate the changed standards in their respective networks.

50.1.10.6 Each ALI discrepancy report shall be jointly researched by U S WEST and AT&T. Corrective action shall be taken immediately by the responsible party.

50.1.10.7 Technical specifications for E911 network interface are available through U S WEST technical publication 77338. Technical specifications for database loading and maintenance are available through the third party database manager -- SCC.

50.1.10.8 U S WEST shall begin restoration of E911 and/or E911 trunking facilities immediately upon notification of failure or outage. U S WEST must provide priority restoration of trunks or networks outages on the same terms/conditions it provides itself and without the imposition of Telecommunications Service Priority (TSP).

50.1.10.9 U S WEST shall identify any special operator-assisted calling requirements to support 911.

50.1.10.10 Trunking shall be arranged to minimize the likelihood of central office isolation due to cable cuts or other equipment failures. There will be an alternate means of transmitting a 911 call to a PSAP in the event of failures.

50.1.10.11 Circuits shall have interoffice, loop and carrier system diversity when such diversity can be achieved using existing facilities. Circuits will be divided as equally as possible across available carrier systems. Diversity will be maintained or upgraded to utilize the highest level of diversity available in the network.

50.1.10.12 Equipment and circuits used for 911 shall be monitored at all times. Monitoring of circuits shall be done to the individual circuit level. Monitoring shall be conducted by U S WEST for trunks between the tandem and all associated PSAPs.

50.1.10.13 Repair service shall begin immediately upon receipt of a report of a malfunction. Repair service includes testing and diagnostic service from a remote location, dispatch of or in-person visit(s) of personnel. Technicians will be dispatched without delay.

50.1.10.14 All 911 trunks must adhere to the Americans with Disabilities Act requirements.

50.1.10.15 The Parties will cooperate in the routing of 911 traffic in those instances where the ALI/ANI information is not available on a particular 911 call.

50.1.10.16 AT&T is responsible for network management of its network components in compliance with the Network Reliability Council Recommendations and meeting the network standard of U S WEST for the 911 call delivery.

50.1.11 Basic 911 and E911 Additional Requirements

50.1.11.1 All AT&T lines that have been ported via INP shall reach the correct PSAP when 911 is dialed. U S WEST shall send both the ported number and the AT&T number (if both are received from AT&T). The PSAP attendant shall see both numbers where the PSAP is using a standard ALI display screen and the PSAP extracts both numbers from the data that is sent.

50.1.11.2 U S WEST shall work with the appropriate government agency to provide AT&T the ten-digit POTS number of each PSAP which subtends each U S WEST E-911 Tandem to which AT&T is interconnected.

50.1.11.3 U S WEST will provide AT&T with the ten-digit telephone numbers of each PSAP agency, for which U S WEST provides the 911 function, to be used by AT&T operators for handling emergency calls in those instances where the AT&T Customer dials "O" instead of "911."

50.1.11.4 AT&T will provide U S WEST with the ten-digit telephone numbers of each PSAP agency, for which AT&T provides the 911 function, to be used by U S WEST operators for handling emergency calls in those instances where the U S WEST Customer dials "O" instead of "911."

50.1.11.5 U S WEST shall notify AT&T forty-eight (48) hours in advance of any scheduled testing or maintenance affecting AT&T 911 service, and provide notification as soon as possible of any unscheduled outage affecting AT&T 911 service.

50.1.11.6 AT&T shall be responsible for reporting all errors, defects and malfunctions to U S WEST. U S WEST shall provide AT&T with the point of contact for reporting errors, defects, and malfunctions in the service and shall also provide escalation contacts.

50.1.11.7 AT&T may enter into subcontracts with third parties, including AT&T affiliates, for the performance of any of AT&T duties and obligations stated herein.

50.1.11.8 U S WEST shall provide sufficient planning information regarding anticipated moves to SS7 signaling for the next twelve (12) months.

50.1.11.9 U S WEST shall provide notification of any pending tandem moves, NPA splits, or scheduled maintenance outages, with enough time to react.

50.1.11.10 U S WEST shall provide "reverse ALI" inquiries by public safety entities, consistent with U S WEST's practices and procedures.

50.1.11.11 U S WEST shall manage NPA splits by populating the ALI database with the appropriate new NPA codes, consistent with U S WEST's practices and procedures for resold services.

50.1.11.12 U S WEST must provide the ability for AT&T to update 911 database with end user information for lines that have been ported via INP or NP.

50.1.11.13 The data in the ALI database shall be managed by U S WEST, but is the property of U S WEST and all participating telephone companies.

50.1.12 Performance Criteria. E-911 Database accuracy shall be as set forth below:

50.1.12.1 Accuracy of ALI (Automatic Location Identification) data submitted by AT&T to U S WEST will be measured jointly by the PSAPs and U S WEST. All such reports shall be forwarded to AT&T by U S WEST and will indicate incidents when incorrect or no ALI data is displayed. A report regarding any inaccuracy shall be prepared by U S WEST.

50.1.12.2 Each discrepancy report will be jointly researched by U S WEST and AT&T. Corrective action will be taken immediately by the responsible party.

50.1.12.3 Each party will be responsible for the accuracy of the Customer records it provides.

50.2 Directory Assistance Service

50.2.1 U S WEST shall provide for the routing of Directory Assistance calls (including but not limited to 411, 555-1212, NPA-555-1212) dialed by AT&T Customers directly to either the AT&T Directory Assistance service platform or U S WEST Directory Assistance service platform as specified by AT&T.

50.2.2 AT&T Customers shall be provided the capability by U S WEST to dial the same telephone numbers for access to AT&T Directory Assistance that U S WEST Customers use to access U S WEST Directory Assistance.

50.2.3 U S WEST shall provide Directory Assistance functions and services to AT&T for its Customers as described below until, at AT&T's discretion, U S WEST routes calls to the AT&T Directory Assistance Services platform.

50.2.3.1 U S WEST agrees to provide AT&T Customers with the same Directory Assistance service available to U S WEST Customers.

50.2.3.2 U S WEST shall notify AT&T in advance of any changes or enhancements to its Directory Assistance Service, and shall make available such service enhancements on a non-discriminatory basis to AT&T.

50.2.3.3 U S WEST shall provide Directory Assistance to AT&T Customers in accordance with U S WEST's internal operating procedures and standards, which shall, at a minimum, comply with accepted professional and industry standards.

50.2.3.4 U S WEST shall provide AT&T with the same level of support for the provisioning of Directory Assistance as U S WEST provides itself.

50.2.3.5 Service levels shall comply with the Commission requirements for Directory Assistance or with what U S WEST provides itself, if greater.

50.2.3.6 U S WEST agrees to maintain an adequate operator work force based on a review and analysis of actual call attempts and abandonment rate.

50.2.3.7 *In the event that AT&T becomes aware of complaints or concerns about Directory Assistance services provided by U S WEST pursuant to this Agreement, AT&T shall be entitled, upon written notice to U S WEST, to retain a mutually acceptable independent third party to monitor Directory Assistance services. Subject to the provisions of applicable U S WEST collective bargaining agreements, the third party retained by AT&T shall be entitled to participate in call monitoring activities available to U S WEST and to remote call monitor for the express purpose of investigating the complaints or concerns. The written request from AT&T shall specify the nature of the complaints or concerns, the limited period for which call monitoring is being requested, and the identity of the third party that is to perform such activities. The third party retained by AT&T shall limit its report to AT&T to information relating only to the complaints or concerns giving rise to the call monitoring program or any issues identified by the third party during the course of the call monitoring program that concern services provided to AT&T and its end users. In addition, AT&T is entitled at any time during the course of this Agreement to place test calls into U S WEST Directory Assistance service offices similar to end user calls to monitor tost quality. It is expressly understood that U S WEST will not be required to add recorded announcements specifically to allow for third party call monitoring if U S WEST does not make such announcements for itself.*

50.2.3.8 *U S WEST shall provide the following minimum Directory Assistance capabilities to AT&T Customers:*

(a) *A maximum of two Customer listings and/or addresses or U S WEST party per AT&T Customer request.*

(b) *Name and address to AT&T Customers upon request, except for unlisted numbers, in the same states where such information is provided to U S WEST Customers.*

(c) *For AT&T customers who are served exclusively through resold U S WEST retail services, AT&T may resell U S WEST's Directory Assistance call completon services to the extent U S WEST offers call Directory Assistance completion to its own end users. For AT&T customers who are served from an AT&T switch, AT&T may request Directory Assistance call completion services through the BFR process. Such BFR process shall address the identification of the AT&T end user at the U S WEST Directory Assistance platform for purposes of routing and billing of intraLATA and interLATA toll calls.*

(d) *When the mechanized interface is available, U S WEST will populate the Directory Assistance database in the same manner and in the same time frame as for U S WEST Customers.*

(e) *Any information provided by a Directory Assistance Automatic Response Unit (ARU) shall be repeated the same number of times for AT&T Customers as for U S WEST Customers.*

(f) When an AT&T Customer served on a resale or unbundled switching basis requests a U S WEST Directory Assistance operator to provide instant credit on a Directory Assistance call, the U S WEST Directory Assistance operator shall inform the AT&T Customer to call an 800 number for AT&T Customer service to request a credit. The accurate identification of AT&T as the customer's local service provider by the U S WEST Directory Assistance operator requires the use of separate AT&T trunks to the Directory Assistance Platform.

50.2.3.9 For resold lines and unbundled switching, U S WEST shall provide data regarding billable events as requested by AT&T.

50.2.3.10 U S WEST agrees to (1) provide to AT&T operators, on line access to U S WEST's Directory Assistance database equivalent to the access provided to U S WEST operators; (2) allow AT&T or an AT&T designated operator bureau to license U S WEST's subscriber listings database on terms and conditions equivalent to the terms and conditions upon which U S WEST utilizes such databases; and (3) in conjunction with branded or unbranded Directory Assistance services pursuant to Section 8 of this Part A, provide caller-optional Directory Assistance call completion service which is comparable in every way to the Directory Assistance call completion service U S WEST makes available to its own users. AT&T may, at its option, request U S WEST not to provide call completion services to AT&T.

50.2.3.11 In addition to charges for Directory Assistance, when call completion for an intraLATA toll call is requested, the applicable charge for the completion of such intraLATA toll call will apply.

50.3 Operator Services

50.3.1 U S WEST shall provide for the routing of local Operator Services calls (including but not limited to 0+, 0-) dialed by AT&T Customers directly to either the AT&T Operator Service platform or U S WEST Operator Service platform as specified by AT&T.

50.3.2 AT&T Customers shall be provided the capability by U S WEST to dial the same telephone numbers to access AT&T Operator Service that U S WEST Customers dial to access U S WEST Operator Service.

50.3.3 U S WEST shall provide Operator Services to AT&T as described below until, at AT&T's discretion, U S WEST routes calls to the AT&T local Operator Services platform.

50.3.3.1 U S WEST agrees to provide AT&T Customers the same Operator Services available to U S WEST Customers. U S WEST shall make available its service enhancements on a non-discriminatory basis.

50.3.3.2 U S WEST shall provide the following minimum Operator Service capabilities to AT&T Customers:

(a) U S WEST shall complete 0+ and 0- dialed local calls, including O-Coin, Automatic Coin Telephone Service (ACTS) and the

completion of coin calls, the collection of coins and, the provision of coin rates.

(b) U S WEST shall complete 0+ intraLATA and, when offered, interLATA toll calls. The Parties will cooperate to develop industry standards to include the end user's PIC in Operator Services signaling and the development of associated routing procedures.

(c) U S WEST shall complete calls for AT&T Customers that are billed to calling cards and other commercial cards on the same basis as provided to U S WEST own customers and AT&T shall designate to U S WEST the acceptable types of special billing.

(d) U S WEST shall complete person-to-person calls.

(e) U S WEST shall complete collect calls.

(f) U S WEST shall provide the capability for callers to bill to a third party and complete such calls.

(g) U S WEST shall complete station-to-station calls.

(h) U S WEST shall process emergency calls.

(i) U S WEST shall process Busy Line Verify and Busy Line Interrupt requests.

(j) U S WEST shall process emergency call trace in accordance with its normal and customary procedures.

(k) U S WEST shall process operator-assisted Directory Assistance calls.

(l) U S WEST operators shall provide AT&T Customers with long distance rate quotes to the extent U S WEST provides such rate quotes to its own end users. Based on technology available as of the Effective Date of this Agreement, the provision of rate quotes to AT&T Customers requires a separate AT&T trunk group to the U S WEST Operator Services platform to identify the caller as an AT&T Customer.

(m) U S WEST operators shall provide AT&T Customers with time and charges to the extent U S WEST provides such time and charges to its own end users. Based on technology available as of the Effective Date of this Agreement, the provision of time and charges to AT&T Customers requires a separate AT&T trunk group to the U S WEST Operator Services platform to identify the caller as an AT&T Customer.

(n) U S WEST shall route 0- traffic to a "live" operator team.

(o) When requested by AT&T, U S WEST shall provide instant credit on Operator Services calls on a non-discriminatory basis as provided to U S WEST Customers or shall inform AT&T

Customers to call a toll free number for AT&T Customer service to request a credit. U S WEST shall provide one (1) toll free number for business Customers and another for residential Customers. Pending Commission approval of permanent pricing, U S WEST may charge AT&T, on an interim basis, the costs of providing such credit as specified by the Operator Assistance line item in Appendix A.

(p) U S WEST shall provide caller assistance for the disabled in the same manner as provided to U S WEST Customers.

(q) When available to U S WEST end users, U S WEST shall provide operator-assisted conference calling to AT&T.

50.3.3 U S WEST shall exercise at least the same level of fraud control in providing Operator Service to AT&T that U S WEST provides for its own operator service, where the AT&T fraud control data is in U S WEST's LIDB database.

50.3.4 U S WEST shall perform billed number screening when handling collect, third party, and calling card calls, both for station to station and person to person call types.

50.3.5 In the event that AT&T becomes aware of complaints or concerns about Operator Services provided by U S WEST pursuant to this Agreement, AT&T shall be entitled, upon written notice to U S WEST, to retain a mutually acceptable independent third party to monitor Operator Services. Subject to the provisions of applicable U S WEST collective bargaining agreements, the third party retained by AT&T shall be entitled to participate in call monitoring activities available to U S WEST and to remote call monitor for the express purpose of investigating the complaints or concerns. The written request from AT&T shall specify the nature of the complaints or concerns, the limited period for which call monitoring is being requested, and the identity of the third party that is to perform such activities. The third party retained by AT&T shall limit its report to AT&T to information relating only to the complaints or concerns giving rise to the call monitoring program or any issues identified by the third party during the course of the call monitoring program that concern services provided to AT&T and its end users. In addition, AT&T is entitled at any time during the course of this Agreement to place test calls into U S WEST Operator Service offices similar to end user calls to monitor test quality. It is expressly understood that U S WEST will not be required to add recorded announcements specifically to allow for third party call monitoring if U S WEST does not make such announcements for itself.

50.3.6 U S WEST shall direct Customer account and other similar inquiries to the Customer service center designated by AT&T.

50.3.7 U S WEST shall provide an electronic feed of Customer call records in "EMR" format to AT&T in accordance with the time schedule mutually agreed between the Parties.

50.3.8 U S WEST shall update the Line Information Data Base ("LIDB") for AT&T Customers. Additionally, U S WEST must provide access to LIDB for validation of collect, third party billed, and LEC card billed calls.

50.3.9 Where INP is deployed and when a BLV/BLI request for a ported number is directed to a U S WEST operator and the query is not successful (i.e., the request yields an abnormal result), AT&T may request, through the BFR process, that the

operator confirm whether the number has been ported and direct the request to the appropriate operator.

50.3.10 U S WEST shall allow AT&T to order provisioning of Telephone Line Number ("TLIV") calling cards and BNS, in its LIDB, for ported numbers, as specified by AT&T. U S WEST shall continue to allow AT&T access to its LIDB.

50.3.11 Toll and Assistance ("T/A") refers to functions Customers associate with the "O" operator. Subject to availability and capacity, access may be provided via Operator Services trunks purchased from U S WEST or provided by AT&T via Collocation arrangements to route calls to AT&T's platform.

50.3.12 Automated Branding is the ability to announce the carrier's name to the Customer during the introduction of the call .

50.3.13 Interconnection to the U S WEST Toll and Assistance Operator Services from an end office to U S WEST T/A is technically feasible at least at three (3) distinct points on the trunk side of the switch. The first connection point is an Operator Services trunk connected directly to the T/A host switch. The second connection point is an Operator Services trunk connected directly to a remote T/A switch. The third connection point is an Operator Services trunk connected to a remote access tandem with operator concentration capabilities.

50.3.14 All trunk interconnections will be digital.

50.3.15 The technical requirements of Operator Services type trunks and the circuits to connect the operator positions to the host are covered in the Operator Services Switching Generic Requirements ("OSSGR") Bellcore Document number FR-NWT-000271.

50.3.16 Busy Line Verify and Interrupt

50.3.16.1 At the request of AT&T operators or Customers, U S WEST operators will perform Busy Line Verify ("BLV") and/or Busy Line Interrupt ("BLI") operations where such capacity exists.

50.3.16.2 When possible and where consistent with the service U S WEST provides to its own Customers and/or end users, U S WEST shall engineer its BLV/BLI facilities to accommodate the anticipated volume of BLV/BLI requests during the busy hour. AT&T may, from time to time, provide its anticipated volume of BLV/BLI requests to U S WEST. In those instances when failures occur to significant portions of the BLV/BLI systems and databases and those systems and databases become unavailable, U S WEST shall promptly inform AT&T.

50.3.16.3 BLV is performed when one Party's Customer requests assistance from the other Party's operator or operator bureau to determine if the called line is in use, provided however, that the operator bureau will not complete the call for the Customer initiating the BLV inquiry. Only one (1) BLV attempt will be made per Customer operator bureau call, and a charge shall apply whether or not the called party releases the line.

50.3.16.4 BLI is performed when one Party's Customer requests assistance from the other Party's operator bureau to interrupt a telephone call in progress after BLV has occurred. The operator bureau will interrupt

the busy line and inform the called party that there is a call waiting. The operator bureau will only interrupt the call and will not complete the telephone call of the Customer initiating the BLI request. The operator bureau will make only one BLI attempt per Customer operator telephone call and the applicable charge applies whether or not the called party releases the line.

50.3.16.5 Each Party's operator bureau shall accept BLV and BLI inquiries from the operator bureau of the other Party in order to allow transparent provision of BLV/BLI traffic between the Parties' networks.

50.3.16.6 Each Party shall route BLV/BLI Traffic inquiries over direct trunks between the Parties' respective operator bureaus. Unless otherwise mutually agreed, the Parties shall configure BLV/BLI trunks over the Interconnection architecture defined in Attachment 4 to this Agreement.

50.4 Directory Assistance and Listings Service Requests

50.4.1 These requirements pertain to U S WEST's Directory Assistance and Listings Service Request process that enables AT&T to (a) submit AT&T Customer information for inclusion in U S WEST Directory Assistance and Directory Listings databases, (b) submit AT&T Customer information for inclusion in published directories, and (c) provide AT&T Customer delivery address information to enable U S WEST to fulfill directory distribution obligations.

50.4.1.1 (Intentionally left blank for numerical consistency.)

50.4.1.2 U S WEST will accept the following Directory Listing Migration Orders from AT&T, valid under all access methods, including but not limited to, Resale, unbundled Network Elements and facilities-based, and will process the orders in a mechanized format:

(a) Migrate with no Changes: Maintain all Directory Listings for the Customer in both Directory Assistance and Directory Listing. Transfer ownership and billing for listings to AT&T.

(b) Migrate with Additions: Maintain all Directory Listings for the Customer in both Directory Assistance and Directory Listing. Incorporate the specified additional listings order. Transfer ownership and billing for the listings to AT&T.

(c) Migrate with Deletions: Maintain all Directory Listings for the Customer in both Directory Assistance and Directory Listing. Delete the specified listings from the listing order. Transfer ownership and billing for the listings to AT&T.

50.4.1.3 The Directory Listings Migration Options should not be tied to migration options specified for a related service order (if any) such that a service order specified as migration with changes may be submitted along with a Directory Listing order specified as migration with no changes.

50.4.1.4 U S WEST shall enable AT&T to electronically transmit multi-line listing orders.

50.4.1.5 *U S WEST agrees to work cooperatively with AT&T to define specifications for, and implement a daily summary report of Directory Service Requests. The summary information will include but is not limited to the following information:*

(a) White page listings text and format (name, address, phone, title, designation, extra line requirements)

(b) Listing Instruction codes

50.4.1.6 *To ensure accurate order processing, U S WEST shall provide to AT&T the following information, with updates within one (1) Business Day of change and via electronic exchange:*

(a) A matrix of NXX to central office
(b) Geographical maps if available of U S WEST service area
(c) A description of calling areas covered by each directory, including but not limited to maps of calling areas and matrices depicting calling privileges within and between calling areas
(d) Listing format rules
(e) Listing alphabetizing rules
(f) Standard abbreviations acceptable for use in listings and addressas
(g) Titles and designations

50.4.1.7 *Based on changes submitted by AT&T, U S WEST shall update and maintain Directory Assistance and Directory Listings data for AT&T Customers who:*

(a) Disconnect Service
(b) Change carrier
(c) Install Service
(d) Change any service which affects Directory Assistance information
(e) Specify Non-Solicitation
(f) Are Non-Published, Non-Listed, or Listed

50.4.1.8 *U S WEST shall not charge for storage of AT&T Customer information in the Directory Assistance and Directory Listing systems.*

50.4.1.9 *AT&T shall not charge for storage of U S WEST Customer information in the Directory Assistance and Directory Listing systems.*

50.5 Directory Assistance Data

50.5.1 *This Section refers to the residential, business, and government Customer records used by U S WEST to create and maintain databases for the provision of live or automated operator assisted Directory Assistance. Directory Assistance Data is information that enables telephone exchange carriers to swiftly and accurately respond to requests for directory information, including, but not limited to name, address and phone numbers. Under the provisions of the Act and the FCC's Interconnection Order, U S WEST shall provide unbundled and non-discriminatory access to the residential, business and government Customer records used by U S WEST to create and maintain databases for the provision of live or automated operator assisted Directory Assistance.*

50.5.2 *U S WEST shall provide an initial load of Customer records and Customer list information to AT&T, in a mutually-agreed-to format, via electronic transfer, within thirty (30) calendar days of as requested by AT&T. The initial load shall include all data resident in the U S WEST databases and/or systems used by U S WEST for housing Directory Assistance data and/or Customer listing data. In addition, the initial load shall be current as of the prior Business Day on which the initial load is provided.*

50.5.3 *U S WEST shall provide AT&T daily updates to the Customer records and Customer list information in a mutually-agreed-to format via electronic transfer.*

50.5.4 *U S WEST shall provide the ability for AT&T to electronically query the U S WEST Directory Assistance database and Listings database in a manner at least consistent with and equal to that which U S WEST provides to itself or any other Person.*

50.5.5 *U S WEST shall provide AT&T a complete list of ILECs, CLECs, and independent telephone companies that provided data contained in the database.*

50.5.6 *On a daily basis, U S WEST shall provide updates (end user and mass) to the Listing information via electronic data transfer. Updates shall be current as of one Business Day prior to the date provided to AT&T.*

50.5.7 *U S WEST shall provide AT&T access to Directory Assistance support databases. For example, AT&T requires access to use restriction information including, but not limited to, call completion.*

50.5.8 *Directory Assistance data shall specify whether the Customer is a residential, business, or government Customer.*

50.5.9 *Directory Assistance data shall be provided on the same terms, conditions, and rates that U S WEST provides such data to itself or other third parties.*

50.5.13 *U S WEST shall provide complete refresh of the Directory Assistance data upon request by AT&T.*

50.5.14 *U S WEST and AT&T will cooperate in the designation of a location at which the data will be provided.*

51. Unused Transmission Media

51.1 Definitions

51.1.1 *Unused Transmission Media is physical inter-office transmission media (e.g., optical fiber, copper twisted pairs, coaxial cable) which have no lightwave or electronic transmission equipment terminated to such media to operationalize transmission capabilities.*

51.1.2 **Dark fiber is excess fiber optic cable which has been placed in a network and is not currently being lit by electronics from any carrier.**[32] *Dark Fiber, one type of Unused Transmission Media, is unused strands of optical fiber. Dark Fiber also includes strands of optical fiber which may or may not have lightwave repeater (regenerator or optical amplifier) equipment interspliced, but which has no line terminating facilities terminated to such strands. Unused Transmission*

[32] Per First Order at page 10, Paragraph 69.

Media also includes unused wavelengths within a fiber strand for purposes of coarse or dense wavelength division multiplexed (WDM) applications. Typical single wavelength transmission involves propagation of optical signals at single wavelengths (1.3 or 1.55 micron wavelengths). In WDM applications, a WDM device is used to combine optical signals at different wavelengths on to a single fiber strand. The combined signal is then transported over the fiber strand. For coarse WDM applications, one (1) signal each at 1.3 micron and 1.55 micron wavelength are combined. For dense WDM applications, many signals in the vicinity of 1.3 micron wavelength and/or 1.55 micron wavelength are combined. **Dark fiber is not a network element.**[33]

51.2 *While U S WEST is not required to provide Unused Transmission Media,* **other than Dark Fiber,**[34] *AT&T may, subject to the agreement of U S WEST, lease copper twisted pairs, coaxial cable or other Unused Transmission Media.* **U S WEST may not refuse a request for fiber based on lack of lit fiber if it has installed dark fiber that it can make functional in order to meet the capacity request. U S WEST will not be required to light its installed dark fiber if it needs to retain the dark fiber to accommodate its customers in the future. The burden is on U S WEST to show that dark fiber is needed for its own customers.**[35]

51.3 Requirements

51.3.1 Subject to Section 51.2 above, U S WEST shall make available Unused Transmission Media to AT&T under a lease agreement or other arrangement.

51.3.2 U S WEST shall provide a single point of contact for negotiating all Unused Transmission Media use arrangements.

51.3.3 AT&T may test the quality of the Unused Transmission Media to confirm its usability and performance specifications.

51.3.4 Where Unused Transmission Media is required to be offered or is agreed to be offered by U S WEST, U S WEST shall provide to AT&T information regarding the location, availability and performance of Unused Transmission Media within ten (10) Business Days for a records-based answer and twenty (20) Business Days for a field- based answer, after receiving a request from AT&T ("Request"). Within such time period, U S WEST shall send written or electronic confirmation or any other method of notification agreed to by the Parties of availability of the Unused Transmission Media ("Confirmation").

51.3.5 Where Unused Transmission Media is required to be offered or is agreed to be offered by U S WEST, U S WEST shall make Unused Transmission Media available for AT&T's use in accordance with the terms of this Section 51 within twenty (20) Business Days or a reasonable time frame consistent with industry standards after it receives written acceptance from AT&T that the Unused Transmission Media is wanted for use by AT&T. Splicing of AT&T fiber may be performed at the same points that are available for U S WEST splices.

51.4 **Requirements Specific to Dark Fiber**

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33 Per First Order at page 10, Paragraph 72.
34 Per First Order at page 10, Paragraph 72.
35 Per First Order at page 10, Paragraph 72.

51.4.1 *AT&T may test Dark Fiber leased from U S WEST using AT&T or AT&T designated personnel subject to Section 51.2. U S WEST shall provide appropriate interfaces to allow testing of Dark Fiber. U S WEST shall provide an excess cable length of twenty-five (25) feet minimum, where available, for fiber in underground conduit. U S WEST shall provide splicing of AT&T fiber to U S WEST Dark Fiber under normal circumstances (e.g., no construction) in metropolitan areas within seventeen (17) calendar days of AT&T's request, and within thirty (30) calendar days of a request in a non-metropolitan area. AT&T may request expedited splicing, which shall be subject to available U S WEST resources.*

51.4.2 *For WDM applications, U S WEST shall provide to AT&T an interface to an existing WDM device or allow AT&T to install its own WDM device (where sufficient system loss margins exist or where AT&T provides the necessary loss compensation) to multiplex the traffic at different wavelengths. This applies to both the transmit and receive ends of the Dark Fiber.*

51.5 *[Intentionally left blank for numbering consistency.]*

51.6 *Portions of the bandwidth of the fiber may be sectioned and AT&T may share the bandwidth with U S WEST and other CLECs.*

52. Service Standards

52.1 *General. U S WEST shall provide services to AT&T under this Agreement in conformity with the performance standards specified in this Agreement, subject to this Section 52, and in conformity with applicable law.*

52.2 *Interconnection. With respect to any performance standard specified in this Agreement, U S WEST will provide interconnection to AT&T with at least the level of service quality or performance of obligations under this Agreement as U S WEST provides itself or any other Person. AT&T acknowledges that certain provisions contained in this Agreement may conflict with this standard. If AT&T requests a particular level of quality for interconnection set forth herein, but U S WEST demonstrates that it does not provide that level of quality to itself, U S WEST shall only be required to provide AT&T that level of quality that U S WEST provides to itself.*[36]

52.3 Network Elements.

52.3.1 *U S WEST shall provide nondiscriminatory access to the network elements specified in this Agreement at any technically feasible point that is equal in quality to the access which U S WEST provides to* **itself**[37] *or any other Person and that is on rates, terms and conditions that are just, reasonable and nondiscriminatory. AT&T acknowledges that certain provisions contained in this Agreement may conflict with this standard.*

52.3.2 *For purposes of this Agreement, "rates, terms and conditions that are just, reasonable and nondiscriminatory" shall mean that (i) such terms and conditions are equal in quality to the terms and conditions that U S WEST provides to* **itself**[38] *or any other Person,*

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[36] Pursuant to the Eighth Circuit Decision, the Parties agree to this language.
[37] Per Second Arbitration Order, page 4, ¶6.
[38] Per Second Arbitration Order, page 4, ¶6.

or, (ii) where it is technically infeasible to provide such terms and conditions to AT&T, such terms and conditions are offered equally to all requesting carriers.

52.3.3 For purposes of this Agreement, "equal in quality" shall mean, among other things, equal to the timeliness, responsiveness, accuracy and integrity of the provisioning of or access to the Network Element U S WEST provides itself and equal in the quality of design, performance, features, functions, capabilities and other characteristics, including, but not limited to, levels and types of redundant equipment and facilities for power, diversity and security, that U S WEST provides to itself.[39]

52.3.4 If AT&T requests a particular level of access that is set forth herein, but U S WEST demonstrates that it does not provide that particular level of access to itself or that such access is technically infeasible, U S WEST shall not be required to provide that level of access to network elements,[40] but rather the level of access U S WEST provides itself (if technically feasible) or the level of access equal to that provided to all other competing carriers.

52.4 Technical Feasibility. The Parties recognize that providing a number of the services specified in this Agreement depend upon the "technical feasibility" of providing that service, as that term is defined under the Act and/or by FCC or Commission rules and decisions. If the Parties cannot agree on whether providing a service is technically feasible, the matter, including cost and expenses (if any), shall be resolved through good faith negotiation or the dispute resolution process outlined in this Agreement.

52.5 Equipment.

52.5.1 The Parties recognize that equipment vendors may manufacture telecommunications equipment that does not fully incorporate and may deviate from industry standards referenced in this Agreement. Due to the manner in which individual equipment manufacturers have chosen to implement industry standards into the design of their products, along with differing vintages of individual facility components and the presence of embedded technologies pre-dating current technical standards, some of the individual facility components deployed within U S WEST's network, including, without limitation, Network Elements and associated business processes and the standards associated with the equipment providing such Network Elements (collectively, "Network Components"), may not adhere to all the specifications set forth and described in the Bellcore, ANSI, ITU and other technical and performance standards outlined in this Agreement. Upon request by either Party, the Parties will develop a process by which U S WEST will inform AT&T of deviations from standards referenced in this Agreement. In addition, the Parties agree that those deviations from such standards documented by U S WEST to AT&T shall, to the extent permitted by FCC and Commission

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[39] Per Second Arbitration Order, page 4, ¶6.

[40] Pursuant to the Eighth Circuit Decision, the Parties agree to this language.

rules and regulations, supersede sections of this Agreement referencing technical standards otherwise applicable for the affected Network Elements.

52.5.2 *U S WEST agrees that in no event shall it intentionally allow any Network Component provided by U S WEST to AT&T under this Agreement to perform below the standards or deviations therefrom reflected in Section 52.5.1. U S WEST shall minimize any degradation to its equipment relative to currently applicable service, where reasonable in view of industry adopted performance standards and technological developments. Written notice (the "Change Notice") of any planned changes in standards for any Network Component which could impact that Network Component will be provided at least ninety (90) days (or at the make/buy point) prior to the planned implementation. If AT&T notifies U S WEST of how the proposed change may adversely impact AT&T or its Customers within fourteen (14) calendar days after receipt of U S WEST's Change Notice, U S WEST and AT&T will schedule joint discussions to address and attempt to resolve the matter, including without limitation consideration of proposed alternatives. In addition, if U S WEST learns that any Network Component purchased by AT&T under this Agreement has been permitted (even if not intentionally) to fall materially below the level or specification in effect as of the Effective Date, U S WEST shall inform AT&T immediately.*

52.6 *Services and Processes. The Parties recognize that services and processes to be provided or followed by U S WEST may deviate from those desired by AT&T or otherwise outlined in this Agreement. Due to the manner in which U S WEST has chosen to adopt its own processes or implement industry standards into the design of its services or support functions, some of the services or support functions deployed within U S WEST may not adhere to all the specifications set forth and described in this Agreement. Within forty-five (45) days after a request by either Party, the Parties will develop processes by which U S WEST will inform AT&T of the standards known by U S WEST to differ from standards referenced in this Agreement for services or support functions actually provided to AT&T. In addition, the Parties agree that such deviations documented by U S WEST pursuant to such process shall, to the extent permitted by FCC and Board rules and regulations, supersede sections of this Agreement referencing such standards, services, or functions.*

52.7 *U S WEST and AT&T agree to amend this Section and all relevant portions of this Agreement, to incorporate any performance standards and reporting measures to which the Parties may mutually agree. In the event the Parties do not reach agreement as to specific performance standards and reporting measures, U S WEST will provide to AT&T performance standard reports that U S WEST prepares for itself or can reasonably develop.*[41] *Either Party may resolve specific disputes regarding performance standards and reporting measures in accordance with the dispute resolution process contained herein. However, AT&T is*

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41 Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "AT&T may request any additional reports, provided that it pays U S WEST's efficient incremental costs for providing these additional reports."

not entitled to demand in the name of parity service levels at any predetermined level, nor will any performance penalties or credits be included in this agreement except as the Parties may otherwise agree.

52.8 Existing Network. Nothing in this Agreement shall be construed as an agreement by the parties to waive any continuing legal requirement that U S WEST need only provide access to or interconnection with its network as it exists at the time that AT&T may request such access. Modifications to U S WEST's network may be limited to those required to accommodate interconnection or access to unbundled network elements as required by law. Nothing in this agreement shall constitute a waiver of any obligation that U S WEST has to meet applicable state or federal standards respecting the nature, extent, or capabilities of its network that serves customers in South Dakota.

52.9 Application. These provisions in Section 52 shall apply to each and every provision in this Agreement. Failure to specifically refer to these provisions shall not be construed to mean these provisions do not apply. The provisions of this Section 52 are applicable for the entire contract and takes precedence over any other conflicting section. The absence of specific references to this Section 52 in potentially conflicting sections is not to be construed to mean that this Section does not apply. Resolution of disputes under this provision shall be resolved by the Commission or through the dispute resolution process of Section 27 of Part A of this Agreement.

53. Entire Agreement

53.1 This Agreement shall include the Attachments, Appendices and other documents referenced herein all of which are hereby incorporated by reference, and constitutes the entire agreement between the Parties and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.

53.2 If a provision contained in any U S WEST tariff conflicts with any provision of this Agreement, the provision of this Agreement shall control, unless otherwise ordered by the FCC or the Commission.

54. Reservation of Rights

54.1 The Parties acknowledge that the terms of this Agreement were established pursuant to an order of the Commission. Any or all of the terms of this Agreement may be altered or abrogated by a successful challenge to this Agreement (or the order approving this Agreement) as permitted by applicable law. By signing this Agreement, neither Party waives its right to pursue such a challenge.

54.2 The Parties enter into this Agreement without prejudice to any position they may have taken previously, or may take in the future in any legislative, regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

AT&T Communications of the Midwest, Inc..

Signature

CATHERINE A. KILSTROM
Name Printed/Typed

BUSINESS MKTS VICE PRES.
Title

1/15/99
Date

U S WEST Communications, Inc.

Signature

Kathy Fleming
Name Printed/Typed

Executive Director – Interconnection
Title

1/11/99
Date

*Signed as ordered by the arbitrator/commission in Docket No. TC96-184. Signature does not indicate agreement with all aspects of the arbitrator's decision, nor does it waive any of U S WEST's right to seek judicial review of all or part of the agreement, or to reform the agreement as the result of successful judicial review.

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

INTERCONNECTION - LOCAL EXCHANGE

	Recurring	Nonrecurring
Entrance Facility		
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

	Price
Call Termination	
Average Per Minute of Use	$0.003469

	Fixed	Per Mile
Call Transport		
Direct Trunked Transport		
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.95
DS1 - Over 8 to 25	$34.76	$1.82
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.63
DS3 - Over 25 to 50	$236.71	$9.91
DS3 - Over 50	$243.94	$24.44

	Price
Tandem-Switched Transport	
Tandem Switching, Per Minute Of Use	$0.001748

	Fixed	Per Mile
Tandem Transmission		
0 Mile	None	None
Over 0 - 8 Miles	$0.000412	$0.000012
Over 8 - 25 Miles	$0.000406	$0.000014
Over 25 - 50 Miles	$0.000408	$0.000013
Over 50 Miles	$0.000410	$0.000009

	Recurring	Nonrecurring
Multiplexing, per arrangement		
DS3 to DS1	$191.32	$287.45
DS1 to DS0	$181.28	$280.77

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

COMMON CHANNEL SIGNALING ACCESS SERVICE

	Recurring	Nonrecurring
Entrance Facility		
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

	Fixed	Per Mile
Direct Link Transport		
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$2.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$9.95
DS1 - Over 8 to 25	$34.76	$1.82
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23
Direct Link Transport		
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.83
DS3 - Over 25 to 50	$236.71	$2.91
DS3 - Over 50	$243.94	$24.44

	Recurring	Nonrecurring
CCS Link – First Link	To Be Negotiated	To Be Negotiated
CCS Link – Each additional Link	To Be Negotiated	To Be Negotiated
STP Port – Per Port	To Be Negotiated	To Be Negotiated
Multiplexing		
DS3 to DS1	$191.32	$287.45
DS1 to DS0	$181.28	$250.77

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

PHYSICAL AND VIRTUAL COLLOCATION		
	Recurring	Nonrecurring
Common Elements		
Quote Preparation Fee	To Be Negotiated	$1,000.00
Entrance Facility - 2 fibers (Note 1)	$107.83	$1,000.00
DICT Channel Terminations		
2-wire DS0 DICT	$1.14	$274.65
4-wire DS0 DICT	$1.45	$274.65
DS1 DICT	$12.57	$311.69
DS3 DICT	$36.56	$313.28
DICT Regeneration		
DS1 Regeneration	$12.21	$311.69
DS3 Regeneration	$75.61	$313.28
Cable Splicing		
Per setup	None	$474.70
Per Fiber Splice	None	$37.95
48 Volt Power, per ampere, per month	$15.24	None
48 Volt Power Cable, per foot (Note 7)		
20 Ampere Capacity - Recurring	$0.11	$70.21
40 Ampere Capacity - Recurring	$0.15	$95.20
60 Ampere Capacity - Recurring	$0.17	$107.22

	Regular Hours	After Hours
Inspection per 1/2 Hour	$27.70	$35.99

Virtual Collocation	Recurring	Nonrecurring
Equipment Bay, Per Shelf	$3.68	None

	Regular Hours	After Hours
Training per 1/2 Hour	$24.54	None
Engineering per 1/2 Hour	$29.93	$32.01
Installation per 1/2 Hour	$27.70	$35.99
Maintenance per 1/2 Hour	$24.54	$32.64

Physical Collocation	Recurring	Nonrecurring
Cage/Hard Wall Enclosure	ICB	ICB
Floor (w/ Maintenance) - per square foot, Zone 1 (Note 2)	$2.75	None
Floor (w/ Maintenance) - per square foot, Zone 2 (Note 2)	$2.26	None
Floor (w/ Maintenance) - per square foot, Zone 3 (Note 2)	$2.06	None

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

Issue 1-2 Parked
Pursuant to Eighth Circuit Decision, U S WEST proposes the following.

Xpnt Frame, Per Termination	Recurring	Nonrecurring
DSO	0.01	5.18
DS1	0.02	12.25
VG3	0.32	185.78

Xpnt Frame, Each Termination	Recurring	Nonrecurring
DSO, Per 100	1.10	517.55
DS1, Per 28	0.76	443.94
DS3, Per each Termination	$0.43	$298.87

AT&T proposes deletion of this section.

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

ANCILLARY SERVICES	
	Price
Directory Assistance	
Price per Call -- Facilities-Based Providers	$0.31
Listings	
Primary Listings, Directory Assistance, White & Yellow Pages	No Charge
E911	
LEC and AECs recover costs from PSAP	No Charge
Interim Number Portability	**Price**
	New York Method
Assignment of Numbers	**Price**
Assignments per industry guidelines	No Charge
Busy Line Verification	
Per Call	$0.75
Busy Line Interrupt	
Per Call	$0.92
Operator Assistance	
Per activity	$0.36

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

ANCILLARY SERVICES	Price
Directory Assistance	
Price per Call -- Facilities-Based Providers	$0.31
Listings	
Primary Listings, Directory Assistance, White & Yellow Pages	No Charge
E911	
LEC and AECs recover costs from PSAP	No Charge
Interim Number Portability	**Price**
	New York Method
Assignment of Numbers	**Price**
Assignments per industry guidelines	No Charge
Busy Line Verification	
Per Call	$0.75
Busy Line Interrupt	
Per Call	$0.92
Operator Assistance	
Per activity	$0.36

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

ACCESS TO UNBUNDLED ELEMENTS

	Recurring	Nonrecurring
Unbundled Loops		
2-Wire LIS-Link, Statewide	$21.09	
4-Wire LIS-Link, Statewide	$39.34	
ISDN Extension Increment, Per Loop (Note 3)	$21.49	
Basic Installation, First LIS-Link		$106.29
Basic Installation, Each Additional LIS-Link		$52.44
Installation with Conformance Testing, First LIS-Link		$170.79
Installation with Conformance Testing, Each Additional LIS-Link		$86.61
Coordinated Installation with Testing, First LIS-Link		$218.00
Coordinated Installation with Testing, Each Additional LIS-Link		$133.61
Network Interface Device (Note 4)		$58.58
Cable Unloading and Bridge Tap Removal (Note 5)		$58.50

	Recurring	Nonrecurring
Unbundled Ports		
End Office Port, Per First Port	$1.84	$101.15
End Office Port, Per Each Additional Port	$1.84	$54.43
Average Per Minute of Use, Per Port	$0.003469	

	Recurring	Nonrecurring
Vertical Features		
Vertical Features - Analog		
Call Hold	$0.0568	
Call Transfer	$0.2166	
Three Way Calling	$0.0963	
Call Pickup	$0.0577	
Call Waiting/Cancel Call Waiting	$0.1330	
Distinctive Ringing	$0.0797	
Speed Call Long -- Customer Changeable	$0.0654	
Station Dial Conferencing (6-way)	$1.0508	
Call Forwarding Busy Line	$0.1386	
Call Forwarding Don't Answer	$0.1696	
Call Forwarding Variable	$0.1414	
Call Forwarding Variable Remote	$0.1128	
CLASS - Call Waiting ID	$0.0519	
CLASS - Calling Name & Number	$0.1915	
CLASS - Calling Number Delivery	$0.0608	
CLASS - Calling Number Delivery - Block	$0.3822	
CLASS - Continuous Redial	$0.5008	
CLASS - Last Call Return	$0.4258	
CLASS - Priority Calling	$1.0829	

ACCESS TO UNBUNDLED ELEMENTS (continued)

	Recurring	Nonrecurring
CLASS - Selective Call Forwarding	$0.9206	

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

CLASS - Selective Call Rejection	$1.7651	
CLASS - Anonymous Call Rejection	$0.3937	
Call Park (Store & Retrieve)	$0.1289	
Message Waiting Indication Audible/Visual	$0.0662	
Subsequent Order Charge		$12.75

Note: Any other vertical features requested by AT&T will be priced on an individual case basis.

Vertical Features - BRI ISDN	
2 B + D	under development
2 Primary Directory Numbers (PDNs)	under development
D - Channel Packet	under development
Call Appearances - Two per terminal	under development
Normal Ringing	under development
Caller ID Blocking - per call	under development
Subsequent Order Charge	under development

Note: Any other vertical features requested by AT&T will be priced on an individual case basis.

RESALE	Nonrecurring
Customer Transfer Charge	$5.00

	Wholesale Discount Rate
USWC Retail Services (Note 6)	
includes billing and collections, operator services, and directory assistance	15.55%
If CLEC provides its own billing and collections	15.61%
If CLEC provides its own operator services and directory assistance	18.23%
If CLEC provides its own operator services, directory assistance, and billing and collections	18.29%

Notes

1 Pursuant to Order TC 96-184 the recurring rate is applicable for the first two years of the agreement. After that period, the Entrance Enclosure recurring rate is $2.83.
2 Zones per NECA 4 Tariff
3 This charge applies when a CLEC requests ISDN capability on an unbundled loop greater than 18 kft.
4 This charge applies when USW must install a Network Interface Device for a CLEC or when USW must connect a CLEC's loop to the USW Network Interface Device.
5 This charge applies only when loop unloading is necessary.
6 Pursuant to Order TC 96-184 U S WEST is not required to make its enhanced services available for resale.
7 Price subject retroactive upon final resolution to Cost docket.

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charges billed to AT&T for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. The new rate will be effective upon the tariff effective date.

2.4 *A Subscriber Line Charge (SLC) will continue to be paid by AT&T without discount for each local exchange line resold under this Agreement. All federal and state rules and regulations associated with SLC or as found in the applicable tariffs also apply.*

2.5 *AT&T will pay to U S WEST the PIC change charge without discount associated with AT&T end user changes of inter-exchange or intraLATA carriers.*

2.6 *AT&T agrees to pay U S WEST at the wholesale discounted rate when its end user activates any services or features that are billed on a per use or per activation basis (e.g., continuous redial, last call return, call back calling, call trace, etc.). U S WEST shall provide AT&T with detailed billing information per applicable OBF standards unless otherwise agreed to by the Parties as necessary to permit AT&T to bill its end users such charges.*

2.7 *(Intentionally left blank for numbering consistency.)*

2.8 *Nonrecurring charges will be billed as approved by the Commission.*

2.9 *(Intentionally left blank for numbering consistency.)*

2.10 *(Intentionally left blank for numbering consistency.)*

~~Issue 1-1 Period~~

~~[U S WEST proposes the following]~~

2.11 ~~*Resale prices shall be wholesale rates determined*~~ [on the basis of retail rates charged to subscribers for the Telecommunications Service requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by U S WEST,] *as specified in the Act, and by the Commission.* **U S WEST shall be obligated to offer its volume and term discount service plans to AT&T provided that AT&T complies with the volume and term requirements contained therein. If selected by AT&T, an appropriate wholesale discount shall also be applied to such plans.**[7] *With the exception of the preceding, AT&T shall not be required to agree to volume or term commitments as a condition for obtaining Local Resale.*

2.12 *U S WEST shall bill AT&T and AT&T is responsible for all applicable charges for the resold services. AT&T shall be responsible for all charges associated with services that AT&T resells to an end user.*

3. Construction and Implementation Costs

3.1 **U S WEST shall be obligated to modify its network to the extent necessary to accommodate AT&T's request for interconnection and access to network elements. U S WEST shall construct when necessary to meet its general obligations as an incumbent LEC as ordered by the Commission or federal law. All other**

[7] Per First Order at page 20, Paragraph 163.

conditioned.[11]

4.7 AT&T shall pay for the cost or redesigning and reconfiguring the loop facilities in the requested location to allow for access to subloop elements.[12]

5. Transport and Termination

5.1 U S WEST may charge for three functions associated with transport and termination: call termination within a given month, call transport and call transit. U S WEST shall waive reciprocal compensation call termination charges if traffic exchanged between AT&T and U S WEST is within +/- 5%.[13]

5.2 U S WEST may charge for three rate elements associated with call transport: direct trunked transport based on a fixed per month charge and per mile charge, tandem switching based on per minute use, and tandem transmission based upon a fixed per minute charge and per mile charge.[14]

5.3 Except as otherwise specifically outlined in this Agreement, U S WEST may not charge AT&T switched access tariff prices for local exchange access.[15]

5.4 AT&T shall not receive the tandem switched rate for terminating calls.[16]

6. Number Portability

6.1 *AT&T may request U S WEST to provide AT&T call detail records identifying each IXC which are sufficient to allow AT&T to render bills to IXCs for calls IXCs place to ported numbers in the U S WEST network which U S WEST forwards to AT&T for termination. To the extent that U S WEST is unable to provide billing detail information within a reasonable time frame, the Parties may agree on an interim method to share access revenues pursuant to a mutually agreed upon surrogate approach.*

6.2 Cost for number portability will be allocated on the basis of the "New York Method" as described in the FCC's First Report and Order and Further Notice of Rulemaking in CC Docket No. 95-116, In the Matter of Telephone Number Portability (Number Portability Order), at Paragraph 136.[17]

6.3 Each Party, when it is the terminating carrier, shall receive the common carrier line and local switching charges. Transport charges shall be shared based on meet point billing arrangement.[18]

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[11] Per First Order at page 15, Paragraph 114.
[12] Per First Order at page 10, Paragraph 68.
[13] Per First Order at page 29, Paragraphs 235 and 238
[14] Per First Order at page 29, Paragraph 236.
[15] Per First Order at page 29, Paragraph 239.
[16] Per First Order at pages 29-30, Paragraphs 240-241.
[17] Per First Order at page 26, Paragraphs 213-215.
[18] Per First Order at page 27, Paragraph 218.

7. Collocation – Physical and Virtual

See Appendix A, attached to this Attachment.

8. Rate Structure

See Appendix A attached to this Attachment.

9. Unbundled Switching

9.1 U S WEST may charge a nonrecurring charge of $101.15 for the first port and $54.43 for each additional port requested by AT&T. Additionally, AT&T shall pay U S WEST the amount set forth in Appendix A per month per port utilized by AT&T and $.003334 per minute of use of such port.[19]

10. Operational Support Systems

10.1 A company shall be allowed to assess users of its gateway systems used to access its databases a per transaction charge. The costs used to derive the transaction charge may include the costs incurred for the development of the gateway and recurring costs associated with use of the gateway.[20]

11. Poles, Conduits, Ducts and Rights-of-Ways

11.1 AT&T shall pay U S WEST a just and reasonable rate[21] for access to poles, conduits, ducts and rights-of-ways, the following fees , which shall be based upon Commission based rules and as follows:[22]

11.1.1 Annual usage fee for the use of poles and conduit.
11.1.2 Make ready charges for facility arrangements.
11.1.3 Charge for inspection or supervision of facility.

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[19] Per First Order at pages 15-16. Paragraphs 116 and 120.
[20] Per First Order at page 25, Paragraph 208.
[21] Per First Order at page 28, Paragraph 227.
[22] Per First Order at page 28, Paragraphs 226-231.

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RESALE

1. Description

1.1 *U S WEST will make the following services available for resale: residence basic exchange, Centrex Plus, Operator Services, Directory Assistance, Optional Calling Plans, Volume Discount Plans, Discounted Feature Packages, Private Line Transport, negotiated contract arrangements, Business Basic Exchange, PBX Trunks, Frame Relay Service, ISDN, listings, features, IntraLATA toll, AIN Services and WATS. This list of services is neither all inclusive nor exclusive. U S WEST will not prohibit, nor impose unreasonable or discriminatory conditions or limitations on the resale of its Telecommunications Services.*

1.2 **AT&T may resell to any and all classes of end-users Telecommunications Services obtained from U S WEST under this Agreement, except that (i) services U S WEST makes available only to residential customers or to a limited class of residential customers may not be resold to classes of customers who are not eligible to subscribe to such services from U S WEST,[1] and (ii) Lifeline Assistance and Link-up Services may be resold only to those customers eligible for those services.[2]** *The foregoing shall permit, without limitation, the resale of Telecommunications Services to another Reseller.*

1.3 *At the request of AT&T, and pursuant to the requirements of the Act, and FCC rules and state regulations, U S WEST shall make available to AT&T for resale any Telecommunications Services that U S WEST currently provides or may offer hereafter, including, but not limited to,* **Telecommunications Services offered through promotions of more than ninety (90) days duration, contract service arrangements, special arrangements, and discount plans.[3]** *Resale discounts may vary from the standard resale discount, subject to the approval of the Commission.*

1.4 *This Section describes several services which U S WEST shall make available to AT&T for resale pursuant to this Agreement. This description of services is neither all inclusive nor exclusive. Except as may be noted elsewhere in this Agreement, all services or offerings of U S WEST which are to be offered for resale pursuant to the Act are subject to the terms herein, even though they are not specifically enumerated or described. U S West shall also provide Service Functions, as agreed to in this Attachment 2. The Telecommunications Services and Service Functions provided by U S WEST to AT&T pursuant to this Attachment 2 are collectively referred to as "Local Resale."*

1.5 **U S WEST is not required to make enhanced services, including voice mail, available for resale.[4]**

1.5.1 *Voice Mail*

U S WEST shall make available the SMDI-E ("Station Message Desk Interface-Enhanced"), where available, or SMDI (Station Message Desk Interface), where SMDI-E is not available, feature capability allowing for Voice Mail Services. U S WEST shall make available, where available, the MWI (Message Waiting Indicator) stutter dialtone and message waiting light feature capabilities. U S WEST shall make available CF-B/DA (Call Forward on Busy/Don't Answer), CF/B (Call Forward on Busy), and CF/DA (Call Forward Don't Answer) feature

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[1] Per First Order at page 19, Paragraph 145.
[2] Per First Order at page 19, Paragraph 152.
[3] Per First Order at page 20, Paragraph 157.
[4] Per First Order at page 19, Paragraph 151.

capabilities allowing for Voice Mail services.

1.8 Grandfathered Services.

U S WEST shall offer for resale to AT&T all grandfathered services. AT&T may resell such services only to the same limited group of customers that have purchased such services in the past. For purposes of this Agreement, a grandfathered service is a service that U S WEST no longer offers to new subscribers or a class of new subscribers. AT&T shall be notified of any U S WEST request for the termination of service and/or its grandfathering filed with the Commission or U S WEST's intent to grandfather/withdraw a service at least thirty (30) calendar days prior to the effective date of such grandfathering or intended termination. The form of notification may be either in written or electronic form.

1.9 N11 Service.

AT&T shall have the right to resell any N11 service, including, but not limited to, 411 and 911 services.

1.10 Promotions.

Promotions of ninety (90) days or less need not be made available to AT&T at the wholesale discount rate.[5]

1.11 The specific business process requirements and systems interface requirements are set forth in Attachment 5 and Attachment 6.

2. General Terms and Conditions for Resale

2.1 Primary Local Exchange Carrier Selection. U S WEST shall apply the principles set forth in Section 64.1100 of the FCC Rules, 47 C.F.R. § 64.1100, as implemented, to the process for end-user selection of a primary local exchange carrier. In accordance with the customer authorization process described elsewhere in this Agreement, U S WEST shall not require confirmation from the customer, another carrier, or another entity, in order to process an AT&T order for Local Resale for a customer.

2.2 Except where otherwise provided, AT&T, or AT&T's agent, shall act as the single point of contact for its end users' service needs, including, without limitation, sales, service design, order taking, provision, change orders, training, maintenance, trouble reports, repair, post-sale servicing, billing, collection and inquiry. AT&T shall inform its end users that they are customers of AT&T for resold services. AT&T's end users who inadvertently contact U S WEST with questions regarding their AT&T service will be instructed to contact AT&T. U S WEST end users who inadvertently contact AT&T with questions regarding their U S WEST service will be instructed to contact U S WEST. Nothing in this Agreement shall be deemed to prohibit either Party from discussing its products and services with customers of the other Party who solicit such information or who are directly contacted by a Party.

3. Basic Service Requirements

3.1 Call Types

3.1.1 U S WEST shall provide the following call types, features and functions to AT&T and its end users with no loss of feature or functionality: (a) dial tone and ringing; (b) capability for either dial pulse or touch tone; (c) flat and measured services; (d)

[5] See First Order at page 20, Paragraph 157.

speech recognition as available with other custom calling and CLASS features; (e) same extended area service free calling area; (f) 1 + intraLATA toll calling; (g) access to interLATA toll calling; (h) access to international calling; (i) lines as well as trunks (DID, DOD); (j) analog and digital private line - all speeds; (k) off-premises extensions; (l) CENTREX; and (m) ISDN.

3.2 U S WEST will provide access for AT&T and all its end user customers to all call types, including, but not limited to, 500, 700, 800, 900, exchanges and dial around services (10XXX).

3.3 U S WEST shall impose no restrictions on customer's calling (e.g., there should not be a 750 minute limit on flat rate calling).

3.4 U S WEST will provide pre-subscription services for intraLATA, when the Commission orders the provision of 1+ pre-subscription, and interLATA toll services in accordance with currently accepted methods and procedures.

3.5 Features Requirements

3.5.1 U S WEST will provide AT&T the ability to suspend and restore customer service, including vacation suspension service, at the direction of AT&T.

3.5.2 End Office Features. U S WEST will provide to AT&T the same end office features available to U S WEST's end users, including, but not limited to, CLASS features, Custom Calling features, and AIN features.

3.5.3 Call Blocking Features. U S WEST will provide to AT&T the same call blocking features as are available to U S WEST's own customers.

3.6 Upon request by AT&T, U S WEST shall provide AT&T a list, in an agreed upon format by central office, of all the Telecommunications Services, features and functions offered by U S WEST and shall provide updates to such lists as further described in Attachment 5. U S WEST shall also provide an electronic access method for AT&T to ascertain the service availability of a particular USOC in a given central office.

4. Requirements for Specific Services

4.1 IntraLATA Toll

U S WEST will provide AT&T its intraLATA toll service to AT&T for resale where 1+ intraLATA toll presubscription is not available.

4.2 Private Line Services

The following private line services shall be made available without restriction from U S WEST: (a) voice grade private line services; (b) off premise extensions; (c) foreign exchange line service; (d) point-to-point and multi-point digital services (e.g., 9.6 kbps-56 kbps; fractional DS-1); (e) DS-1 Services; (f) DS-3 services; (g) OC-3 service (where available); (h) frame relay service; (i) packet switched services; (j) switched digital services; and (k) other private line services as they are made available.

4.2.1 **Special access services are not required to be offered for resale at the wholesale discount rate.**[6]

4.3 **CENTREX Requirements**

4.3.1 *At AT&T's option and as they are available to U S WEST's own end users via interstate tariffs and state tariffs, price lists, price schedules, catalogs, or individual Case Basis, AT&T may purchase a single, any combination, or the entire set of CENTREX features, including CENTREX Management System (CMS) or its equivalent as described in Attachment 5. The CENTREX Service provided for resale will meet the requirements set forth in the following provisions of this Section.*

4.3.2 *All service levels and features of CENTREX Service provided by U S WEST for resale by AT&T shall be at parity with levels and features provided to U S WEST's own customers or as mutually agreed upon by the Parties.*

4.3.3 *AT&T may aggregate the CENTREX local exchange and intraLATA traffic usage of AT&T subscribers to the extent U S WEST makes such aggregation available to itself or to U S WEST end users, Customers, or Affiliates.*

4.3.4 *AT&T may aggregate multiple AT&T customers on dedicated access facilities.*

4.3.5 *U S WEST shall make CMS information available to AT&T at the common block level via an electronic interface, as provided to U S WEST's own end users.*

4.3.6 *AT&Y may use remote call forwarding in conjunction with CENTREX Service to provide service to AT&T Local Service Customers residing outside of the geographic territory in which U S WEST provides local exchange service. However, U S WEST is not obligated to provide facilities outside its service territory.*

4.3.7 *AT&T may purchase any and all levels of CENTREX Service for resale without restriction on the minimum or maximum number of lines that may be purchased for any one level of service, equivalent to what is offered to U S WEST's own end users.*

4.3.8 *U S WEST will provide to AT&T the ability to suppress the need for AT&T customers to dial "9" when placing calls outside the CENTREX system.*

4.3.9 *U S WEST shall make available to AT&T for resale, at no additional charge, intercom calling among all AT&T customers within a common block who utilize resold CENTREX Service.*

4.4 **CLASS and Custom Features Requirements**

*AT&T may purchase a single, any combination, or the entire set of CLASS and custom features and functions, on a customer-specific basis. CLASS features shall include, but not be limited to: caller identification, name and number; call screening; call tracing; and automatic call back on busy (*69). U S WEST shall provide to AT&T a list of all such CLASS and custom features and functions within ten (10) days of a request by AT&T and shall provide updates to such list when new features and functions become available.*

4.5 **Customer Financial Assistance Programs**

4.5.1 *Local Services provided to low-income subscribers, pursuant to requirements*

[6] Per First Order at page 20, Paragraph 155.

established by the appropriate state regulatory body, include programs such as Lifeline, Voluntary Federal Customer Financial Assistance Program, and Link-Up America ("Voluntary Federal Customer Financial Assistance Programs"). When a U S WEST subscriber eligible for the Voluntary Federal Subscriber Financial Assistance Programs or other similar state programs chooses to obtain local service from AT&T, U S WEST shall forward information available to U S WEST regarding such subscriber's eligibility to participate in such programs to AT&T and in electronic format when available in accordance with the procedures set forth herein.

4.5.2 **U S WEST shall offer for resale Lifeline and Link-Up Service; provided, however, that AT&T may only resell Lifeline and Link-Up Service to those Customers eligible to receive such services.**[7] *U S WEST will provide information about the certification process for the provisioning of Lifeline, Link-up, and similar services. U S WEST will forward to AT&T, in electronic format (when available), information available to U S WEST regarding a subscriber's program eligibility, status and certification when a U S WEST subscriber currently on any U S WEST telephone assistance program changes service to AT&T as their local exchange carrier. U S WEST will cooperate in obtaining any subsidy associated with a subscriber transfer to AT&T.*

4.5.2.1 In connection with the transfer of a customer from U S WEST to AT&T, U S WEST shall provide to AT&T customer profile, including customer name, billing and residence address, billing telephone number(s), eligibility for Voluntary Federal Customer Financial Assistance Program and other similar services, and identification of U S WEST features and services subscribed to by the customer.

4.6 **Discount Plans and Services**

4.6.1 **AT&T can utilize any volume discounts that U S WEST makes available to its end user customers. U S WEST's volume discounts are subject to the wholesale discount set forth in Attachment 1 to this Agreement.**[8]

4.7 **Hospitality Service.**

U S WEST shall provide all blocking, screening, and all other applicable functions available for hospitality lines utilized as such.

4.8 **Telephone Line Number Calling Cards.** *Effective ten (10) Business Days after the date of an end-user's subscription to AT&T Service or within twenty-four (24) hours after AT&T has notified U S WEST that it has replaced the subscriber's calling card, whichever is earlier, U S WEST will terminate its existing telephone line number-based calling cards and remove any U S WEST-assigned telephone line calling card number subaccount and PIN (including area code) ("TLN") from the LIDB. AT&T may issue a new telephone calling card to such customer, utilizing the same TLN, and AT&T shall have the right to enter such TLN in the LIDB for calling card validation purposes. U S WEST will assume responsibility for billing its calling card calls that appear before the card is terminated. Nothing in this section shall prohibit U S WEST from terminating calling card service to U S WEST customers who have been determined to be a credit risk, according to U S WEST's normal business practices.*

4.8.1 Except as provided above, the Parties will cooperate in the deactivation and activation of calling cards and will make reasonable efforts to minimize the time a

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[7] Per First Order at page 19, Paragraph 152.
[8] Per First Order at page 20, Paragraph 163.

customer is without an active calling card.

4.8.2 U S WEST shall not prohibit AT&T from issuing a new telephone calling card to an AT&T customer utilizing the same TLN and AT&T shall have the right to enter the TLN in the LIDB for calling card verification purposes.

4.8.3 U S WEST will provide AT&T the ability to utilize U S WEST's LIDB for calling card validation.

4.9 U S WEST shall make engineering support available to AT&T for resold services on the same basis as it provides such support for U S WEST end users. To the extent the cost of such engineering support has been considered an avoided cost in the development of the avoided cost discount, the cost of such engineering support shall be borne by AT&T.

4.10 **Payphone Services**

U S WEST agrees to sell for resale all tariffed PAL Services at an appropriate wholesale discount to be determined by the Commission.

4.10.1 U S WEST shall offer for resale, at a minimum, the following Coin Line, PAL, and PAL Coinless features:

Billed Number Screening
Ability to "freeze" PIC selection
One (1) bill per line and/or multiple lines per BAN
Point of demarcation at the Network Interface location
Detailed billing showing all 1+ traffic on paper, diskette or electronic format
Touch-tone service
Option for listed or non-listed numbers
Access to 911 service
One (1) directory per line

4.10.2 At a minimum, U S WEST shall offer for resale the following Coin Line features:

Access to all Central Office intelligence required to perform answer detection, coin collection, coin return, and disconnect
Answer Detection
Option to block all 1+ calls to international destinations
Intral ATA Call Timing
Option of one-way or two-way service on line
Flat Rate Service, where available
Originating line screening
U S WEST central office intelligence for rating and other functions
Option of measured service, where available
Ability to block any 1+ service that cannot be rated by the coin circuits/TSPS/OSPS to the extent provided on U S WEST coin lines
Protect against clip on fraud to the extent provided on U S WEST coin lines
Protect against blue box fraud to the extent provided on U S WEST coin lines
Provision of Information Digit 27

4.10.3 As a minimum, U S WEST shall offer for resale the following PAL and PAL Coinless features:

Originating line screening
Two-way service option
Flat rate service based on rate groups, where available

Option of one-way service on the line, where available
Option of measured service, where available
Ability to keep existing serving telephone numbers if cutover to AT&T resale line incoming/outgoing screening
Provision of Information Digit 07
Provision of International Toll Denial Recognition Tone, when available

4.10.4 At a minimum, U S WEST shall offer for resale the following PAL Coin feature:

Blocking for 1+ international, 10XXXX1 + international, 101XXXX1 + international, 1+500, N11, 976 and option to block all 1-700 and 1-500 calls
Line side supervision option

4.10.5 At a minimum, U S WEST shall offer for resale the following PAL Coinless feature:

Blocking for 1 + international, 10XXXX1 + international, 101XXXX1 +International, 1+900, N11, 976, and 7 digit local

4.10.6 U S WEST shall provide installation intervals to AT&T for ordering, call transfer, billing, and PIC changes in accordance with performance standards that are established by the Commission, pursuant to subsequent agreement between the Parties or as provided to any other Person.

5. Service Functions

5.1 U S WEST shall provide AT&T with the information available to U S WEST that AT&T will need to certify subscribers who transfer from U S WEST as exempt from charges (including taxes), or eligible for reduced charges associated with providing services.

5.2 U S WEST shall provide AT&T with appropriate notification of all area transfers with line level detail one hundred twenty (120) days before service transfer, and will also notify AT&T within one hundred twenty (120) days before such change or any LATA boundary changes.

5.3 U S WEST will work cooperatively with AT&T in practices and procedures regarding the handling of law enforcement and service annoyance calls.

5.4 Support Functions

5.4.1 Routing to Directory Assistance, Operator and Other Services

5.4.1.1 U S WEST shall make available to AT&T the ability to route:

(a) all Local Directory Assistance calls (411, (NPA) 555-1212) dialed by AT&T Customers directly to the AT&T Directory Assistance Services platform, where technically feasible and consistent with FCC rules; and

(b) Local Operator Services calls (O+, O-) dialed by AT&T Customers directly to the AT&T Local Operator Services platform, where technically feasible and consistent with FCC rules. Such traffic shall be routed over trunk groups between U S WEST end offices and the AT&T Local Operator Services Platform, using standard Operator Services dialing protocols of O+ or O-.

5.4.1.2 All direct routing capabilities described herein shall permit AT&T Customers to dial the same telephone numbers for AT&T Directory Assistance and Local Operator Service as U S WEST customers use to access similar

services.

6. Security and Law

6.1 U S WEST will maintain and safeguard all AT&T customer information according to CPNI privacy guidelines.

6.2 U S WEST and AT&T will work jointly in security matters as they relate to AT&T customers in a resale environment including, but not limited to, harassment and annoyance calls.

6.3 U S WEST and AT&T will work jointly to support law enforcement agency requirements including, but not limited to, taps, traces and court orders.

6.4 U S WEST will work jointly with AT&T with respect to prevention and settlement of fraud.

6.5 U S WEST and AT&T will work jointly to provide access to lines in a hostage situation.

7. Ordering and Maintenance

7.1 AT&T shall transmit to U S WEST the information necessary for the installation (billing, listing and other information), repair, maintenance and post-installation servicing according to U S WEST's standard procedures, as described in the U S WEST resale operations guide that will be provided to AT&T. When U S WEST's end user or the end user's new service provider discontinues the end user's service in anticipation of moving to another service provider, U S WEST will render its closing bill to the end user effective with the disconnection. Should AT&T's end user, a new service provider or AT&T request service be discontinued to the end user, U S WEST will issue a bill to AT&T for that portion of the service provided to the AT&T end user. In no event, shall the transition of an end user from U S WEST to AT&T cause a disconnection of service other than as specifically provided for in this Agreement. It is understood that AT&T's decision to request a change in class of service (or a conversion to a re-used unbundled loop) at "transition" may involve a few minutes out-of-service. The preceding may be modified by agreement of the Parties.

7.2 U S WEST will notify AT&T by Fax or other processes as agreed to by the Parties, when an end user moves to another service provider.

7.3 The new service provider shall be responsible for issuing either a transfer of service or disconnect/new connect order, as appropriate.

7.4 The Parties agree that they will work cooperatively to develop the standards and processes applicable to the transfer of such accounts that are in arrears.

8. Changes in Retail Service

8.1 U S WEST will notify AT&T of any changes in the terms and conditions under which it offers Telecommunications Services at retail to subscribers who are not telecommunications service providers or carriers, including, but not limited to, the introduction or discontinuance of any features, functions, services or promotions.

8.2 U S WEST will provide to AT&T advance notice of the availability of new Telecommunication Services in accordance with Part A, Section 23.2 of this Agreement.

8.3 In the event U S WEST intends to terminate the provisioning of any resold services to AT&T for any reason, AT&T shall be responsible for providing any and all necessary notice to its end users of the termination. In no case shall U S WEST be responsible for providing such

notice to AT&T's end users. U S WEST will provide sufficient written notice to AT&T of U S WEST's intent to terminate a resold service so that AT&T may notify its customers or intervene in the proceedings on a timely basis consistent with Commission rules and notice requirements.

9. Customer Authorization Process

9.1 *U S WEST and AT&T will use the existing PIC process as a model, and the same or similar procedures for changes of local providers. For a local carrier change initiated by AT&T or an agent of AT&T to a customer, one of the following four (4) procedures will constitute authorization for the change: (a) Obtain the customer's written authorization (letter of authorization or LOA); (b) Obtain the customer's electronic authorization by use of an toll-free number; (c) Have the customer's oral authorization verified by an independent third party (third party verification); or (d) Send an information package, including a prepaid, returnable postcard, within three (3) days of the customer's request for a local carrier change, and wait fourteen (14) days before submitting the local carrier change to the previous carrier.*

9.2 **It is understood by U S WEST and AT&T that these procedures may be superseded or modified by FCC rules, state law or industry standards.**[9]

9.3 *U S WEST will provide AT&T authorization for a local carrier change that is initiated by a customer call to AT&T. In this case AT&T will: (a) maintain internal records verifying the customer's stated intent to switch carriers; and (b) produce the record in case of a slamming dispute consistent with the FCC rules.*

9.4 *Should an end user dispute or a discrepancy arise regarding the authority of AT&T to act on behalf of the end user, AT&T is responsible for providing a written response evidencing its authority to U S WEST within five (5) Business Days of receipt of a written request from U S WEST describing the basis of the dispute or discrepancy. If there is a conflict between the end user designation or AT&T does not provide a response within five (5) Business Days, U S WEST shall honor the designation of the end user. In the event the end user designation is honored by U S WEST as described above then AT&T shall remit a slamming charge, if any, in accordance with Section 258 of the Act and Commission Rules.*

9.5 *Should an end user dispute or a discrepancy arise regarding the authority of U S WEST to act on behalf of the end user, U S WEST is responsible for providing a written response evidencing its authority to AT&T within five (5) Business Days of receipt of a written request from AT&T describing the basis of the dispute or discrepancy. If there is a conflict between the end user designation or U S WEST does not provide a response within five (5) Business Days, AT&T shall honor the designation of the end user. In the event the end user designation is honored by AT&T as described above then U S WEST shall remit a slamming charge, if any, in accordance with Section 258 of the Act and Commission rules.*

9.6 *AT&T shall designate the Primary Interexchange Carrier (PIC) assignments on behalf of its end users for interLATA services and for intraLATA services when intraLATA presubscription is implemented.*

9.6.1 U S WEST shall not be required to assign central office codes in a U S WEST central office for the exclusive use of AT&T.[10]

9.7 *When Customers switch from U S WEST to AT&T, or to AT&T from any other service*

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[9] Per First Order at page 6, Paragraph 32 and Reconsideration Order at page 5.
[10] Per First Order at page 31, Paragraph 250.

provider, such Customers shall be permitted to retain their current telephone numbers if they so desire and if they do not change their service address to an address served by a different central office. U S WEST shall take no action to prevent AT&T customers from retaining their current telephone numbers.

10. AT&T Responsibilities

10.1 AT&T must send to U S WEST either (a) complete and accurate end user listing information for Directory Assistance and 911 Emergency Services using processes mutually agreed to by the Parties, or (b) notification of as is migration. AT&T must provide to U S WEST accurate end user information to ensure appropriate listings in any databases in which U S WEST retains and/or maintains end user information. AT&T assumes liability for the accuracy of information provided to U S WEST. After receiving accurate information from AT&T, U S WEST assumes liability for the accuracy of transmission of such information to the database provider (e.g., SCC).

10.2 U S WEST shall provide AT&T with the capability to assign large quantities (i.e., greater than ten (10)) telephone numbers for multiple line and PBX customers in accordance with U S WEST's tariffs and/or its own internal practices.

10.3 AT&T will provide a three (3) year non-binding forecast within ninety (90) days of a request by U S WEST.. The forecast shall be updated and provided to U S WEST on a quarterly basis. The initial forecast will provide:

The date service will be offered (by city and/or state)
The type and quantity of service(s) which will be offered
AT&T's anticipated order volume
AT&T's key contact personnel

11. Pricing

The wholesale discount rate charged to AT&T for Local Resale is set forth in Attachment 1 of this Agreement.

12. Deposit

12.1 U S WEST may require a suitable deposit to be held by U S WEST as a guarantee for payment of U S WEST's charges for companies which cannot demonstrate sufficient financial integrity based on commercially reasonable standards, which may include a satisfactory credit rating as determined by a recognized credit rating agency reasonably acceptable to U S WEST.

12.2 **For purposes of this Agreement, a deposit will not be required from AT&T**[11] regardless of whether a deposit may be required from any other CLEC.

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[11] Per First Order at page 22, Paragraph 176.

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UNBUNDLED ACCESS/ELEMENTS

1. Introduction

The following standards shall apply to each provision in Attachment 3. Failure to specifically reference this standard, or individual subsections 1.1 - 1.3 below, shall not be construed to mean this standard does not apply.

1.1 *Pursuant to the Act, U S WEST shall provide nondiscriminatory access to the network elements specified in this Attachment 3 at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory.*

1.2 *For purposes of this Attachment 3, "rates, terms and conditions that are just, reasonable and nondiscriminatory" shall mean that (i) such terms and conditions are equal in quality to the terms and conditions that U S WEST provides to itself, or, (ii) where it is technically infeasible to provide such terms and conditions to AT&T, such terms and conditions are offered equally to all requesting carriers.*

1.3 *Notwithstanding any performance standard set forth in this Attachment, U S WEST will provide the services set forth in this Attachment to AT&T with the level of service quality set forth in Section 52, Part A of this Agreement.*

1.4 *U S WEST shall provide unbundled Network Elements in accordance with this Agreement, the Act, FCC rules and regulations, and state rules, regulations and orders. The price for each Network Element is set forth in Attachment 1 of this Agreement. Except as otherwise set forth in this Attachment, AT&T may order Network Elements as of the Effective Date of this Agreement.*

1.5 General Terms

1.5.1 *U S WEST agrees to make available the following unbundled Network Elements which are addressed in more detail in the following sections of this Attachment: (a) local loop, (b) local and tandem switches* **(including all vertical switching features provided by such switches)**;[1] *(c) interoffice transmission facilities, (d) network interface devices, (e) signaling and call-related database facilities, (f) operations support systems functions, and (g) operator and directory assistance facilities.*

Issue 3-1 - Partial

[AT&T proposed provision]

1.5.2 **U S WEST shall offer each Network Element individually and in Combinations with any other Network Element or Network Elements in order to permit AT&T to combine such Network Element or Network Elements obtained from U S WEST or with network components provided by itself or by third parties to provide Telecommunications Services to its subscribers. U S WEST must combine unbundled Network Elements in any manner requested by AT&T, unless U S WEST can prove that a request is not technically feasible or would undermine the ability of other carriers to access unbundled Network Elements and interconnect. AT&T may purchase**

[1] Per First Order at page 11, Paragraph 78.

unbundled Network Elements individually or in Combinations without restrictions as to how those elements may be rebundled.[2]

[U S WEST proposes the following.]

1.5.2 U S WEST shall offer each Network Element individually with any other individual Network Element or Network Elements in order to permit AT&T to combine such Network Element or Network Elements obtained from U S WEST or with network components provided by itself or by third parties to provide Telecommunications Services to its subscribers. U S WEST is not obligated to provide AT&T two or more unbundled network elements in combination. U S WEST will enable AT&T to combine two or more network elements pursuant to the re-bundling provisions at Section 19 of this Agreement.

2. Unbundled Network Elements

2.1 U S WEST shall offer Network Elements to AT&T on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement.

2.2 U S WEST shall permit AT&T to connect AT&T's facilities or facilities provided to AT&T by third parties with each of U S WEST's unbundled Network Elements at any technically feasible point designated by AT&T.

2.3 AT&T may use one or more Network Elements to provide any feature, function, capability, or service option such Network Element(s) is capable of providing or any feature, function, capability, or service option described in the technical references identified herein, or as may otherwise be determined by AT&T.

2.3.1 AT&T may, at its option, designate any technically feasible point of access to unbundled Network Elements.
Issue 3-2 - Parked

[U S WEST proposes the following]

2.4 For each Network Element, U S WEST shall provide the Single Point of Termination ("SPOT") frame as a demarcation point as described in Section 19 below.

[AT&T proposes the following]

2.4 For each Network Element, U S WEST shall provide a demarcation point (e.g., at a Digital Signal Cross Connect, DCS, Light Guide Cross Connect panel or a Main Distribution Frame) and if necessary, access to the AT&T side of such demarcation point, which AT&T agrees is suitable. Where U S WEST provides combined Network Elements at AT&T's direction, however, no demarcation point shall exist between such contiguous Network Elements.

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[2] Per First Order at page 12, Paragraph 83.

2.5 *[Intentionally left blank for numbering consistency.]*

2.6 *This Attachment describes the initial set of Network Elements which AT&T and U S WEST have identified as of the Effective Date of this Agreement:*

Loop
Network Interface Device
Distribution (subject to the BFR)
Local Switching
Operator Systems
Shared Transport
Dedicated Transport
Signaling Link Transport
Signaling Transfer Points
Service Control Points/Databases
Tandem Switching
911
Directory Assistance
Operational Support Systems[3]

2.7 *AT&T and U S WEST agree that the Network Elements identified in this Attachment are not all of the possible Network Elements.*

2.8 *AT&T may identify additional or revised Network Elements as necessary to provide Telecommunications Services to its subscribers, to improve network or service efficiencies or to accommodate changing technologies, customer demand, or other requirements.*

3. Standards for Network Elements

3.1 *Each Network Element shall be furnished at a performance level equal to the performance level that U S WEST provides itself as to*[4] *the requirements set forth in the technical references identified herein for each such Network Element, as well as any performance or other requirements, identified in this Attachment, subject to Sections 52.5.1 and 52.5.2 of Part A of this Agreement.*

3.2 *If one or more of the requirements set forth in this Agreement are in conflict, the Parties agree to resolve such conflict in accordance with Section 27, Dispute Resolution, of Part A of this Agreement.*

3.2.1 *U S WEST shall provide to AT&T, upon request, engineering, design, performance and other network data sufficient for AT&T to determine that the requirements of this Section 3 are being met. In the event that such data indicates that the requirements set forth herein are not being met, U S WEST shall, within ten (10) days, cure any design, performance or other deficiency and provide new data sufficient for AT&T to determine that such deficiencies have been cured.*

3.2.2 *U S WEST agrees to work cooperatively with AT&T to provide Network Elements that will meet AT&T's needs in providing Telecommunications Services to its subscribers.*

Description of Unbundled Elements

[3] Pursuant to the Eighth Circuit Decision, the Parties agree to this addition.
[4] Pursuant to the Eighth Circuit Decision, the Parties have agreed to this modification.

4. Tandem Switching

U S WEST will provide a tandem switching element ("Tandem Switching") on an unbundled basis. The tandem switch element includes the facilities connecting the trunk to the distribution frames to the switch, and all the functions of the switch itself, including those facilities that establish a temporary transmission path between two other switches. The definition of the tandem switching element also includes the functions centralized in tandems rather than in separate end office switches, such as call recording, the routing of calls to Operator Services, and signaling conversion functions.

4.1 Definition:

Tandem Switching is the function that establishes a communications path between two switching offices through a third switching office (the tandem switch) including, but not limited to, those of AT&T, U S WEST, independent telephone companies (ICOs), IXCs and wireless carriers.

4.2 Technical Requirements

4.2.1 Tandem Switching provided by U S WEST to AT&T shall have the same capabilities or equivalent capabilities as those described in Bell Communications Research TR-TSY-000540 Issue 2R2, Tandem Supplement, June 1, 1990. The requirements for Tandem Switching include, but are not limited to, the following:

4.2.1.1 Tandem Switching shall provide signaling to establish a tandem connection;

4.2.1.2 When provided with Custom Routing, Tandem Switching shall provide screening (digit analysis) and routing as designated by AT&T.

4.2.1.3 Where technically feasible, U S WEST shall modify tandem switching for the recording of billable events to the extent necessary to accommodate interconnection and access to unbundled network elements.

4.2.1.4 [Intentionally left blank for numbering consistency.]

4.2.1.5 Tandem Switching shall provide connectivity to Operator Systems as designated by AT&T;

4.2.1.6 Tandem Switching shall provide access to toll free number portability database where AT&T sends such traffic to a tandem;

4.2.1.7 Tandem Switching shall allow the passing of all functions associated with traffic for all trunk interconnection discussed under the "Network Interconnection" section of this Agreement (e.g., SS7, MF, DTMF, Dial Pulse, PRI-ISDN, DID, and CAMA-ANI (if appropriate for 911));

4.2.1.8 Tandem Switching shall provide connectivity to PSAPs where 911 solutions are deployed and the tandem is used for 911; and

4.2.1.9 Tandem Switching shall provide connectivity to Transit Traffic to and from other carriers.

4.2.2 Tandem Switching shall accept connections (including the necessary signaling and trunking interconnections) between end offices, other tandems, IXCs, ICOs, CAPs and CLEC switches.

4.2.3 *Tandem Switching shall provide local tandeming functionality between two (2) end offices including two (2) offices belonging to different CLECs (e.g., between an AT&T end office and the end office of another CLEC).*

4.2.4 *Tandem Switching shall preserve CLASS/LASS features and Caller ID as traffic is processed. Additional signaling information and requirements are provided in Section 15 of this Attachment.*

4.2.5 *Tandem Switching shall record billable events and send them to the area billing centers designated by AT&T. Billing requirements are specified in Attachment 5 of this Agreement.*

4.2.6 *U S WEST shall perform routine testing and fault isolation on the underlying switch providing Tandem Switching and all its interconnections. When requested by AT&T, the results and reports of the testing shall be made immediately available to AT&T.*

4.2.7 *When requested by AT&T, U S WEST shall provide to AT&T for review performance data regarding traffic characteristics or other measurable elements with respect to AT&T traffic.*

4.2.8 *Tandem Switching shall control congestion using capabilities such as Automatic Congestion Control and Network Routing Overflow. Congestion control provided or imposed on AT&T traffic shall be at parity with controls being provided or imposed on U S WEST traffic (e.g., U S WEST shall not block AT&T traffic and leave its own traffic unaffected or less affected).*

4.2.9 *Tandem Switching shall route calls to U S WEST or AT&T endpoints or platforms (e.g., Operator Services and PSAPs) on a per call basis as designated by AT&T. Detailed primary and overflow routing plans for all interfaces available within the U S WEST switching network shall be mutually agreed to by AT&T and U S WEST. Such plans shall meet AT&T requirements for routing calls through the local network.*

4.2.10 *Tandem Switching shall process originating toll free traffic received from an AT&T local switch.*

4.2.11 *In support of AIN triggers and features, Tandem Switching shall provide SSP capabilities when these capabilities are not available from the Local Switching Network Element.*

4.2.12 *The Local Switching and Tandem Switching functions may be combined in an office. If this is done, both Local Switching and Tandem Switching shall provide all of the functionality required of each of those Network Elements in this Agreement.*

4.3 *Interface Requirements*

4.3.1 *Tandem Switching shall provide interconnection to the E911 PSAP where the underlying Tandem is acting as the E911 Tandem.*

4.3.2 *Tandem Switching shall interconnect, with direct trunks, to all carriers with which U S WEST interconnects.*

4.3.3 *U S WEST shall provide all signaling necessary to provide Tandem Switching with no loss of feature functionality.*

4.3.4 *For applicable call types, Tandem Switching shall interconnect with AT&T's switch, using two-way trunks, for traffic that is transiting via the U S WEST network to interLATA or intraLATA carriers. At AT&T's request, Tandem Switching shall record and keep records of traffic for billing.*

4.3.5 *At AT&T's request, Tandem Switching shall provide overflow routing of traffic from a given trunk group or groups onto another trunk group or groups according to the methodology employed by U S WEST as designated by AT&T.*

4.4 *Tandem Switching shall meet or be at the performance level that U S WEST provides itself as to[5] each of the requirements for Tandem Switching set forth in the following technical references:*

4.4.1 *Bell Communications Research TR-TSY-000540 Issue 2R2, Tandem Supplement, June 1, 1990;*

4.4.2 *GR-905-CORE covering CCSNIS;*

4.4.3 *GR-1429-CORE for call management features; and*

4.4.4 *GR-2863-CORE and GR-2902-CORE for CCS AIN interconnection.*

5. Shared Transport

5.1 *U S WEST will provide unbundled access to U S WEST transmission facilities between end offices, end offices and the tandem switch, and the tandem switch and end offices for completing local calls. Such transmission facilities would be shared with U S WEST and as applicable with other CLECS. Transport routing shall be on an identical basis as routing is performed by U S WEST, providing the same efficiencies that U S WEST employs for itself. Shared transport shall meet the technical specifications as itemized below for Common Transport.*

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[AT&T proposes the following] [U S WEST opposes the addition]

Costs for shared transport will be allocated appropriately based upon the transmission path taken by each call.

5.2 *Technical Requirements*

5.2.1 *U S WEST shall be responsible for the engineering, provisioning, and maintenance of the underlying equipment and facilities used to provide Shared Transport.*

5.2.2 *In accordance with Part A, Sections 52.5.1 and 52.5.2, of this Agreement, at a minimum, Shared Transport shall meet all of the requirements set forth in the following technical references (as applicable for the transport technology being used):*

5.2.3 *ANSI T1.101-1994, American National Standard for Telecommunications-Synchronization Interface Standard Performance and Availability;*

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[5] Pursuant to the Eighth Circuit Decision, the Parties agree to this modification.

5.2.3.1 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;

5.2.3.2 ANSI T1.102.01-199x, American National Standard for Telecommunications - Digital Hierarchy - VT1.5;

5.2.3.3 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;

5.2.3.4 ANSI T1.105.01-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Automatic Protection Switching;

5.2.3.5 ANSI T1.105.02-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Payload Mappings;

5.2.3.6 ANSI T1.105.03-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Jitter at Network Interfaces;

5.2.3.7 ANSI T1.105.03a-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET)-Jitter at Network Interfaces - DS-1 Supplement;

5.2.3.8 ANSI T1.105.05-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Tandem Connection;

5.2.3.9 ANSI T1.105.06-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Physical Layer Specifications;

5.2.3.10 ANSI T1.105.07-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Sub STS-1 Interface Rates and Formats;

5.2.3.11 ANSI T1.105.09-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Network Element Timing and Synchronization;

5.2.3.12 ANSI T1.106-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode);

5.2.3.13 ANSI T1.107-1988, American National Standard for Telecommunications - Digital Hierarchy - Formats Specifications;

5.2.3.14 ANSI T1.107a-1990, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications (DS3 Format Applications);

5.2.3.15 *ANSI T1.107b-1991, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications;*

5.2.3.16 *ANSI T1.117-1991, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (SONET) (Single Mode - Short Reach);*

5.2.3.17 *ANSI T1.403-1989, Carrier to Subscriber Installation, DS-1 Metallic Interface Specification;*

5.2.3.18 *ANSI T1.404-1994, Network-to-Subscriber Installation - DS-3 Metallic Interface Specification;*

5.2.3.19 *ITU Recommendation G.707, Network node interface for the synchronous digital hierarchy (SDH);*

5.2.3.20 *ITU Recommendation G.704, Synchronous frame structures used at 1544, 6312, 2048, 8488 and 44736 kbit/s hierarchical levels;*

5.2.3.21 *Bellcore FR-440 and TR-NWT-000499, Transport Systems Generic Requirements (TSGR): Common Requirements;*

5.2.3.22 *Bellcore GR-820-CORE, Generic Transmission Surveillance: DS-1 & DS-3 Performance;*

5.2.3.23 *Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET); Common Generic Criteria;*

5.2.3.24 *Bellcore TR-NWT 000507, Transmission, Section 7, Issue 5 (Bellcore, December 1993) (A module of LSSGR, FR-NWT-000064.);*

5.2.3.25 *Bellcore TR-NWT-000776, Network Interface Description for ISDN Subscriber Access;*

5.2.3.26 *Bellcore TR-INS-000342, High-Capacity Digital Special Access Service-Transmission Parameter Limits and Interface Combinations, Issue 1, February 1991;*

5.2.3.27 *Bellcore ST-TEC-000052, Telecommunications Transmission Engineering Textbook, Volume 2: Facilities, Third Edition, Issue 1, May 1989;and*

5.2.3.28 *Bellcore ST-TEC-000051, Telecommunications Transmission Engineering Textbook Volume 1: Principles, Third Edition, Issue 1, August 198.*

6. *[Intentionally left blank for numbering consistency.]*

7. **Dedicated Transport**

7.1 *Definition:*

7.1.1 Dedicated Transport is a transmission path between any of the following: U S WEST's end offices, U S WEST Serving Wire Centers, U S WEST tandem switches, AT&T meet points, AT&T switches or wire centers and interexchange carrier POPs.

7.1.2 U S WEST shall offer Dedicated Transport in each of the following manners:

7.1.2.1 as capacity on a shared facility;

7.1.2.2 as a circuit (e.g., DS-1, DS-3, STS-1) dedicated to AT&T;

7.1.2.3 provisioned on a system (i.e., the equipment and facilities used to provide Dedicated Transport such as SONET ring).

7.1.3 When Dedicated Transport is provided as a circuit or as capacity on a shared facility, it shall include, as appropriate:

7.1.3.1 multiplexing functionality;

7.1.3.2 grooming functionality; and,

7.1.3.3 redundant equipment and facilities necessary to support protection and restoration.

7.1.4 When Dedicated Transport is provided it shall include:

7.1.4.1 transmission equipment such as multiplexers, line terminating equipment, amplifiers, and regenerators;

7.1.4.2 inter-office transmission facilities such as optical fiber, copper twisted pair, and coaxial cable;

7.1.4.3 redundant equipment and facilities necessary to support protection and restoration; and

7.1.4.4 access to the Digital Cross-Connect System (DCS) functionality as an option in the same manner provided to IXCs that purchase transport services. DCS is described below in Section 7.5 of this Attachment.

7.2 Technical Requirements

This Section sets forth technical requirements for all Dedicated Transport.

7.2.1 When U S WEST provides Dedicated Transport (e.g., DS-1, DS-3, STS-N) such transport shall be AT&T designated traffic.

7.2.2 U S WEST shall offer Dedicated Transport using currently available technologies including, but not limited to, DS-1 and DS-3 transport systems, SONET Bi-directional Line Switched Rings, SONET Unidirectional Path Switched Rings, and SONET point-to-point transport systems (including linear add-drop systems), at all available transmission bit rates.

7.2.3 When requested by AT&T, Dedicated Transport shall provide physical diversity. Physical diversity means that two (2) circuits are provisioned in such a way that no single failure of facilities or equipment will cause a failure on both circuits.

7.2.4 When physical diversity is requested by AT&T, U S WEST shall provide the maximum feasible physical separation between transmission paths for all facilities and equipment (unless otherwise agreed to by AT&T).

7.2.5 Upon AT&T's written request and where technically feasible and available in the U S WEST network, U S WEST shall provide real time and continuous remote access to performance monitoring and alarm data affecting, or potentially affecting, AT&T's traffic.

7.2.6 U S WEST shall offer the following interface transmission rates for Dedicated Transport:

7.2.6.1 DS-1 (Extended SuperFrame - ESF/B8ZS, D4, and unframed applications shall be provided, except for those local/EAS tandems as designated by U S WEST);

7.2.6.2 DS-3 (C-bit Parity, M13, and unframed applications shall be provided);

7.2.6.3 SONET standard interface rates in accordance with ANSI T1.105 and ANSI T1.105.07 and physical interfaces per ANSI T1.106.06 (including referenced interfaces). In particular, VT1.5 based STS-1s will be the interface at an AT&T service node; and

7.2.6.4 where available, SONET standard interface rates in accordance with International Telecommunications Union ("ITU") Recommendation G.707 and Plesiochronous Digital Hierarchy ("PDH") rates per ITU Recommendation G.704.

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[U S WEST proposes the following]

7.2.7 U S WEST shall provide intraoffice wiring up to a suitable Single Point of Termination ("SPOT") between Dedicated Transport and AT&T designated equipment. U S WEST shall provide the following equipment for the physical SPOT:

7.2.7.1 DSX1 or DCS for DS-1s or VT1.5s;

7.2.7.2 DSX3 or DCS for DS-3s or STS-1s; and

7.2.7.3 Light guide cross-connect for optical signals (e.g., OC-3 and OC-12).

7.2.8 For Dedicated Transport U S WEST shall design such transport (including, but not limited to, facility routing and termination points) according to AT&T specifications.

7.2.9 Upon AT&T's request and where available, U S WEST shall provide AT&T with electronic provisioning control, of AT&T specified Dedicated Transport via Command-A-Link or equivalent interface in the same manner as is provided to interexchange carriers.

7.2.10 U S WEST shall offer Dedicated Transport together with and separately from DCS.

7.3 Technical Requirements for Dedicated Transport Using SONET Technology.

This Section sets forth additional technical requirements for Dedicated Transport using SONET technology including rings, point-to-point systems, and linear add-drop systems.

7.3.1 All SONET Dedicated Transport provided as a system shall:

7.3.1.1 be synchronized with a primary Stratum 1 level timing source;

7.3.1.2 where technically feasible, provide SONET standard interfaces as available in the U S WEST network and consistent with generally accepted industry standards which properly interwork with SONET standard equipment from other vendors, including, but not limited to, SONET standard section, line and path performance monitoring, maintenance signals, alarms, and data channels;

7.3.1.3 provide Data Communications Channel ("DCC") or equivalent connectivity through the SONET transport system. Dedicated Transport provided over a SONET transport system shall be capable of routing DCC messages between AT&T and SONET network components connected to the Dedicated Transport. For example, if AT&T leases a SONET ring from U S WEST, that ring shall support DCC message routing between AT&T and SONET network components connected to the ring; and

7.3.1.4 support the following performance requirements for each circuit (STS-1, DS-1, DS-3, etc.):

7.3.1.4.1 no more than ten (10) Errored Seconds Per Day (Errored Seconds are defined in the technical reference at Section 7.4.5); and

7.3.1.4.2 no more than one (1) Severely Errored Second Per Day (Severely Errored Seconds are defined in the technical reference at Section 7.4.5).

7.3.2 SONET rings shall:

7.3.2.1 be provisioned on physically diverse fiber optic cables (including separate building entrances where available). "Diversely routed" shall be interpreted as the maximum feasible physical separation between transmission paths, unless otherwise agreed to by AT&T;

7.3.2.2 support dual ring interworking per SONET Standards where available in the U S WEST network;

7.3.2.3 provide the necessary redundancy in optics, electronics, and transmission paths such that no single failure will cause a service interruption;

7.3.2.4 where available, provide the ability to disable ring protection switching at AT&T's direction (selective protection lock-out). This requirement applies to line switched rings only;

7.3.2.5 where available, provide the ability to use the protection channels to carry extra traffic. This requirement applies to line switched rings only;

7.3.2.6 provide 50 millisecond restoration as defined in SONET standards;

7.3.2.7 where available, have settable ring protection switching thresholds that shall be set in accordance with AT&T's specifications;

7.3.2.8 where available, provide revertive protection switching with a settable wait to restore delay with a default setting of five (5) minutes. This requirement applies to line switched rings only;

7.3.2.9 provide non-revertive protection switching. This requirement applies to path switched rings only; and

7.3.2.10 adhere to the following availability requirements, where availability is defined in the technical reference set forth in Section 7.4.5:

7.3.2.10.1 no more than 0.25 minutes of unavailability per month; and

7.3.2.10.2 no more than 0.5 minutes of unavailability per year.

7.4 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, at a minimum, Dedicated Transport shall meet each of the requirements set forth in Section 7.2.3 of this Attachment and in the following technical references:

7.4.1 ANSI T1.105.04-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Data Communication Channel Protocols and Architectures;

7.4.2 ANSI T1.119-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Operations, Administration, Maintenance, and Provisioning (OAM&P) Communications;

7.4.3 ANSI T1.119.01-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Operations, Administration, Maintenance, and Provisioning (OAM&P) Communications Protection Switching Fragment;

7.4.4 ANSI T1.119.02-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) Operations, Administration, Maintenance, and Provisioning (OAM&P) Communications Performance Monitoring Fragment; and

7.4.5 ANSI T1.231-1993 -American National Standard for Telecommunications - Digital Hierarchy - Layer 1 In-Service Digital Transmission Performance Monitoring.

7.5 Digital Cross-Connect System (DCS)

7.5.1 Definition

7.5.1.1 Digital Cross-Connect System ("DCS") is a function which provides automated cross connection of Digital Signal level 0 (DS-0) or higher transmission bit rate digital channels within physical interface facilities. Types of DCSs include but are not limited to DCS 1/0s, DCS 3/1s, and DCS 3/3s, where the nomenclature 1/0 denotes interfaces typically at the DS-1 rate or greater with cross-connection typically at the DS-0 rate. This same nomenclature, at the appropriate rate substitution, extends to the other types of DCSs specifically cited as 3/1 and 3/3. Types of DCSs that cross-connect Synchronous Transport Signal level 1 (STS-1) or other Synchronous Optical Network ("SONET") signals (e.g., STS-3) are also DCSs, although not denoted by this same type of nomenclature. DCS may provide the functionality of more than one of the aforementioned DCS types (e.g., DCS 3/3/1 which combines functionality of DCS 3/3 and DCS 3/1)

For such DCSs, the requirements will be, at least, the aggregation of requirements on the "component" DCSs.

7.5.1.2 In locations where automated cross connection capability does not exist, a Digital Signal Cross-Connect ("DSX") or light guide cross-connect patch panels and D4 channel banks or other DS-0 and above multiplexing equipment used to provide the function of a manual cross connection will be made available.

7.5.1.3 Interconnection between a DSX or light guide cross-connect, to a switch, another cross-connect, or other service platform device, is included as part of DCS.

7.6 DCS Technical Requirements

7.6.1 DCS shall provide completed end-to-end cross connection of the channels designated by AT&T.

7.6.2 DCS shall perform facility grooming, multipoint bridging, one-way broadcast, two-way broadcast, and facility test functions, where such technology is available.[6]

7.6.3 DCS shall provide multiplexing, format conversion, signaling conversion, or other functions, where such technology is available.[7]

7.6.4 The end-to-end cross connection shall be input to the underlying device used to provide DCS from an operator at a terminal or via an intermediate system. The cross connection assignment shall remain in effect whether or not the circuit is in use.

7.6.5 U S WEST shall administer and maintain DCS.

7.6.6 Where available, U S WEST shall provide various types of DCS, including:

7.6.6.1 DS-0 cross-connects (typically termed DCS 1/0);

7.6.6.2 DS1/VT1.5 (Virtual Tributaries at the 1.5Mbps rate) cross-connects (typically termed DCS 3/1);

7.6.6.3 DS-3 cross-connects (typically termed DCS 3/3);

7.6.6.4 STS-1 cross-connects; and

7.6.6.5 other technically feasible cross-connects designated by AT&T.

7.6.7 U S WEST shall provide immediate and continuous configuration and reconfiguration of the channels between the physical interfaces (i.e., U S WEST shall establish the processes to implement cross connects on demand) where available based on engineering forecasts.

7.6.8 U S WEST shall provide scheduled configuration and reconfiguration of the AT&T channels between the physical interfaces (i.e., U S WEST shall establish the

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[6] Pursuant to the Eighth Circuit Decision, the Parties agree to the deletion of the following: "technically feasible"

[7] Pursuant to the Eighth Circuit Decision, the Parties agree to the deletion of the following: "technically feasible"

processes to implement AT&T cross connects on the schedule designated by AT&T) or, at AT&T's option, permit AT&T to control such configurations and reconfigurations where available based on engineering forecasts.

7.6.9 DCS shall continuously monitor protected circuit packs and redundant common equipment.

7.6.10 DCS shall automatically switch to a protection circuit pack on detection of a failure or degradation of normal operation.

7.6.11 DCS equipment shall be equipped with a redundant power supply or a battery back-up.

7.6.12 U S WEST shall have available and utilize spare maintenance facilities and equipment necessary for provisioning repairs.

7.6.13 At AT&T's option, U S WEST shall provide, where available, AT&T with real time performance monitoring and alarm data on the signals and the components of the underlying equipment used to provide DCS that actually impact or might impact AT&T's services. For example, this may include hardware alarm data and facility alarm data on a DS-3 in which an AT&T DS-1 is traversing.

7.6.14 At AT&T's option, U S WEST shall provide AT&T with real time ability to initiate tests on integrated equipment used to test the signals and the underlying equipment used to provide DCS, as well as other integrated functionality for routine testing and fault isolation where available.

7.6.15 Where available, DCS shall provide SONET to asynchronous gateway functionality (e.g., STS-1 to DS-1 or STS-1 to DS-3).

7.6.16 Where available, DCS shall perform optical to electrical conversion where the underlying equipment used to provide DCS contains optical interfaces or terminations (e.g., Optical Carrier level 3, i.e., OC-3, interfaces on a DCS 3/1).

7.6.17 Where available, DCS shall have SONET ring terminal functionality where the underlying equipment used to provide DCS acts as a terminal on a SONET ring.

7.6.18 DCS shall provide multipoint bridging of multiple channels to other DCSs. AT&T may designate multipoint bridging to be one-way broadcast from a single master to multiple tributaries, or two-way broadcast between a single master and multiple tributaries.

7.6.19 DCS shall multiplex lower speed channels onto a higher speed interface and demultiplex higher speed channels onto lower speed interfaces as designated by AT&T.

7.7 DCS Interface Requirements

7.7.1 U S WEST shall provide physical interfaces on DS-0, DS-1, and VT1.5 channel cross-connect devices at the DS-1 rate or higher. In all such cases, these interfaces shall be in compliance with applicable Bellcore, ANSI, and ITU[8] standards.

[8] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and AT&T".

7.7.2 U S WEST shall provide physical interfaces on DS-3 channel cross-connect devices at the DS-3 rate or higher. In all such cases, these interfaces shall be in compliance with applicable Bellcore, ANSI, and ITU[9] standards.

7.7.3 U S WEST shall provide physical interfaces on STS-1 cross-connect devices at the OC-3 rate or higher. In all such cases, these interfaces shall in compliance with applicable Bellcore, ANSI, ITU[10] standards.

7.7.4 Interfaces on all other cross-connect devices shall be in compliance with applicable Bellcore, ANSI, and ITU[11] standards.

7.8 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, DCS shall, at a minimum, meet all the requirements set forth in the following technical references:

7.8.1 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;

7.8.2 ANSI T1.102.01-199x, American National Standard for Telecommunications - Digital Hierarchy - VT1.5;

7.8.3 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;

7.8.4 ANSI T1.105.03-1994, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Jitter at Network Interfaces;

7.8.5 ANSI T1.105.03a-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET): Jitter at Network Interfaces - DS-1 Supplement;

7.8.6 ANSI T1.105.06-199x, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Physical Layer Specifications;

7.8.7 ANSI T1.106-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode);

7.8.8 ANSI T1.107-1988, American National Standard for Telecommunications - Digital Hierarchy - Formats Specifications;

7.8.9 ANSI T1.107a-1990, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications (DS-3 Format Applications);

7.8.10 ANSI T1.107b-1991, American National Standard for Telecommunications - Digital Hierarchy - Supplement to Formats Specifications;

7.8.11 ANSI T1.117-1991, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (SONET) (Single Mode - Short Reach);

7.8.12 ANSI T1.403-1989, Carrier to Subscriber Installation, DS-1 Metallic Interface Specification;

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[9] Pursuant to the Eighth Circuit decision, the Parties agree to delete the following: "and AT&T".
[10] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and AT&T".
[11] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "and AT&T".

7.8.13 *ANSI T1.404-1994, Network-to-Subscriber Installation - DS-3 Metallic Interface Specification;*

7.8.14 *ITU Recommendation G.707, Network node interface for the synchronous digital hierarchy (SDH);*

7.8.15 *ITU Recommendation G.704, Synchronous frame structures used at 1544, 6312, 2048, 8488 and 44736 kbit/s hierarchical levels;*

7.8.16 *FR-440 and TR-NWT-000499, Transport Systems Generic Requirements (TSGR): Common Requirements;*

7.8.17 *GR-820-CORE, Generic Transmission Surveillance: DS1 & DS3 Performance;*

7.8.18 *GR-253-CORE, Synchronous Optical Network Systems (SONET); Common Generic Criteria; and*

7.8.19 *TR-NWT-000776, Network Interface Description for ISDN Subscriber Access.*

8. Loop

8.1 *Definition*

8.1.1 *A Loop is a transmission facility between a distribution frame, or its equivalent, in a U S WEST central office or wire center, and the Network Interface Device (as defined herein), or network interface at a subscriber's premises, to which AT&T is granted exclusive use. This includes, but is not limited to, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide ISDN, ADSL, HDSL, and DS-1 level signals.. A Loop may be composed of the following components:*

Loop Concentrator / Multiplexer
Loop Feeder
Network Interface Device (NID)
Distribution

8.1.1.1 *AT&T may purchase Loop and NID on an unbundled basis. AT&T shall use the Bona Fide Request Process set forth in Part A of this Agreement to request unbundling of Loop Concentrator/Multiplexer, Loop Feeder and Distribution.*

8.1.2 *If U S WEST uses Integrated Digital Loop Carrier ("IDLCs") systems to provide the local Loop, U S WEST will make alternate arrangements, equal in quality, to permit AT&T to order a contiguous unbundled local loop. These arrangements may, at U S WEST's option, include the following: providing AT&T with copper facilities or universal DLC that meet established technical parameters, deploying Virtual Remote Terminals, allowing AT&T to purchase the entire Integrated DLC, or converting integrated iDLCs to non-integrated systems.*

8.1.3 *U S WEST shall provide the BRI U interface using 2-wire copper loops in accordance with TR-NWT-000393, January 1991, Generic Requirements for ISDN Basic Access Digital Subscriber Lines.*

8.2 *Technical Requirements*

Subdivided to each component as detailed below.

8.3 *Interface Requirements*

Subdivided to each component as detailed below.

8.4 *Loop Components*

8.4.1 *Loop Concentrator/Multiplexer*

8.4.1.1 *Definition:*

8.4.1.1.1 *The Loop Concentrator/Multiplexer is the Network Element that: (a) aggregates lower bit rate or bandwidth signals to higher bit rate or bandwidth signals (multiplexing), (b) disaggregates higher bit rate or bandwidth signals to lower bit rate or bandwidth signals (demultiplexing); (c) aggregates a specified number of signals or channels to fewer channels (concentrating); (d) performs signal conversion, including encoding of signals (e.g., analog to digital and digital to analog signal conversion); and (e) in some instances performs electrical to optical (E/O) conversion.*

8.4.1.1.2 *The Loop Concentrator/Multiplexer function may be provided through a Digital Loop Carrier (DLC) system, channel bank, multiplexer or other equipment at which traffic is encoded and decoded, multiplexed and demultiplexed, or concentrated.*

8.4.1.2 *Technical Requirements*

8.4.1.2.1 *The Loop Concentrator/Multiplexer shall be capable of performing its functions on the signals for the following services, as needed by AT&T to provide end-to-end service capability to its subscriber, including, but not limited to:*

8.4.1.2.1.1 *two-wire & four-wire analog voice grade loops;*

8.4.1.2.1.2 *two-wire & four-wire loops conditioned to transmit the digital signals needed to provide digital services;*

8.4.1.2.1.3 *4-wire digital data (2.4Kbps through 64Kbps and "n" times 64Kbps (where n < 24);*

8.4.1.2.1.4 *DS 3 rate private lines where available; and*

8.4.1.2.1.5 *Optical SONET rate private lines where available.*

8.4.1.2.2 *The Loop Concentrator/Multiplexer shall perform the following functions as appropriate:*

8.4.1.2.2.1 *analog to digital signal conversion of both incoming and outgoing (upstream and downstream) analog signals;*

8.4.1.2.2.2 *multiplexing of the individual digital signals up to higher transmission bit rate signals (e.g., DS-0, DS-1, DS-3, or optical SONET rates) for transport to the U S WEST central office through the Loop Feeder; and*

8.4.1.2.2.3 concentration of end-user subscriber signals onto fewer channels of a Loop Feeder (when available the concentration ratio shall be as specified from time to time by AT&T.)

8.4.1.2.2.4 Concentration ratios shall not impair analog or digital performance.

8.4.1.2.3 AT&T may request U S WEST to provide power for the Loop Concentrator /Multiplexer through a non-interruptible source, if the function is performed in a central office, or from a commercial AC power source with battery backup, if the equipment is located outside a central office. Such power shall also adhere to the requirements stated herein.

8.4.1.2.4 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, the Loop Concentrator/Multiplexer shall be provided to AT&T in accordance with the following Technical References:

8.4.1.2.4.1 Bellcore TR-NWT-000057, Functional Criteria for Digital Loop Carrier Systems, Issue 2, January 1993;

8.4.1.2.4.2 Bellcore TR-NWT-000393, Generic Requirements for ISDN Basic Access Digital Subscriber Lines;

8.4.1.2.4.3 T1.106 - 1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode);

8.4.1.2.4.4 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;

8.4.1.2.4.5 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;

8.4.1.2.4.6 ANSI T1.403-1989, American National Standard for Telecommunications - Carrier to Subscriber Installation, DS-1 Metallic Interface Specification;

8.4.1.2.4.7 Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET), Common Generic Criteria;

8.4.1.2.4.8 Bellcore TR-TSY-000008, Digital Interface Between the SLC 96 Digital Loop Carrier System and a Local Digital Switch, Issue 2, August 1987;

8.4.1.2.4.9 Bellcore TR-NWT-000303, Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, Issue 2, December 1992; Rev. 1, December 1993; Supplement 1, December 1993;

8.4.1.2.4.10 Bellcore TR-TSY-000673, Operations Systems Interface for an IDLC System, (LSSGR) FSD 20-02-2100, Issue 1, September 1989; and

8.4.1.2.4.11 Bellcore Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, GR-303-CORE, Issue 1, September 1995.

8.4.1.3 Requirements for an Intelligent Loop Concentrator/ Multiplexer:

8.4.1.3.1 In addition to the basic functions described above for the Loop Concentrator/Multiplexer, the Intelligent Loop Concentrator/Multiplexer ("IC/M") shall provide facility grooming, facility test functions, format conversion and signaling conversion, as appropriate.

8.4.1.3.2 The underlying equipment that provides such IC/M function shall continuously monitor protected circuit packs and redundant common equipment.

8.4.1.3.3 The underlying equipment that provides such IC/M function shall automatically switch to a protection circuit pack on detection of a failure or degradation of normal operation.

8.4.1.3.4 The underlying equipment that provides such IC/M function shall be equipped with a redundant power supply or a battery back-up.

8.4.1.3.5 AT&T may request U S WEST to provide AT&T with real time performance monitoring and alarm data on IC/M elements that may affect AT&T's traffic. This includes IC/M hardware alarm data and facility alarm data on the underlying device that provides such IC/M function.

8.4.1.3.6 AT&T may request U S WEST to provide AT&T with real time ability to initiate tests on the underlying device that provides such IC/M function integrated test equipment as well as other integrated functionality for routine testing and fault isolation.

8.4.1.4 Interface Requirements

8.4.1.4.1 The Loop Concentrator/Multiplexer shall meet the following interface requirements, as appropriate for the configuration that AT&T designates:

8.4.1.4.2 The Loop Concentrator/Multiplexer shall provide an analog voice frequency copper twisted pair interface at the serving wire center.

8.4.1.4.3 The Loop Concentrator/Multiplexer shall provide digital 4-wire electrical interfaces at the serving wire center.

8.4.1.4.4 The Loop Concentrator/Multiplexer shall provide optical SONET interfaces at rates of OC-3, OC-12, OC-48, and OC-N.

8.4.1.4.5 The Loop Concentrator/Multiplexer shall provide the Bellcore TR-303 DS 1 level interface at the serving wire center. Loop Concentrator/ Multiplexer shall provide Bellcore TR-08 modes 1&2 DS1 interfaces when designated by AT&T.

8.4.1.4.6 The Intelligent Loop Concentrator/Multiplexer shall be provided to AT&T in accordance with the Technical References set forth in Sections 8.4.1.2.4.8 through 8.4.1.2.4.11 above.

8.4.2 Loop Feeder

8.4.2.1 Definition:

8.4.2.1.1 The Loop Feeder is the Network Element that provides connectivity between (a) a Feeder Distribution Interface (FDI) associated with Loop Distribution and a termination point appropriate for the media in a central office, or (b) a Loop Concentrator/Multiplexer provided in a remote terminal and a termination point appropriate for the media in a central office.

8.4.2.1.2 Pursuant to a Bona Fide Request for unbundled feeder or distribution, U S WEST shall provide AT&T physical access to the FDI and the right to connect the Loop Feeder to the FDI.

8.4.2.1.3 Upon request from AT&T regarding a specific area, U S WEST shall provide information on Feeder Distribution Interface (FDI) within a reasonable time. If such information is available as part of U S WEST's operations support system, it must be made available to AT&T on the same terms and conditions as it is available to U S WEST.

8.4.2.1.4 The physical medium of the Loop Feeder may be copper twisted pair, or single or multi-mode fiber or other existing technologies To the extent U S WEST agrees to provide facilities that differ from the existing, the imposition of special construction charges shall be applied as specified in Attachment 1.[12]

8.4.2.2 Requirements for Loop Feeder

8.4.2.2.1 The Loop Feeder shall be capable of transmitting analog voice frequency, basic rate ISDN, digital data, or, where available in the network, analog radio frequency signals, as appropriate.

8.4.2.2.2 U S WEST shall provide appropriate power for all active elements in the Loop Feeder. U S WEST will provide appropriate power from a central office source, or from a commercial AC source with rectifiers for AC to DC conversion and 8-hour battery back-up when the equipment is located in an outside plant Remote Terminal ("RT").

8.4.2.3 Additional Requirements for Special Copper Loop Feeder Medium

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[12] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

In addition to requirements set forth in the above, AT&T may require U S WEST to provide copper twisted pair Loop Feeder unfettered by any intervening equipment (e.g., filters, load coils, and range extenders), so that AT&T can use these Loop Feeders for a variety of services by attaching appropriate terminal equipment at the ends.

8.4.2.4 Additional Technical Requirements for DS-1 Conditioned Loop Feeder

In addition to the requirements set forth in the above, AT&T may designate that the Loop Feeder be conditioned to transport a DS-1 signal. The requirements for such transport are defined in the references below in Section 8.4.2.6.

8.4.2.5 Additional Technical Requirements for Optical Loop Feeder

In addition to the requirements set forth in the above, AT&T may designate that Loop Feeder will transport DS-3 and OC-n (where "n" is defined in the technical reference in Section 8.4.1.2.4.4). The requirements for such transport are defined in the references below in Section 8.4.2.6.

8.4.2.6 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, U S WEST shall offer Loop Feeder in compliance with the requirements set forth in the following Technical References:

8.4.2.6.1 Bellcore Technical Requirement TR-NWT-000499, Issue 5, December 1993, section 7 for DS-1 interfaces;

8.4.2.6.2 Bellcore TR-NWT-000057, Functional Criteria for Digital Loop Carrier Systems, Issue 2, January 1993;

8.4.2.6.3 Bellcore TR-NWT-000393, Generic Requirements for ISDN Basic Access Digital Subscriber Lines;

8.4.2.6.4 ANSI T1.106-1988, American National Standard for Telecommunications - Digital Hierarchy - Optical Interface Specifications (Single Mode);

8.4.2.6.5 ANSI T1.105-1995, American National Standard for Telecommunications - Synchronous Optical Network (SONET) - Basic Description including Multiplex Structure, Rates and Formats;

8.4.2.6.6 ANSI T1.102-1993, American National Standard for Telecommunications - Digital Hierarchy - Electrical Interfaces;

8.4.2.6.7 ANSI T1.403-1999, American National Standard for Telecommunications - Carrier to Subscriber Installation, DS-1 Metallic Interface Specification; and

8.4.2.6.8 Bellcore GR-253-CORE, Synchronous Optical Network Systems (SONET), Common Generic Criteria.

8.4.2.7 Interface Requirements

8.4.2.7.1 The Loop Feeder point of termination ("POT") within a U S WEST central office will be as follows:

8.4.2.7.1.1 Copper twisted pairs shall terminate on the MDF;

8.4.2.7.1.2 DS-1 Loop Feeder shall terminate on a DSX1, DCS1/0 or DCS3/1; and

8.4.2.7.1.3 Fiber Optic cable shall terminate on a light guide termination panel or equivalent.

8.4.2.7.2 In accordance with Sections 52.5.1 and 52.5.2 of Part A of this Agreement, Loop Feeder shall be equal to or at the same level as U S WEST provides to itself[13] for each of the applicable interface requirements set forth in the following technical references:

8.4.2.7.2.1 Bellcore TR-TSY-000008, Digital Interface Between the SLC 96 Digital Loop Carrier System and a Local Digital Switch, Issue 2, August 1987;

8.4.2.7.2.2 Bellcore TR-NWT-000303, Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, Issue 2, December 1992; Rev. 1, December 1993; Supplement 1, December 1993; and

8.4.2.7.2.3 Bellcore Integrated Digital Loop Carrier System Generic Requirements, Objectives and Interface, GR-303-CORE, Issue 1, September 1995.

9. Distribution

9.1 Definition:

9.1.1 Distribution provides connectivity between the NID component of Loop Distribution and the terminal block on the subscriber-side of an FDI. The FDI is a device that terminates the Distribution Media and the Loop Feeder, and cross-connects them in order to provide a continuous transmission path between the NID and a telephone company central office. There are three (3) basic types of feeder-distribution connections: (a) multiple (splicing of multiple distribution pairs onto one (1) feeder pair); (b) dedicated ("home run"); and (c) interfaced ("cross-connected"). While older plant uses multiple and dedicated methods, newer plant and all plant that uses DLC or other pair-gain technology necessarily uses the interfaced connection method. The feeder-distribution interface ("FDI") in the interfaced design makes use of a manual cross-connection, typically housed inside an outside plant device ("green box") or in a vault or manhole.

9.1.2 The Distribution may be copper twisted pair, coax cable, single or multi-mode fiber optic cable or other technologies. A combination that includes two (2) or more of these media is also possible. In certain cases, AT&T may request a copper twisted pair Distribution even in instances where the Distribution for services that U S WEST offers is other than a copper facility. To the extent U S WEST agrees to provide additional facilities, special construction charges and development costs will apply in accordance with the Construction section of Attachment 1.

9.2 Requirements for All Distribution

[13] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

9.2.1 *Distribution shall be capable of transmitting signals for the following services, as* requested by *AT&T:*

9.2.1.1 *two-wire & four-wire analog voice grade loops; and*

9.2.1.2 *two-wire & four-wire loops conditioned to transmit the digital signals needed to provide digital services.*

9.2.2 *Distribution shall transmit all signaling messages or tones. Where the Distribution includes any active elements that terminate any of the signaling messages or tones, these messages or tones shall be reproduced by the Distribution at the interfaces to an adjacent Network Element in a format that maintains the integrity of the signaling messages or tones. U S WEST shall not interfere with AT&T's ability to support functions associated with provisioning, maintenance, performance monitoring and testing of unbundled distribution.*

9.2.3 *U S WEST shall not interfere with AT&T's ability to support functions associated with provisioning, maintenance, performance monitoring and testing of the unbundled Distribution.*

9.2.4 *Distribution shall be equal to or at the same level as U S WEST provides to itself*[1] *for all of the applicable requirements set forth in the following technical references:*

9.2.4.1 *Bellcore TR-TSY-000057, "Functional Criteria for Digital Loop Carrier Systems"; and*

9.2.4.2 *Bellcore TR-NWT-000393, "Generic Requirements for ISDN Basic Access Digital Subscriber Lines."*

9.3 *Additional Requirements for Special Copper Distribution*

In addition to Distribution that supports the requirements set forth in Section 9.2. above, AT&T may designate Distribution to be copper twisted pair unfettered by any intervening equipment (e.g., filters, load coils, range extenders) so that AT&T can use these loops for a variety of services by attaching appropriate terminal equipment at the ends.

9.4 *Additional Requirements for Fiber Distribution*

Fiber optic cable Distribution shall be capable of transmitting signals for the following services in addition to the those set forth in Section 9.2.1 above:

9.4.1 *DS-3 rate private line service;*

9.4.2 *Optical SONET OC-n rate private lines (where "n" is defined in the technical reference in Section 8.4.1.2.4.4); and*

9.4.3 *Where available in the U S WEST network, Analog Radio Frequency based services (e.g., Cable Television (CATV)).*

9.5 *Additional Requirements for Coaxial Cable Distribution*

Where available in the U S WEST network, Coaxial Cable (coax) Distribution shall be capable of transmitting signals for the following services in addition to those set forth in Section 9.2.1 above:

[1] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

9.5.1 *Broadband data, either one way or bi-directional, symmetric or asymmetric, at rates between 1.5 Mb/s and 45 Mb/s; and*

9.5.2 *Analog Radio Frequency based services (e.g., CATV).*

9.6 *Interface Requirements*

9.6.1 *Signal transfers between the Distribution and the NID and an adjacent Network Element shall have levels of degradation that are within the performance requirements set forth in Section 18.2 of this Attachment.*

9.6.2 *Distribution shall be equal to or at the same level as U S WEST provides to itself*[15] *as to each of the applicable interface requirements set forth in the following technical references:*

9.6.2.1 *Bellcore TR-NWT-000049, "Generic Requirements for Outdoor Telephone Network Interface Devices" issued December 1, 1994;*

9.6.2.2 *Bellcore TR-NWT-000057, "Functional Criteria for Digital Loop Carrier Systems", issued January 2, 1993;*

9.6.2.3 *Bellcore TR-NWT-000393, "Generic Requirements for ISDN Basic Access Digital Subscriber Lines"; and*

9.6.2.4 *Bellcore TR-NWT-000253, SONET Transport Systems: Common Criteria (A module of TSGR, FR-NWT-000440), Issue 2, December 1991.*

10. Local Switching

10.1 Definition:

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[U S WEST proposes the following]

10.1.1 *Local Switching is the Network Element that provides the functionality required to connect the appropriate lines or trunks* via the SPOT [wired to the Main Distributing] *Frame* [("MDF") or Digital Cross Connect ("DSX") panel to a desired line or trunk.] *The desired connection path for each call type will vary by subscriber and will be specified by AT&T as a routing scenario that will be implemented in advance as part of or after the purchases of the unbundled Local Switching.* **All of the vertical features that the switch is capable of providing shall be available to AT&T as separate unbundled Network Elements**[16] and priced separately. *The Local Switching function also provides the ability to access transport, signaling (ISDN User Part ("ISUP") and Transaction Capabilities Application Part ("TCAP"), and platforms such as adjuncts, Public Safety Systems (911), Operator Services, Directory Services and Advanced Intelligent Network ("AIN"). Remote Switching Module functionality is included in the Local Switching function. Local Switching shall also be capable of routing local, intraLATA, interLATA, and international calls to the subscriber's preferred carrier*

[15] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.
[16] Per First Order at page 11, Paragraph 78.

[,call features (e.g., call forwarding) and Centrex capabilities].

10.1.2 *Local Switching, including the ability to route to AT&T's transport facilities shall be unbundled from all other unbundled Network Elements.*

10.2 *Technical Requirements*

10.2.1 *Local Switching shall be equal to or at the same level as U S WEST provides to itself as to*[17] *the requirements for Local Switching set forth in Bellcore's Local Switching Systems General Requirements FR-NWT-000064.*

10.2.1.1 *U S WEST shall route calls to the appropriate trunk or lines for call origination or termination.*

10.2.1.2 *U S WEST shall route calls on a per line or per screening class basis to (a) U S WEST platforms providing Network Elements or additional requirements, (b) AT&T designated platforms, or (c) third-party platforms.*

10.2.1.3 *U S WEST shall provide to AT&T recorded announcements as furnished by AT&T and call progress tones to alert callers of call progress and disposition. The installation cost shall be borne by AT&T for such announcements and call progress tones to the extent they are different than those standardly used by U S WEST.*

10.2.1.4 *U S WEST shall change a subscriber from U S WEST's services to AT&T's services without loss of feature functionality, unless designated otherwise by AT&T.*

10.2.1.5 *U S WEST shall perform routine testing (e.g., Mechanized Loop Tests ("MLT") and test calls such as 105, 107 and 108 type calls) and fault isolation on AT&T's unbundled Network Elements as designated by AT&T.*

10.2.1.6 *U S WEST shall repair and restore any equipment or any other maintainable component that may adversely impact AT&T's use of unbundled Local Switching.*

10.2.1.7 *U S WEST shall control congestion points such as mass calling events and network routing abnormalities using capabilities such as Automatic Call Gapping, Automatic Congestion Control, and Network Routing Overflow. Application of such control shall be competitively neutral and not favor any user of unbundled switching or U S WEST.*

10.2.1.8 *U S WEST shall perform manual call trace as designated by AT&T and shall permit subscriber originated call trace.*

10.2.1.9 *U S WEST shall record all billable events, involving usage of the Network Element, and send the appropriate recording data to AT&T as further described in Attachment 5.*

10.2.1.10 *For Local Switching used as E911 tandems, U S WEST shall allow interconnection with AT&T switches in that same local switch used as a E911 tandem and shall route calls to the appropriate Public Safety Access Point*

[17] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

("PSAP"). In the event the Local Switching element and the E911 tandem are contained within the same U S WEST switch, such trunking shall be provided on an intra-switch basis.

10.2.1.11 Where U S WEST provides the following special services, it shall provide to AT&T:

10.2.1.11.1 essential Service Lines;

10.2.1.11.2 Telephone Service Prioritization ("TSP");

10.2.1.11.3 related services for handicapped;

10.2.1.11.4 Where U S WEST provides soft dial tone, it shall do so on a competitively-neutral basis; and

10.2.1.11.5 any other service required by law or regulation.

10.2.1.12 U S WEST shall provide Switching Service Point ("SSP") capabilities and signaling software to interconnect the signaling links destined to the Signaling Transfer Point Switch ("STPs"). In the event Local Switching is provided out of a switch without SS7 capability, the Tandem shall provide this capability as further described in Section 4 of this Attachment on Tandem Switching. These capabilities shall adhere to Bellcore specifications TCAP (GR-1432-CORE), ISUP (GR-905-CORE), Call Management (GR-1429-CORE), Switched Fractional DS1 (GR-1357-CORE), Toll Free Service (GR-1428-CORE), Calling Name (GR-1597-CORE), Line Information Database (GR-954-CORE), and Advanced Intelligent Network (GR-2863-CORE).

10.2.1.13 U S WEST shall provide interfaces to adjuncts through industry standard and Bellcore interfaces. These adjuncts may include, but are not limited to, Service Node, Service Circuit Node, Voice Mail and Automatic Call Distributors. Examples of existing interfaces are ANSI ISDN standards Q.931 and Q.932.

10.2.1.14 Upon AT&T's request, U S WEST shall provide performance data regarding a subscriber line, traffic characteristics or other measurable elements to AT&T.

10.2.1.15 U S WEST shall offer all Local Switching features resident in a particular switch, and, in providing such features, do so at parity with those provided by U S WEST to itself or any other Person.

10.2.1.15.1 Such feature offerings shall include, but are not limited to:

Basic and primary rate ISDN;
Residential features;
Custom Local Area Signaling Services (CLASS/LASS);
Custom Calling Features; and
Centrex (including equivalent administrative capabilities, such as subscriber accessible reconfiguration and detailed message recording).

10.2.1.15.2 AT&T may use the BFR Process set forth in Part A of this Agreement to request unbundling of Advanced Intelligent Network ("AIN") triggers supporting AT&T and U S WEST service applications in U S WEST's SCPs. U S WEST shall offer AIN-based services in accordance with applicable technical references. Such services may include, but are not limited to:

10.2.1.15.2.1 Off-Hook Immediate;

10.2.1.15.2.2 Off-Hook Delay;

10.2.1.15.2.3 Private EAMF Trunk;

10.2.1.15.2.4 Shared Interoffice Trunk (EAMF, SS7);

10.2.1.15.2.5 Termination Attempt;

10.2.1.15.2.6 3/6/10;

10.2.1.15.2.7 N11;

10.2.1.15.2.8 Feature Code Dialing;

10.2.1.15.2.9 Custom Dialing Plan(s), including 555 services; and

10.2.1.15.2.10 Automatic Route Selection.

10.2.1.16 U S WEST shall assign each AT&T subscriber line the class of service designated by AT&T (e.g., using line class codes or other switch specific provisioning methods), and at AT&T's option shall route Directory Assistance calls from AT&T subscribers as directed by AT&T. This includes each of the following call types:

10.2.1.16.1 0+/0- calls;

10.2.1.16.2 911 calls;

10.2.1.16.3 411/DA calls;

10.2.1.16.4 InterLATA calls specific to PIC

10.2.1.16.5 IntraLATA calls specific to PIC

10.2.1.16.6 Toll Free calls, prior to database query;

10.2.1.16.7 Call forwarding of any type supported on the switch, to a line or a trunk; and

10.2.1.16.8 Any other customized routing that may be supported by the U S WEST switch.

10.2.1.17 U S WEST shall assign each AT&T subscriber line the class of service designated by AT&T (e.g., using line class codes or other switch specific provisioning methods) and shall route operator calls from AT&T subscribers as directed by AT&T at AT&T's option. For example, U S WEST may translate 0- and 0+ intraLATA traffic, and route the call through appropriate trunks to an AT&T Operator Services Position System ("OSPS"). Calls from Local Switching must pass the ANI-II digits unchanged.

10.2.1.18 If an AT&T customer subscribes to AT&T provided voice mail and messaging services, U S WEST shall redirect incoming calls to the AT&T system based upon designated service arrangements (e.g., busy, don't

answer, number of rings). In addition, U S WEST shall provide a Standard Message Desk Interface-Enhanced (SMDI-E) interface to the AT&T system. U S WEST shall support the Inter-switch Voice Messaging Service (IVMS) capability.

10.2.1.19 Local Switching shall be offered in accordance with the requirements of the following technical references and their future releases:

10.2.1.19.1 GR-1298-CORE, AIN Switching System Generic Requirements;

10.2.1.19.2 GR-1299-CORE, AIN Switch-Service Control Point (SCP)/Adjunct Interface Generic Requirements;

10.2.1.19.3 TR-NWT-001284, AIN 0.1 Switching System Generic Requirements; and

10.2.1.19.4 SR-NWT-002247, AIN Release 1 Update.

10.2.2 Interface Requirements:

10.2.2.1 U S WEST shall provide the following interfaces to Loops:

10.2.2.1.1 Standard Tip/Ring interface ,including loopstart or groundstart, on-hook signaling (e.g., for calling number, calling name and message waiting lamp);

10.2.2.1.2 Coin phone signaling provided through a U S WEST coin phone port;

10.2.2.1.3 Basic Rate Interface ISDN adhering to ANSI standards Q.931, Q.932 and appropriate Bellcore Technical Requirements;

10.2.2.1.4 Two-wire analog interface to PBX to include reverse battery, E&M, wink start and DID;

10.2.2.1.5 Four wire analog interface to PBX to include reverse battery, E&M, wink start and DID;

10.2.2.1.6 Four-wire DS-1 interface to PBX or subscriber provided equipment (e.g., computers and voice response systems);

10.2.2.1.7 Primary Rate ISDN to PBX adhering to ANSI standards Q.931, Q.932 and appropriate Bellcore Technical Requirements;

10.2.2.1.8 Switched Fractional DS-1 with capabilities to configure Nx64 channels (where "n" = 1 to 24); and

10.2.2.1.9 Loops adhering to Bellcore TR-NWT-08 and TR-NWT-303 specifications to interconnect Digital Loop Carriers.

10.2.2.2 U S WEST shall provide access to the following, but not limited to:

10.2.2.2.1 SS7 Signaling Network or Multi-Frequency trunking, if requested by AT&T;

because there is a limitation in the technical feasibility of offering custom routing beyond the capacity of the 1A ESS switch, custom routing will be offered to CLECs on a first-come, first-served basis.

10.4 Integrated Services Digital Network (ISDN)

10.4.1 Integrated Services Digital Network ("ISDN") is defined in two (2) variations. The first variation is Basic Rate ISDN ("BRI"). BRI consists of 2 Bearer (B) Channels and one Data (D) Channel. The second variation is Primary Rate ISDN ("PRI"). PRI consists of 23 B Channels and one D Channel. Both BRI and PRI B Channels may be used for voice, Circuit Switched Data ("CSD") or Packet Switched Data ("PSD"). The BRI D Channel may be used for call related signaling, non-call related signaling or packet switched data. The PRI D Channel may be used for call related signaling.

10.4.2 Technical Requirements — ISDN

10.4.2.1 U S WEST shall offer ISDN that:

10.4.2.2 provides integrated Packet handling capabilities;

10.4.2.3 allows for full 2B+D Channel functionality for BRI; and

10.4.2.4 allows for full 23B+D Channel functionality for PRI.

10.4.2.5 Each B Channel shall allow for voice, 64 Kbps CSD, and PSD of 128 logical channels at minimum speeds of 19 Kbps throughput of each logical channel up to the total capacity of the B Channel.

10.4.2.6 Each B Channel shall provide capabilities for alternate voice and data on a per call basis.

10.4.2.7 The BRI D Channel shall allow for call associated signaling, non-call associated signaling and PSD of 16 logical channels at minimum speeds of 9.6 Kbps throughput of each logical channel up to the total capacity of the D channel.

10.2.2.2.2 *Interface to AT&T operator services systems or Operator Services through appropriate trunk interconnections for the system; and*

10.2.2.2.3 *Interface to AT&T Directory Assistance Services through the AT&T switched network or to Directory Services through the appropriate trunk interconnections for the system; and 950 access or other AT&T required access to interexchange carriers as requested through appropriate trunk interfaces.*

10.3 Customized Routing

10.3.1 Description

Customized routing will enable AT&T to direct particular classes of calls to particular outgoing trunks based upon line class codes. AT&T may use customized routing to direct its customers' calls to 411, 555-1212, 0+ or 0-, to its own Operator Services platform Directory Assistance platform.

10.3.2 Limitations

B-

10.4.2.8 The PRI D Channel shall allow for call associated signaling.

10.4.3 Interface Requirements — ISDN

10.4.3.1 U S WEST shall provide the BRI interface using Digital Subscriber Loops adhering to Bellcore TR-NWT-303 Specifications to Interconnect Digital Loop Carriers.

10.4.3.2 U S WEST shall offer PSD interfaces adhering to the X.25, X.75 and X.75 ANSI and Bellcore requirements.

10.4.3.3 U S WEST shall offer PSD trunk interfaces operating at 56 Kbps.

11. Network Interface Device

11.1 Definition:

11.1.1 The Network Interface Device ("NID") is a single-line termination device or that portion of a multiple-line termination device required to terminate a single line or circuit. One of the functions of the NID is to establish the network demarcation point between a carrier and its subscriber. The NID features two (2) independent chambers or divisions which separate the service provider's network from the subscriber's inside wiring. Each chamber or division contains the appropriate connection points or posts to which the service provider and the subscriber each make their connections.

11.1.2 AT&T may connect its NID to U S WEST's NID.

11.1.3 U S WEST will allow AT&T to locate dropwires, other than U S WEST's drop wires, inside an existing U S WEST combination NID used in the provisioning of telephone service for single tenant end users subject to the following conditions:

11.1.3.1 Sufficient space exists inside the combination NID to allow proper installation of equipment in accordance with the NID manufacturers specifications and per the National Electric Code;

11.1.3.2 In order to maintain maintenance integrity for the NID, AT&T will install their own overvoltage protection and customer bridging equipment, terminate the dropwires to that equipment, and assume all operational responsibilities and liabilities for that equipment;

In the event that sufficient space is not available in the existing U S WEST NID, to accommodate additional drops, AT&T will be allowed to install and additional NID, at its own expense and the AT&T's NID can be connected to the existing U S WEST NID;

If the existing NID is not the new generation modular type, AT&T may install a new NID. U S WEST will be allowed to move its drop wire to the new NID and remove the old NID;

Upon request by AT&T, the Parties agree to jointly develop a satisfactory process to address the issues with access to single and multi party NIDs.

11.1.4 With respect to multiple-line termination devices, AT&T shall specify the quantity of NIDs it requires within such device.

11.2 Technical Requirements

11.2.1 The NID shall provide a clean, accessible point of connection for the inside wiring and for the Distribution Media and/or cross connect to AT&T's NID and shall maintain a connection to ground meeting the requirements as set forth below.

11.2.2 The NID shall be capable of transferring electrical analog or digital signals between the subscriber's inside wiring and the Distribution Media and/or cross connect to AT&T's NID.

11.2.3 All NID posts or connecting points shall be in place, secure, usable and free of any rust or corrosion. The protective ground connection shall exist and be properly installed. The ground wire shall be free of rust and corrosion and have continuity to ground.

11.2.4 The NID shall be capable of withstanding all normal local environmental variations.

11.2.5 Where the NID is not located in a larger, secure cabinet or closet, the NID shall be reasonably protected from vandalism. The NID shall be accessible to AT&T designated personnel. In cases where entrance to the subscriber premises is required to give access to the NID, AT&T shall obtain entrance permission directly from the subscriber.

11.2.6 U S WEST shall offer the NID together with, and separately from, the Distribution Media component of Loop Distribution.

11.3 Interface Requirements

11.3.1 The NID shall be the interface to subscribers' premises wiring for all loops.

11.3.2 The NID shall be at least equal to all the industry standards for NIDs set forth in the following technical references:

11.3.2.1 Bellcore Technical Advisory TA-TSY-000120 "Subscriber Premises or Network Ground Wire";

11.3.2.2 Bellcore Generic Requirement GR-49-CORE "Generic Requirements for Outdoor Telephone Network Interface Devices";

11.3.2.3 Bellcore Technical Requirement TR-NWT-00239 "Indoor Telephone Network Interfaces";

11.3.2.4 Bellcore Technical Requirement TR-NWT-000937 "Generic Requirements for Outdoor and Indoor Building Entrance"; and

11.3.2.5 Bellcore Technical Requirement TR-NWT-000133 "Generic Requirements for Network Inside Wiring."

12. Operator Systems

See Part A.

13. E911

See Part A.

14. Directory Assistance Data

See Part A.

15. Signaling Link Transport

15.1 Definition:

Signaling Link Transport is a set of two (2) or four (4) dedicated 56 Kbps transmission paths between AT&T-designated Signaling Points of Interconnection ("SPOI") that provides appropriate physical diversity and a cross connect at a U S WEST STP site.

15.2 Technical Requirements

15.2.1 Signaling Link Transport shall consist of full duplex mode 56 Kbps transmission paths.

15.2.2 Of the various options available, Signaling Link Transport shall perform in the following two ways:

15.2.1.1 as an "A-link" which is a connection between a switch or SCP and a home Signaling Transfer Point Switch ("STPs") pair; and

15.2.1.2 as a "D-link" which is a connection between two (2) STP pairs in different company networks (e.g., between two (2) STP pairs for two (2) (CLECs)).

15.2.3 Signaling Link Transport shall consist of two (2) or more signaling link layers as follows:

15.2.3.1 An A-link layer shall consist of two (2) links.

15.2.3.2 A D-link layer shall consist of four (4) links.

15.2.4 A signaling link layer shall satisfy a performance objective such that:

15.2.4.1 there shall be no more than two (2) minutes down time per year for an A-link layer transport only, and

15.2.4.2 there shall be negligible (less than 2 seconds) down time per year for a D-link layer transport only.

15.2.5 Where available, a signaling link layer shall satisfy interoffice and intraoffice diversity of facilities and equipment, such that:

15.2.5.1 no single failure of facilities or equipment causes the failure of both links in an A-link layer (i.e., the links should be provided on a minimum of two (2) separate physical paths end-to-end); and

15.2.5.2 no two concurrent failures of facilities or equipment shall cause the failure of all four (4) links in a D-link layer (i.e., the links should be provided on a minimum of three (3) separate physical paths end-to-end).

15.2.6 For requested link layers, U S WEST will provide AT&T with the level of diversity available.

15.3 *Interface Requirements*

15.3.1 *There shall be a DS-1 (1.544 Mbps) interface at the AT&T-designated SPOIs. Each 56 Kbps transmission path shall appear as a DS-0 channel within the DS-1 interface.*

16. **Signaling Transfer Points (STPs)**

16.1 *Definition*

Signaling Transfer Points ("STPs") provide functionality that enable the exchange of SS7 messages among and between switching elements, database elements and signaling transfer points.

16.2 *Technical Requirements*

16.2.1 *STPs shall provide signaling access to all other Network Elements connected to the U S WEST SS7 network. These include:*

16.2.1.1 *U S WEST Local Switching or Tandem Switching;*

16.2.1.2 *U S WEST Service Control Points/DataBases connected to or resident on service control points;*

16.2.1.3 *Third-party local or tandem switching systems connected to the U S WEST signaling network; and*

16.2.1.4 *Third-party-provided STPs connected to the U S WEST signaling network.*

16.2.2 *The connectivity provided by STPs shall fully support the functions of all other Network Elements connected to U S WEST's SS7 network. This includes the use of U S WEST's SS7 network to convey messages which neither originate nor terminate at a signaling end point directly connected to the U S WEST SS7 network (i.e., transit messages). When the U S WEST SS7 network is used to convey transit messages, there shall be no alteration of the Integrated Services Digital Network User Part ("ISDNUP") or Transaction Capabilities Application Part ("TCAP") user data that constitutes the content of the message.*

16.2.3 *If a U S WEST tandem switch routes traffic, based on dialed or translated digits, on SS7 trunks between an AT&T local switch and third party local switch, U S WEST's SS7 network shall convey the TCAP messages necessary to provide Call Management features (automatic callback, automatic recall, and screening list editing) between the AT&T local STPs and the STPs that provide connectivity with the third party local switch, even if the third party local switch is not directly connected to U S WEST's STPs.*

16.2.4 *STPs shall provide all functions of the MTP as specified in ANSI T1.111 (Reference 12.5.2). This includes:*

16.2.4.1 *Signaling Data Link functions, as specified in ANSI T1.111.2;*

16.2.4.2 *Signaling Link functions, as specified in ANSI T1.111.3; and*

16.2.4.3 *Signaling Network Management functions, as specified in ANSI T1.111.4.*

16.2.5 *STPs shall provide all functions of the SCCP necessary for Class 0 (basic connectionless) service, as specified in ANSI T1.112. In particular, this includes Global Title Translation ("GTT") and SCCP Management procedures, as specified in ANSI T1.112.4.*

16.2.6 *In cases where the destination signaling point is either a U S WEST local or tandem switching system or data base, or is an AT&T or third party local or tandem switching system directly connected to U S WEST's SS7 network, U S WEST STPs shall perform final GTT of messages to the destination and SCCP Subsystem Management of the destination. In all other cases, STPs shall perform intermediate GTT of messages to a gateway pair of STPs in an SS7 network connected with the U S WEST SS7 network, and shall not perform SCCP Subsystem Management of the destination.*

16.2.7 *STPs shall also provide the capability to route SCCP messages based on ISNI, as specified in ANSI T1.118, when this capability becomes available on U S WEST STPs.*

16.2.8 *STPs shall provide all functions of the OMAP commonly provided by STPs, as specified in the reference in Section 16.5.6. This includes:*

16.2.8.1 *MTP Routing Verification Test ("MRVT"); and,*

16.2.8.2 *SCCP Routing Verification Test ("SRVT").*

16.2.9 *In cases where the destination signaling point is either a U S WEST local or tandem switching system or database, or is an AT&T or third party local or tandem switching system directly connected to the U S WEST SS7 network, STPs shall perform MRVT and SRVT to the destination signaling point. In all other cases, STPs shall perform MRVT and SRVT to a gateway pair of STPs in an SS7 network connected with the U S WEST SS7 network. This requirement shall be superseded by the specifications for Inter-network MRVT and SRVT if and when these become approved ANSI standards and available capabilities of U S WEST STPs.*

16.2.10 *STPs shall be equal to or at the same level as U S WEST provides to itself*[18] *as to the following performance requirements:*

16.2.10.1 *MTP Performance, as specified in ANSI T1.111.6; and*

16.2.10.2 *SCCP Performance, as specified in ANSI T1.112.5.*

16.3 *Interface Requirements*

16.3.1 *U S WEST shall provide the following STPs options to connect AT&T or AT&T-designated local switching systems or STPs to the U S WEST SS7 network:*

16.3.1.1 *An A-link interface from AT&T local switching systems.*

16.3.2 *Each type of interface shall be provided by one or more sets (layers) of signaling links, as follows:*

[18] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

16.3.2.1 An A-link layer shall consist of two (2) links.

16.3.3 The Signaling Point of Interconnection (SPOI) for each link shall be located at a cross-connect element, such as a DSX-1, in the Central Office where the U S WEST STPs are located. There shall be a DS-1 or higher rate transport interface at each of the SPOIs. Each signaling link shall appear as a DS-0 channel within the DS-1 or higher rate interface.

16.3.3.1 U S WEST shall offer higher rate DS-1 signaling for interconnecting AT&T local switching systems or STPs with U S WEST STPs as soon as these become approved ANSI standards and available capabilities in U S WEST's network.

16.3.4 U S WEST shall provide MTP and SCCP protocol interfaces that shall conform to all relevant sections in the following specifications:

16.3.4.1 Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP); and

16.3.4.2 Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).

16.4 Message Screening

16.4.1 U S WEST shall set message screening parameters in order to accept messages from AT&T local or tandem switching systems destined to any signaling point in the U S WEST SS7 network with which the AT&T switching system has a signaling relation.

16.4.2 U S WEST shall set message screening parameters in order to accept messages from AT&T local or tandem switching systems destined to any signaling point or network interconnected to the U S WEST SS7 network with which the AT&T switching system has a signaling relation.

16.4.3 U S WEST shall set message screening parameters in order to accept messages destined to an AT&T local or tandem switching system from any signaling point or network interconnected to the U S WEST SS7 network with which the AT&T switching system has a signaling relation.

16.4.4 U S WEST shall set message screening parameters in order to accept and send messages destined to an AT&T SCP from any signaling point or network interconnected to the U S WEST SS7 network with which the AT&T SCP has a signaling relation.

16.5 STP Requirements

16.5.1 Subject to the provisions of Section 52.5.1 and 52.5.2 of Part A of this Agreement, STPs shall be equal to or at the same level as U S WEST provides to itself as to[13] all of the requirements for STPs set forth in the following technical references:

[13] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

16.5.2 *ANSI T1.111-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP);*

16.5.3 *ANSI T1.111A-1994 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP) Supplement;*

16.5.4 *ANSI T1.112-1992 American National, Standard for Telecommunications - Signaling System Number 7 (SS7) - Signaling Connection Control Part (SCCP);*

16.5.5 *ANSI T1.115-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Monitoring and Measurements for Networks;*

16.5.6 *ANSI T1.116-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Operations, Maintenance and Administration Part (OMAP);*

16.5.7 *ANSI T1.118-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Intermediate Signaling Network Identification (ISNI);*

16.5.8 *Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP); and*

16.5.9 *Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).*

17. Service Control Points/Databases

17.1 *Definition:*

17.1.1 *Databases are the Network Elements that provide the functionality for storage of, access to, and manipulation of information required to offer a particular service and/or capability. Databases include, but are not limited to: Number Portability, LIDB, Toll Free Number Database, Automatic Location Identification/Data Management System and AIN.*

17.1.2 *A Service Control Point ("SCP") is a specific type of Database Network Element functionality deployed in a Signaling System 7 ("SS7") network that executes service application logic in response to SS7 queries sent to it by a switching system also connected to the SS7 network. SCPs also provide operational interfaces to allow for provisioning, administration and maintenance of subscriber data and service application data. (e.g., a toll free database stores subscriber record data that provides information necessary to route toll free calls).*

17.2 *Technical Requirements for SCPs/Databases*

Requirements for SCPs/Databases within this section address storage of information, access to information (e.g., signaling protocols and response times), and administration of information (e.g., provisioning, administration, and maintenance). All SCPs/Databases shall be provided to AT&T in accordance with the following requirements, except where such a requirement is superseded by specific requirements set forth in Subparagraphs 17.3 through 17.7 of this Attachment:

17.2.1 U S WEST shall provide interconnection to SCPs through the U S WEST designated STPs using SS7 network and protocols, as specified in Section 16 of this Attachment, with TCAP as the application layer protocol.

17.2.2 Regional SCP pairs shall be available pursuant to applicable technical reference documents.

17.2.3 U S WEST shall provide to AT&T database provisioning consistent with the provisioning requirements of this Agreement (e.g., data required, edits, acknowledgments, data format and transmission medium and notification of order completion).

17.2.4 The operational interface provided by U S WEST shall complete Database transactions (i.e., add, modify, delete) for AT&T subscriber records stored in U S WEST databases at parity with which U S WEST provisions its own subscriber records.

17.2.5 U S WEST shall provide Database maintenance consistent with the maintenance requirements as specified in this Agreement (e.g., notification of U S WEST network affecting events, testing, dispatch schedule and measurement and exception reports).

17.2.6 When and where available, U S WEST shall provide billing and recording information to track Database usage consistent with Connectivity Billing and recording requirements as specified in this Agreement (e.g., recorded messags format and content, timeliness of feed, data format and transmission medium).

17.2.7 U S WEST shall provide SCPs/Databases in accordance with the physical security requirements specified in this Agreement.

17.2.8 U S WEST shall provide SCPs/Databases in accordance with the logical security requirements specified in this Agreement.

17.3 Number Portability Database

17.3.1 Definition:

The Number Portability ("NP") database supplies routing numbers for calls involving numbers that have been ported from one local service provider to another. NP database functionality shall also include Global Title Translations ("GTT") for calls involving ported numbers even if U S WEST provides GTT functionality in another Network Element. This Section 17.3 supplements the requirements of Sections 18.2 and 18.7. U S WEST shall provide the NP database in accordance with industry standards which shall supersede the following as needed.

17.3.2 Requirements

17.3.2.1 U S WEST shall make U S WEST NP Database available for AT&T switches to query to obtain the appropriate routing number on calls to ported numbers or the industry specified indication that the number is not ported for non-ported numbers in NPA-NXXs that are opened to portability. The specified indication will also be provided when the NPA-NXX is not open to portability.

17.3.2.2 *Query responses shall provide such additional information (e.g., Service Provider identification) as may be specified in the NP implementation in the relevant regulatory jurisdiction.*

17.3.2.3 *U S WEST shall complete CLASS or LIDB queries routed to the U S WEST network by AT&T switches and return the appropriate response to the querying source.*

17.3.2.4 *The NP database shall provide such other functionality as has been specified in the regulatory jurisdiction in which portability has been implemented.*

17.3.2.5 *Unavailability of the NP database query and GTT applications shall not exceed four (4) minutes per year.*

17.3.2.6 *The U S WEST NP database shall respond to a round trip query within 500 milliseconds or as amended by industry standards.*

17.3.3 *Interface Requirements*

U S WEST shall interconnect the signaling interface between the AT&T or other local switch and the NP database using the TCAP protocol as specified in the technical references in this Agreement, together with the signaling network interface as specified in the technical references in this Agreement, and such further requirements (e.g., AIN or IN protocols) as may be specified by regulatory or other bodies responsible for implementation of number portability.

17.4 *Line Information Database (LIDB)*

This Section 17.4 defines and sets forth additional requirements for the Line Information Database.

17.4.1 *Definition:*

The Line Information Database ("LIDB") is a transaction-oriented database accessible through Common Channel Signaling ("CCS") networks. It contains records associated with subscriber Line Numbers and Special Billing Numbers (in accordance with the requirements in the technical reference in Section 17.6.5). LIDB accepts queries from other Network Elements, or AT&T's network, and provides appropriate responses. The query originator need not be the owner of LIDB data. LIDB queries include functions, such as screening billed numbers, that provide the ability to accept Collect or Third Number Billing calls and validation of Telephone Line Number based non-proprietary calling cards. The interface for the LIDB functionality is the interface between the U S WEST CCS network and other CCS networks. LIDB also interfaces to administrative systems. The administrative system interface provides work centers with an interface to LIDB for functions such as provisioning, auditing of data, access to LIDB measurements and reports.

17.4.2 *Technical Requirements*

17.4.2.1 *U S WEST shall enable AT&T to store in U S WEST's LIDB any line number or special billing number. AT&T will provide U S WEST a non-binding LIDB forecast. Prior to the availability of permanent NP, U S WEST shall enable AT&T to store in U S WEST's LIDB any subscriber Line Number or Special Billing Number record for AT&T resale, unbundled Network Elements and facility based customers, in accordance with the*

technical reference in Section 17.6.5, whether ported or not, for which the NPA-NXX or NXX-0/1XX Group is supported by that LIDB.

17.4.2.2 Prior to the availability of permanent NP, U S WEST shall enable AT&T to store in U S WEST's LIDB any subscriber Line Number or Special Billing Number record for AT&T resale, unbundled Network Elements and facility based customers, in accordance with the technical reference in Section 17.6.5, whether ported or not, and NPA-NXX and NXX-0/1XX Group Records, belonging to an NPA-NXX or NXX-0/1 XX owned by AT&T.

17.4.2.3 Subsequent to the availability of permanent NP, U S WEST shall enable AT&T to store in U S WEST's LIDB any subscriber Line Number or Special Billing Number record for AT&T resale, unbundled Network Elements and facility based customers, in accordance with the technical reference in Section 17.6.5, whether ported or not, regardless of the number's NPA-NXX or NXX-0/1XX.

17.4.2.4 U S WEST shall perform the following LIDB functions (i.e., processing of the following query types as defined in the technical reference in Section 17.6.5) for AT&T's subscriber records in LIDB:

17.4.2.4.1 Billed Number Screening (provides information such as whether the Billed Number may accept Collect or Third Number Billing calls);

17.4.2.4.2 Calling Card Validation; and

17.4.2.4.3 Originating Line Number Screening (OLNS), when available.

17.4.2.5 U S WEST shall process AT&T's subscriber records in LIDB at least at parity with U S WEST subscriber records, with respect to other LIDB functions (as defined in the technical reference in Section 17.6). U S WEST shall indicate to AT&T what additional functions, if any are performed by LIDB in its network. Upon request by AT&T, the Parties shall develop an interim procedure to process AT&T subscriber records.

17.4.2.6 Within two (2) weeks after a request by AT&T, U S WEST shall provide AT&T with a list of the subscriber data items which AT&T would have to provide in order to support each required LIDB function. The list shall indicate which data items are essential to LIDB function, and which are required only to support certain services. For each data item, the list shall show the data formats, the acceptable values of the data item and the meaning of those values.

17.4.2.7 U S WEST shall provide LIDB performance in accordance with section 17.6.5.

17.4.2.8 U S WEST shall provide AT&T with the capability to provision (e.g., to add, update, and delete) NPA-NXX and NXX-0/1XX Group Records, and Line Number and Special Billing Number Records, associated with AT&T subscribers, directly into U S WEST's LIDB provisioning process. Upon request by AT&T, the Parties shall establish an interim process to meet the requirements of this Section.

17.4.2.9 Unless directed otherwise by AT&T, in the event end user subscribers change their local service provider to AT&T, U S WEST shall maintain

subscriber data (for line numbers, card numbers, and for any other types of data maintained in LIDB) so that such subscribers shall not experience any interruption of service due to the lack of such maintenance of subscriber data.

17.4.2.10 All additions, updates and deletions of AT&T data to the LIDB shall be made solely at the direction of AT&T.

17.4.2.11 U S WEST shall provide priority updates to LIDB for AT&T data upon AT&T's request (e.g., to support fraud protection).

17.4.2.12 When available, U S WEST shall provide AT&T the capability to directly obtain, through an electronic interface, reports of all AT&T data in LIDB. Upon request by AT&T, the Parties shall establish an interim process to meet the requirements of this Section.

17.4.2.13 [Intentionally left blank for numbering consistency]

17.4.2.14 U S WEST shall perform backup and recovery of all of AT&T's data in LIDB as frequently as U S WEST performs backup and recovery for itself and any other Person, including sending to LIDB all changes made since the date of the most recent backup copy. Backup will be performed weekly. When needed, recovery will take place within twenty-four (24) hours.

17.4.2.15 U S WEST shall provide to AT&T access to LIDB measurements and reports at least at parity with the capability U S WEST has for its own subscriber records and that U S WEST provides to any other party. Such access shall be electronic. Upon request by AT&T, the Parties shall establish an interim process to meet the requirements of this Section.

17.4.2.16 U S WEST shall provide AT&T with LIDB reports of data which are missing or contain errors, as well as any misroute errors, within the same time period as U S WEST provides such reports to itself. Upon request by AT&T, the Parties shall establish a process to meet the requirements of this Section.

17.4.2.17 U S WEST shall prevent any access to or use of AT&T data in LIDB by U S WEST personnel or by any other party not authorized in writing by AT&T.

17.4.2.18 If and when available[20], U S WEST shall provide AT&T performance of the LIDB Data Screening function, which allows a LIDB to completely or partially deny specific query originators access to LIDB data owned by specific data owners, (in accordance with the technical reference in Section 17.6.5) for subscriber data that is part of an NPA-NXX or NXX-0/1XX wholly or partially owned by AT&T at least at parity with U S WEST subscriber data. U S WEST shall obtain from AT&T the screening information associated with LIDB Data Screening of AT&T data in accordance with this requirement.

17.4.2.18.1 The Parties agree to investigate technical feasibility of variable LIDB database screening to accomplish 17.4.2.18 above.

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[20] Pursuant to the Eighth Circuit Decision, the Parties agree to the deletion of the following: "technically feasible".

17.4.2.19 U S WEST shall accept queries to LIDB associated with AT&T subscriber records, and shall return responses in accordance with the requirements of this Section 17.

17.4.3 Interface Requirements

U S WEST shall offer LIDB in accordance with the requirements of this Section 17.4.3.

17.4.3.1 The interface to LIDB shall be in accordance with the technical reference in Section 17.6.3.

17.4.3.2 The CCS interface to LIDB shall be the standard interface described in Section 17.6.3.

17.4.3.3 The LIDB Data Base interpretation of the ANSI-TCAP messages shall comply with the technical reference in Section 17.6.4. Global Title Translation shall be maintained in the signaling network in order to support signaling network routing to the LIDB.

17.5 Toll Free Number Database

The Toll Free Number Database is an SCP that provides functionality necessary for toll free (e.g., 800 and 888) number services by providing routing information and additional vertical features during call set-up in response to queries from SSPs. This Section 17.5 supplements the requirements of Section 17.2 and 17.7. U S WEST shall provide the Toll Free Number Database in accordance with the following subsections.:

17.5.1 Technical Requirements

17.5.1.1 U S WEST shall make the U S WEST Toll Free Number Database available, through its STPs, for AT&T to query from AT&T's designated switch including U S WEST unbundled Local Switching.

17.5.1.2 The Toll Free Number Database shall return carrier identification and, where applicable, the queried toll free number, translated numbers and instructions as it would in response to a query from a U S WEST switch.

17.5.2 Interface Requirements

The signaling interface between the AT&T or other local switch and the Toll-Free Number Database shall use the TCAP protocol as specified in the technical reference in Section 17.6.1, together with the signaling network interface as specified in the technical references in Sections 17.6.2 and 17.6.6.

17.6 SCPs/Databases shall be at least equal to all of the requirements for SCPs/Databases set forth in the following technical references:

17.6.1 GR-246-CORE, Bell Communications Research Specification of Signaling System Number 7, Issue 1 (Belicore, December 199X);

17.6.2 GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP) (Belicore, March 1994);

17.6.3 *GR-954-CORE, CCS Network Interface Specification (CCSNIS) Supporting Line Information Database (LIDB) Service 6, Issue 1, Rev. 1 (Bellcore, October 1995);*

17.6.4 *GR-1149-CORE, OSSGR Section 10: System Interfaces, Issue 1 (Bellcore, October 1995) (Replaces TR-NWT-001149);*

17.6.5 *GR-1158-CORE, OSSGR Section 22.3: Line Information Database 6, Issue (Bellcore, October 1995); and*

17.6.6 *GR-1428-CORE, CCS Network Interface Specification (CCSNIS) Supporting Toll Free Service (Bellcore, May 1995).*

17.7 *Advanced Intelligent Network ("AIN") Access, Service Creation Environment and Service Management System ("SCE/SMS") Advanced Intelligent Network Access*

17.7.1 U S WEST shall provide mediated access to all U S WEST service applications, *(if available)*[21], resident in U S WEST's SCP through U S WEST's STPs. Such access may be from AT&T's switch or U S WEST's unbundled local switch.

17.7.2 *SCE/SMS AIN Access shall provide AT&T the ability to create service applications in the U S WEST SCE and deploy those applications via the U S WEST SMS to the U S WEST SCP. This interconnection arrangement shall provide AT&T access to the U S WEST development environment and administrative system in a manner at least at parity with U S WEST's ability to deliver its own AIN-based services. SCE AIN Access is the development of service applications within the U S WEST Service Creation Environment capability. SMS AIN Access is the provisioning of service applications via the U S WEST Service Management System capability. AIN trigger provisioning will be accomplished through the U S WEST local unbundled switching.*

17.7.3 *Services Available. U S WEST shall make SCE hardware, software, testing and technical support (e.g., technical contacts, system administrator) resources available to AT&T. Scheduling of SCE resources shall allow AT&T at least equal priority to U S WEST.*

17.7.4 *Multi-user Access. The U S WEST SCE/SMS shall allow for multi-user access with proper source code management and other logical security functions.*

17.7.5 *Partitioning. When available, the U S WEST SCP shall partition and protect AT&T service logic and data from unauthorized SMS capability and SCE capability access, execution or other types of compromise.*

17.7.6 *Training and Documentation. U S WEST shall provide training and documentation for AT&T development staff only in cases in which such training or documentation is not reasonably available from another source. If training or documentation is required in accordance with this Section, it will be provided in a manner at least at parity with that provided by U S WEST to its development staff. Training will be conducted at a mutually agreed upon location.*

17.7.7 *Access Environment. When AT&T selects SCE/SMS AIN Access, U S WEST shall provide for a secure, controlled access environment on-site. When available AT&T may request mutually agreed upon remote data connections (e.g., dial up, LAN, WAN).*

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[21] Pursuant to the Eighth Circuit Decision, the Parties agree to the following deletion: "current or future (if technically feasible)".

17.7.8 *Data Exchange. When AT&T selects SMS AIN Access, U S WEST shall allow AT&T to download data forms and/or tables to the U S WEST SCP, via the U S WEST SMS capability, in the same fashion as U S WEST downloads such forms and/or tables for itself.*

17.7.9 *Certification Testing. Certification testing is typically a two step process that includes an off-line unit test followed by an on-line controlled introduction testing into one of each of the U S WEST switch types capable of supporting the service. Services created by AT&T will require certification testing by U S WEST before the services can be provisioned in the network. The scheduling of U S WEST certification testing resources for new AT&T services will be jointly coordinated and prioritized between U S WEST and AT&T. AT&T testing requirements will be given equal priority with both U S WEST and other provider's requirements. In most circumstances, such testing will be completed within sixty (60) days from the date the application is submitted by AT&T to U S WEST for certification. In circumstances involving complex applications requiring additional time for testing, U S WEST may request additional time and AT&T will not unreasonably withhold approval of such request. The certification testing procedures described in this Section may be augmented as mutually agreed to by the Parties.*

17.7.10 *Access Standard. SCPs/Databases shall offer SCE/SMS AIN Access in accordance with the requirements of GR-1280-CORE, AIN Service Control Point (SCP) Generic Requirements.*

17.8 *[Intentionally left blank for numbering consistency]*

17.9 *AT&T will provide to U S WEST timely non-binding forecasts of SS7 call transactions, link requirements, database query volumes, etc., as needed for sizing the individual network capabilities that AT&T will utilize under the terms of this Agreement.*

17.10 *CCS Service includes:*

17.10.1 *Entrance Facility - The entrance facility connects AT&T's signaling point of interface with the U S WEST serving wire center ("SWC").*

17.10.2 *Direct Link Transport ("DLT") - The DLT connects the AT&T SWC to the U S WEST STP.*

17.10.3 *STP Port - The STP port provides the switching function at the STP. One (1) STP Port is required for each DLT Link. The Port provides access to the Service Control Point (SCP).*

17.11 *Advanced Intelligent Network ("AIN") triggers will be provided only to access U S WEST databases. Access to Advanced Intelligent Network (AIN) functions is available only through the Signaling Transfer Point (STP). If AT&T requires other access, it will submit a Bona Fide Request.*

18. Additional Requirements

This Section 18 of Attachment 3 sets forth the additional requirements for unbundled Network Elements which U S WEST agrees to offer to AT&T under this Agreement.

18.1 *Cooperative Testing*

Issue 9-4 - Parked

[U S WEST proposes the following]

18.1.1 Definition:

Cooperative Testing means that U S WEST shall cooperate with AT&T upon request or as needed to (a) ensure that the Network Elements and Ancillary Functions and additional requirements being provided to AT&T by U S WEST are in compliance with the requirements of this Agreement, (b) test the overall functionality of various Network Elements and Ancillary Functions provided by U S WEST to AT&T [in combination with each other or] *in combination with other equipment and facilities provided by AT&T or third parties, and (c) ensure that all operational interfaces and processes are in place and functioning properly and efficiently for the provisioning and maintenance of Network Elements and Ancillary Functions and so that all appropriate billing data can be provided to AT&T.*

18.1.2 Requirements

Upon request by AT&T, the Parties will agree upon a process to resolve technical issues relating to interconnection of AT&T's network to U S WEST's network and Network Elements and Ancillary Functions. The agreed upon process shall include procedures for escalating disputes and unresolved issues up through higher levels of each Party's management. If AT&T and U S WEST do not reach agreement on such a process within the 45-day time period, any issues that have not been resolved by the Parties with respect to such process shall be submitted to the dispute resolution procedures set forth in Part A of this Agreement unless both Parties agree to extend the time to reach agreement on such issues.

Issue 3-7 - Parked

[U S WEST proposes the following]

18.1.2.1 U S WEST shall provide AT&T access for testing at any interface between [a] the *U S WEST* and AT&T *Network* [Element or Combinations and AT&T equipment or facilities]. *Such test access shall be sufficient to ensure that the applicable requirements can be tested by AT&T. This access shall be available seven (7) days per week, twenty-four (24) hours per day.*

18.1.2.2 AT&T may test any interfaces, Network Elements or Ancillary Functions and additional requirements provided by U S WEST to AT&T pursuant to this Agreement.

18.1.2.3 U S WEST shall provide engineering data as requested by AT&T for the loop components as set forth in Sections 2, 3 and 4 of this Attachment which AT&T may desire to test. Such data shall include equipment engineering and cable specifications, signaling and transmission path data.

18.1.2.4 The Parties shall establish a process to provide engineering/office support information on unbundled Network Elements (e.g., central office layout and design records and drawings, system engineering and other applicable documentation) pertaining to a Network Element or Ancillary Function or the underlying equipment that is then providing a Network Element or Ancillary Function to AT&T.

18.1.2.5 Upon request from AT&T, U S WEST shall provide to AT&T all applicable test results from U S WEST testing activities on a Network Element or Ancillary Function or additional requirement or the underlying equipment providing a Network Element or Ancillary Function or additional requirements. AT&T may review such test results and may notify U S WEST of any detected deficiencies.

18.1.2.6 U S WEST shall temporarily provision AT&T designated Local Switching features for testing. Upon request by AT&T, the Parties shall mutually agree on the procedures to be established between U S WEST and AT&T to expedite such provisioning processes for feature testing.

18.1.2.7 Upon AT&T's request, U S WEST shall make available technical support to meet with AT&T representatives to provide required support for Cooperative Testing. U S WEST shall define the process to gain access to such technical support.

18.1.2.8 Dedicated Transport and Loop Feeder may experience alarm conditions due to in-progress tests. U S WEST shall notify AT&T upon removal of such facilities from service.

18.1.2.9 U S WEST shall exercise its best efforts to notify AT&T prior to conducting tests or maintenance procedures on Network Elements or Ancillary Functions or on the underlying equipment that is then providing a Network Element or Ancillary Function, that will likely cause a service interruption or degradation of service.

18.1.2.10 U S WEST shall provide a single point of contact to AT&T that is available seven (7) days per week, twenty-four (24) hours per day for trouble status, sectionalization, resolution, escalation, and closure. Such staff shall be adequately skilled to allow expeditious problem resolution.

18.1.2.11 U S WEST shall make available to AT&T access to 105 responders, 100-type test lines, or 102-type test lines associated with any circuits under test.

18.1.2.12 AT&T and U S WEST shall complete Cooperative Testing in accordance with the procedures set forth in Attachment 5.

18.1.2.13 U S WEST shall participate in Cooperative Testing requested by AT&T whenever it is deemed necessary by AT&T to insure service performance, reliability and subscriber serviceability.

18.1.2.14 AT&T may accept or reject the Network Element ordered by AT&T if, upon completion of cooperative acceptance testing, the tested Network Element does not meet the requirements stated herein.

18.2 Performance

18.2.1 Scope

The issue of performance measurements and standards is to be addressed pursuant to the terms of Section 52 of Part A of this Agreement.

18.3 [Intentionally left blank for numbering consistency]

18.4 Synchronization

18.4.1 Definition:

Synchronization is the function which keeps all digital equipment in a communications network operating at the same average frequency. With respect to digital transmission, information is coded into discrete pulses. When these pulses are transmitted through a digital communications network, all synchronous Network Elements are traceable to a stable and accurate timing source. Network synchronization is accomplished by timing all synchronous Network Elements in the network to a stratum 1 traceable source so that transmission from these network points have the same average line rate.

18.4.2 Technical Requirements

The following requirements are applicable to the case where U S WEST provides synchronization to equipment that AT&T owns and operates within a U S WEST location. In addition, these requirements apply to synchronous equipment that is owned by U S WEST and is used to provide a Network Element to AT&T.

18.4.2.1 The synchronization of clocks within digital networks is divided into two parts: intra-building and inter-building. Within a building, a single clock is designated as the Building Integrated Timing Supply ("BITS"), which provides all of the DS-1 and DS-0 synchronization references required by other clocks in such building. This is referred to as intra-building synchronization. The BITS receives synchronization references from remotely located BITS such as a primary reference source. Synchronization of BITS between buildings is referred to as inter-building synchronization.

18.4.2.2 To implement a network synchronization plan, clocks within digital networks are divided into four stratum levels. All clocks in strata 2, 3, and 4 are synchronized to a stratum 1 clock, that is, they are traceable to a stratum 1 clock. A traceable reference is a reference that can be traced back through some number of clocks to a stratum 1 source. Clocks in different strata are distinguished by their free running accuracy or by their stability during trouble conditions such as the loss of all synchronization references.

18.4.2.2.1 Intra-Building

Within a building, there may be different kinds of equipment that require synchronization at the DS-1 and DS-0 rates. Synchronization at the DS-1 rate is accomplished by the frequency synchronizing presence of buffer stores at various DS-1 transmission interfaces. Synchronization at the DS-0 rate is accomplished by using a composite clock signal that phase synchronizes the clocks. Equipment requiring DS-0 synchronization frequently does not have adequate buffer storage to accommodate the phase variations among different equipment. Control of phase variations to an acceptable level is accomplished by externally timing all interconnecting DS-0 circuits to a single clock source and by limiting the interconnection of DS-0 equipment to less than 1,500 cable feet. Therefore, a BITS shall provide DS-1 and composite clock signals when the appropriate composite signal is a 64-kHz 5/8th duty cycle, return to zero with a bipolar violation every eighth pulse (B8RZ).

18.4.2.2.2 Inter-Building

U S WEST shall provide inter-building synchronization at the DS-1 rate, and the BITS shall accept the primary and/or secondary synchronization links from BITS in other buildings where necessary. From hierarchical considerations, the BITS shall be the highest stratum clock within the building and U S WEST shall provide operations capabilities. When available such capability includes, but is not limited to: synchronization reference provisioning; synchronization reference status inquiries; timing mode status inquiries; and alarm conditions.

18.4.3 Synchronization Distribution Requirements

18.4.3.1 Central office BITS shall contain redundant clocks meeting or exceeding the requirements for a stratum 3 clock as specified in ANSI T1.101-1994 and ANSI T1.105.09 and Bellcore GR-NWT-001244 Clocks for the Synchronized Network: Common Generic Criteria.

18.4.3.2 Central office BITS shall be powered by primary and backup power sources.

18.4.3.3 If both reference inputs to the BITS are interrupted or in a degraded mode (meaning off frequency greater than twice the minimum accuracy of the BITS, loss of frame, excessive bit errors, or in Alarm Indication Signal), then the stratum clock in the BITS shall provide the necessary bridge in timing to allow the network to operate without a frame repetition or deletion (slip free) with better performance than specified in these technical references specified in 18.4.3.1.

18.4.3.4 DS-1s multiplexed into a SONET synchronous payload envelope within an STS-n (where "n" is defined in ANSI T1.105-1995) signal shall not be used as reference facilities for network synchronization.

18.4.3.5 The total number of Network Elements cascaded from the stratum 1 source shall be minimized.

18.4.3.6 A Network Element shall receive the synchronization reference signal only from another Network Element that contains a clock of equivalent or superior quality (stratum level).

18.4.3.7 U S WEST shall select for synchronization those facilities shown to have the greatest degree of availability (absence of outages).

18.4.3.8 Where possible, all primary and secondary synchronization facilities shall be physically diverse (this means the maximum feasible physical separation of synchronization equipment and cabling).

18.4.3.9 No timing loops shall be formed in any combination of primary and secondary facilities.

18.4.3.10 U S WEST shall continuously monitor the BITS for synchronization related failures.

18.4.3.11 U S WEST shall continuously monitor all equipment transporting synchronization facilities for synchronization related failures.

18.4.3.12 For non-SONET equipment, U S WEST shall provide synchronization facilities which, at a minimum, comply with the standards set forth in ANSI T1.101-1994.

18.4.3.13 For SONET equipment, U S WEST shall provide synchronization facilities that have time deviation ("TDEV") for integration times greater than 0.05 seconds and less than or equal to ten (10) seconds, that is less than or equal to 100 nanoseconds. TDEV, in nanoseconds, for integration times greater than ten (10) seconds and less than 1000 seconds, shall be less than 31.623 times the square-root of the integration time.

18.5 SS7 Network Interconnection

18.5.1 Definition:

SS7 Network Interconnection is the interconnection of AT&T local Signaling Transfer Point (STPs) with U S WEST STPs. This interconnection provides connectivity that enables the exchange of SS7 messages among U S WEST switching systems and databases, AT&T local or tandem switching systems, and other third-party switching systems directly connected to the U S WEST SS7 network.

18.5.2 Technical Requirements

18.5.2.1 SS7 Network Interconnection shall provide signaling connectivity to all components of the U S WEST SS7 network through U S WEST STPs. These include:

18.5.2.1.1 U S WEST local or tandem switching systems;

18.5.2.1.2 U S WEST databases; and

18.5.2.1.3 other third-party local or tandem switching systems.

18.5.2.2 The connectivity provided by SS7 Network Interconnection shall support the functions of U S WEST switching systems and databases and AT&T or other third-party switching systems with A-link access to the U S WEST SS7 network.

18.5.2.3 SS7 Network Interconnection shall provide transport for certain types of Transaction Capabilities Application Part ("TCAP") messages. If traffic is routed based on dialed or translated digits between an AT&T local switching system and a U S WEST or other third-party local switching system, either directly or via a U S WEST tandem switching system, then it is a requirement that the U S WEST SS7 network convey via SS7 Network Interconnection the TCAP messages necessary to provide Call Management services (Automatic Callback, Automatic Recall, and Screening List Editing) between the AT&T local STPs and the U S WEST or other third-party STPs.

18.5.2.4 When the capability to route messages based on Intermediate Signaling Network Identifier (ISNI) is generally available on U S WEST STPs, the U S WEST SS7 Network shall also convey TCAP messages using SS7 Network Interconnection in similar circumstances where the U S WEST switch routes traffic based on a Carrier Identification Code ("CIC").

18.5.2.5 SS7 Network Interconnection shall provide all functions of the MTP as specified in ANSI T1. 111. This includes:

18.5.2.5.1 Signaling Data Link functions, as specified in ANSI T1.111.2;

18.5.2.5.2 Signaling Link functions, as specified in ANSI T1.111.3; and

18.5.2.5.3 Signaling Network Management functions, as specified in ANSI T1.111.4.

18.5.2.6 SS7 Network Interconnection shall provide all functions of the SCCP necessary for Class 0 (basic connectionless) service, as specified in ANSI T1.112.

18.5.2.7 Where the destination signaling point is a U S WEST switching system or database, or is another third-party local or tandem switching system directly connected to the U S WEST STPs (SS7 network), SS7 Network Interconnection shall include final GTT of messages to the destination and SCCP Subsystem Management of the destination.

18.5.2.8 Where the destination signaling point is an AT&T local or tandem switching system, SS7 Network Interconnection shall include intermediate GTT of messages to a gateway pair of AT&T local STPs, and shall not include SCCP Subsystem Management of the destination.

18.5.2.9 SS7 Network Interconnection shall provide all functions of the Integrated Services Digital Network User Part (ISDNUP), as specified in ANSI T1.113.

18.5.2.10 SS7 Network Interconnection shall provide all functions of the TCAP, as specified in ANSI T1.114.

18.5.2.11 If and when Inter-network MTP Routing Verification Test (MRVT) and SCCP Routing Verification Test (SRVT) become approved ANSI standards and available capabilities of both U S WEST and AT&T STPs, SS7 Network Interconnection shall provide these functions of the OMAP.

18.5.2.11.1 The Parties shall develop a mutually agreed upon interim process for MRVT and SRVT upon request by AT&T. Either Party shall be allowed to shut off MRVT/SRVT for preservation of network integrity.

18.5.2.12 SS7 Network Interconnection shall be equal to or at the same level as U S WEST provides to itself as to[22] the following performance requirements:

18.5.2.12.1 MTP Performance, as specified in ANSI T1.111.6;

18.5.2.12.2 SCCP Performance, as specified in ANSI T1.112.5; and

18.5.2.12.3 ISDNUP Performance, as specified in ANSI T1.113.5.

18.5.3 Interface Requirements

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[22] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

18.5.3.1 U S WEST shall offer the following SS7 Network Interconnection options to connect AT&T or AT&T-designated STPs to the U S WEST STPs (SS7 network):

18.5.3.1.1 D-link interface from AT&T STPs.

18.5.3.2 Each interface shall be provided by one or more sets (layers) of signaling links, as follows:

18.5.3.2.1 A D-link layer shall consist of four links.

18.5.3.3 The Signaling Point of Interconnection (SPOI) for each link shall be located at a cross-connect element, (e.g., DSX-1) in the central office where the U S WEST STPs is located. There shall be a DS-1 or higher rate transport interface at each of the SPOIs. Each signaling link shall appear as a DS-0 channel within the DS-1 or higher rate interface. U S WEST shall offer higher rate DS-1 signaling links for interconnecting AT&T local switching systems or STPs with U S WEST STPs as soon as these become approved ANSI standards and available capabilities of U S WEST STPs.

18.5.3.3.1 In each LATA, there will be two (2) signaling points of interconnection (SPOIs). The requirement for two SPOIs is driven by the critical importance attached by the Parties to signaling link diversity.

18.5.3.3.2 Each Party will designate one of the two SPOIs in a reasonable and efficient location in the LATA. A SPOI can be any existing cross connect point in the LATA.

18.5.3.3.3 Each signaling link requires a port on each Party's STP.

18.5.3.4 Where available, the U S WEST Central Office shall provide intraoffice diversity between the SPOIs and the U S WEST STPs, so that no single failure of intraoffice facilities or equipment shall cause the failure of both D-links in a layer connecting to U S WEST's STPs.

18.5.3.5 The protocol interface requirements for SS7 Network Interconnection include the MTP, ISDNUP, SCCP and TCAP. These protocol interfaces shall conform to the following specifications:

18.5.3.5.1 Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP);

18.5.3.5.2 Bellcore GR-1428-CORE, CCS Network Interface Specification (CCSNIS) Supporting Toll Free Service;

18.5.3.5.3 Bellcore GR-1429-CORE, CCS Network Interface Specification (CCSNIS) Supporting Call Management Services; and

18.5.3.5.4 Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).

18.5.3.6 To the extent available[23], U S WEST shall set message screening parameters to block accept messages from AT&T local or tandem switching systems destined to any signaling point in the U S WEST SS7 network with which the AT&T switching system has a legitimate signaling relation.

18.5.4 SS7 Network Interconnection shall be equal to or at the same level as U S WEST provides to itself as to[24] all of the requirements for SS7 Network Interconnection set forth in the following technical references:

18.5.4.1 ANSI T1.110-1992 American National Standard Telecommunications Signaling System Number 7 (SS7) - General Information;

18.5.4.2 ANSI T1.111-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP);

18.5.4.3 ANSI T1.111A-1994 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Message Transfer Part (MTP) Supplement;

18.5.4.4 ANSI T1.112-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Signaling Connection Control Part (SCCP);

18.5.4.5 ANSI T1.113-1995 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Integrated Services Digital Network (ISDN) User Part;

18.5.4.6 ANSI T1.114-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Transaction Capabilities Application Part (TCAP);

18.5.4.7 ANSI T1.115-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Monitoring and Measurements for Networks;

18.5.4.8 ANSI T1.116-1990 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Operations, Maintenance and Administration Part (OMAP);

18.5.4.9 ANSI T1.118-1992 American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Intermediate Signaling Network Identification (ISNI);

18.5.4.10 Bellcore GR-905-CORE, Common Channel Signaling Network Interface Specification (CCSNIS) Supporting Network Interconnection, Message Transfer Part (MTP), and Integrated Services Digital Network User Part (ISDNUP);

18.5.4.11 Bellcore GR-954-CORE, CCS Network Interface Specification (CCSNIS) Supporting Line Information Database (LIDB) Service;

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[23] Pursuant to the Eighth Circuit Decision, the Parties agree to the following deletion: "technically feasible".

[24] Pursuant to the Eighth Circuit Decision, the Parties agree to the addition of this language.

18.5.4.12 Bellcore GR-1428-CORE, CCS Network Interface Specification (CCSNIS) Supporting Toll Free Service;

18.5.4.13 Bellcore GR-1429-CORE, CCS Network Interface Specification (CCSNIS) Supporting Call Management Services; and

18.5.4.14 Bellcore GR-1432-CORE, CCS Network Interface Specification (CCSNIS) Supporting Signaling Connection Control Part (SCCP) and Transaction Capabilities Application Part (TCAP).

19. AT&T Combination of Unbundled Network Elements

Issue 3-6 - Parked

[U S WEST proposes the following.]

19.1 SPOT Frame - - General Description

This section describes how U S WEST will provide AT&T with access to unbundled Network Elements. AT&T may combine these unbundled Network Elements. This section sets forth the procedures whereby AT&T may obtain access to the U S WEST Central Office(s) for the combination of unbundled Network Elements. It also describes the SPOT frame as the demarcation device at which AT&T gains access to unbundled Network Elements purchased from U S WEST, and the procedures by which AT&T will request the use of the SPOT frame.

19.1.1 Definition

The Single Point of Termination (SPOT) frame shall be located in the U S WEST Central Office and shall be used by AT&T to make cross-connections between unbundled Network Elements and/or AT&T collocated equipment. The SPOT frame provides terminations for unbundled Network Elements as well as any AT&T facilities, provided through collocation arrangements. U S WEST will extend unbundled Network Elements to the SPOT frame through the use of AT&T-requested and U S WEST-provided tie cables. Tie cables between the SPOT frame and AT&T's equipment shall be provided as a part of AT&T's collocation arrangement. Tie cables are available for DS0, DS1, DS3 and optical capacities and extend from the applicable U S WEST frame to the SPOT frame, or from AT&T's collocated space to the SPOT frame.

19.1.2 AT&T may use a SPOT frame to combine unbundled Network Elements in Central Offices where AT&T has obtained Collocation for the placement of AT&T equipment. Alternatively, AT&T may combine unbundled Network Elements within its collocated space.

19.1.3 U S WEST will provide AT&T with 24 hour access to the Central Office for the purpose of running jumpers on the SPOT frame. Such access will be in accordance with the terms and conditions applicable to physical collocation, in accordance with Section 40.3 of Part A of this Agreement. This access, including picture identification cards, access cards and/or keys, or other procedures, will be equal to the access U S WEST provides to itself for similar purposes.

19.1.4 AT&T may run jumpers on the SPOT frame to make connections in three basic types of configurations:

- U S WEST unbundled Network Elements to U S WEST unbundled Network Elements;
- U S WEST unbundled Network Elements to AT&T's equipment;
- AT&T's equipment to another CLEC's equipment.

19.1.5 The SPOT frame shall be the standard demarcation point between AT&T and U S WEST-owned network facilities and equipment as well as the demarcation between unbundled Network Elements. This demarcation point will be used as the designated test point for AT&T and U S WEST.

19.1.6 Dedicated SPOT Frame

Upon AT&T's request, U S WEST shall make available a "dedicated" SPOT frame for AT&T's sole use where existing U S WEST frame capacity will allow for such a dedicated SPOT frame.

19.1.6.1 Except as set forth below, the dedicated SPOT frame and associated tie cables will not be made available for use by any other CLEC without the express written consent of AT&T.

19.1.6.2 AT&T shall order the dedicated SPOT frame and associated tie cables through the procedures outlined in Section 40.5 of Part A of this Agreement (collocation ordering procedures).

19.1.6.3 Upon request, U S WEST will provide security doors for the maintenance and security of AT&T's dedicated SPOT frame. When such doors are requested and installed, U S WEST and AT&T shall have sole access to the dedicated portions of the SPOT frame.

19.1.6.4 AT&T shall be responsible for tie cable administration.

19.1.7 Shared SPOT Frame

U S WEST shall make available to any requesting CLEC a "shared" SPOT frame that may be used by multiple CLECs.

19.1.7.1 AT&T shall order the shared SPOT frame through the procedures outlined In Section 40.5 of Part A of this Agreement (collocation ordering procedures). Costs of the shared SPOT frame shall be set forth in Appendix A to Attachment 1 of this Agreement.

19.2 All U S WEST terminations on the SPOT frame will be given a frame address. U S WEST will establish and maintain frame address records for AT&T's terminations. U S WEST will provide the Point of Interface (POI) frame address to AT&T for each U S WEST

unbundled Network Element ordered. U S WEST will maintain assignment records of such U S WEST unbundled Network Elements (loop, local switching, etc.) and terminations (tie cable) on the SPOT frame.

19.3 AT&T will maintain assignment records for the terminations of AT&T's equipment on the SPOT frame. AT&T will maintain the assignment records for those frame addresses involved in connecting AT&T's equipment to U S WEST unbundled Network Elements and the U S WEST unbundled Network Elements connected to other U S WEST unbundled Network Elements.

19.4 Charges

The two categories of charges for a SPOT frame are associated with the SPOT frame and tie pairs. Additional charges associated with the preparation of space may also apply.

19.4.1 SPOT Frame Charges

AT&T shall pay both non-recurring and recurring charges associated with the shared SPOT frame. Charges for the dedicated SPOT frame will be developed on an Individual Case Basis, in response to the specific SPOT frame capacity and options requested by AT&T, such as dedicated SPOT frame security door(s).

19.4.2 Tie Cable Charges

AT&T shall pay both non-recurring and recurring charges associated with the tie cable arrangements ordered by AT&T.

19.4.2.1 SPOT Frame Terminations

This element includes the tie cables, associated cable racking and terminating blocks placed between AT&T's collocated equipment and the vertical side of the SPOT Frame.

19.4.2.2 EICT

This element includes the tie cables, associated racking and terminating blocks placed between horizontal side of the SPOT Frame and U S WEST Unbundled Network Elements.

19.4.2.3 Regeneration charges shall apply when the tie cable connections are of such a distance as to require a form of conditioning or regeneration to maintain the required signal level.

19.4.2.4 Dedicated tie cables shall be billed as construction charges. These tie cables are dedicated for AT&T's sole use from the SPOT Frame to the point where the U S WEST UNE may be accessed, such as the COSMIC Frame or the DSX.

19.4.3 To the extent that AT&T's use of the SPOT frame results in U S WEST incurring building or frame additions other than the SPOT frame, construction charges will apply

as detailed in Section 3 of Attachment 1, Construction and Implementation Costs.

19.5 AT&T will be required to make the jumper wire connection between frame addresses on the SPOT frame to complete AT&T's circuit.

19.6 Ordering

19.6.1 SPOT frames shall be ordered in accordance with Section 40.5.1 of Part A of this Agreement.

19.6.2 As part of the ordering process, AT&T will provide at a minimum a one-year forecast for each wire center in which it intends to utilize the SPOT frame. Included in this forecast will be the termination type (DS0, DS1, DS3, optical) and the quantity of each termination required, and the quantity of each type of unbundled Network Elements (e.g., unbundled loops, unbundled line-side ports, unbundled trunk-side ports) that will be terminated on the SPOT frame. SPOT frame terminations must be ordered in multiples of the following quantities based upon a per U S WEST frame basis.

100 DS0 terminations
28 DS1 terminations (2-28 pair cables)
1 DS3 termination (2 coax cables)
1 Optical termination (fiber pair)

19.6.3 Upon AT&T's request for a dedicated SPOT frame, AT&T and U S WEST shall hold a joint planning meeting at which AT&T will identify the quantity of tie pairs to each U S WEST central office frame to which AT&T requires dedicated tie cables.

19.6.4 AT&T shall order subsequent tie cable capacity in the same manner as the initial tie cable capacity.

19.6.5 The ordering of unbundled Network Elements shall be in accordance with Section 2 of Attachment 3 of this Agreement.

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INTERCONNECTION

1. Definitions

1.1 *For purposes of this Attachment 4, "Interconnection" is the linking of the U S WEST and AT&T networks for the mutual exchange of traffic. Interconnection does not include the transport and termination of traffic. Interconnection is provided by virtual or physical collocation, entrance facilities or meet point arrangements.*

2. General Description

2.1 **U S WEST will provide Interconnection at any technically feasible point, subject to negotiations between the Parties; such points may include, but not be limited to, a Meet Point, the line side distribution frame of the local switch, the trunk side distribution frame of the local switch, trunk interconnection points of the tandem switch, central office cross-connect points, and Signaling Transfer Points necessary to exchange traffic and access call related databases.**[1]

2.2 **AT&T may select for itself those technically feasible points in U S WEST's network to which AT&T wishes to interconnect. U S WEST may not require AT&T to have one point of interconnection for exchange of local traffic within calling area.**[2] *AT&T will be responsible for engineering and maintaining its network on its side of the POI. If and when the Parties choose to interconnect at a mid-span meet, AT&T and U S WEST will jointly provision the fiber optic facilities that connect the two (2) networks and shall share the financial and other responsibilities for that facility.*

2.3 *Within ten (10) Business Days of AT&T's request for any POI, U S WEST shall provide any information in its possession or available to it regarding the environmental conditions of the interconnection route or location including, but not limited to, the existence and condition of asbestos, lead paint, hazardous substance contamination, or radon. Information is considered "available" under this Agreement if it is in U S WEST's possession, or in the possession of a current or former agent, contractor, employee, lessor, or tenant of U S WEST's.*

2.4 *U S WEST shall allow AT&T to perform any environmental site investigations, including, but not limited to, asbestos surveys, AT&T deems to be necessary in support of its collocation needs. AT&T shall advise U S WEST in writing of its intent to conduct any such investigations, and shall receive written approval from U S WEST to proceed with the investigation which approval shall not be unreasonably withheld. AT&T shall indemnify U S WEST in accordance with the provisions of Section 18 of Part A of this Agreement for any loss or claim for damage suffered by U S WEST as a result of AT&T's actions during any site inspection.*

2.5 *Notwithstanding any performance standard set forth in this Attachment, U S WEST will provide the services set forth in this Attachment to AT&T with the level of service quality set forth in Section 52, Part A of this Agreement.*

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[1] Per First Order at pages 6-7, Paragraph 37.

[2] Per First Order at page 7, Paragraph 38.

3. Location of Interconnection

3.1 AT&T will be responsible for implementing and maintaining its network on its side of the POI. U S WEST will be responsible for implementing and maintaining its network on its side of the POI. If and when the Parties choose to interconnect at a Meet Point, AT&T and U S WEST will jointly provision the fiber optic facilities that connect the two networks and shall proportionately share the financial and other responsibilities for that facility based on the reasonably negotiated Meet Point percentage.

3.2 If interconnection is complicated by the presence of environmental contamination or hazardous materials, and an alternative route is available, U S WEST shall make such alternative route available for AT&T's consideration.

4. Collocation

4.1 Interconnection may be accomplished through either virtual or physical Collocation. The terms and conditions under which Collocation will be available are described in Part A of this Agreement.

5. Entrance Facility

5.1 Interconnection may be accomplished using an entrance facility without the need for collocation. An entrance facility extends from the Point of Interface to a point within a U S WEST central office.

6. Quality of Interconnection

6.1 U S WEST will not, for the purpose of Interconnection, provide to AT&T less favorable terms and conditions than it provides itself or any other Person or in a manner less efficient than it would impose on itself or any other party. Interconnection will be at least equal in quality to that which U S WEST provides to itself.

7. Points of Interconnection

7.1 Upon a request for specific point to point routing, U S WEST will make available to AT&T information indicating the location and technical characteristics of U S WEST's network facilities. The following alternatives include (a) a DS-1, DS-3 or SONET rates, and other negotiated alternatives that are available (where facilities are not available and U S WEST builds in accordance with the Construction section of Attachment 1, Section 3, special construction and development costs may apply, if any); (b) virtual collocation; (c) physical collocation, and (d) negotiated Meet Point facilities. Each Party is responsible for providing its own facilities up to the Meet Point. The Parties will negotiate the facilities arrangement between their networks.

8. Trunking Requirements

8.1 U S WEST agrees to provide designated interconnection facilities that meet the same industry standards for technical criteria and service standards, such as the probability of blocking in peak hours and transmission standards.

8.2 The Parties shall initially reciprocally terminate local exchange traffic and intraLATA/interLATA toll calls originating on each other's networks as follows:

8.2.1 There shall be no restrictions on traffic types carried.

8.2.1.1 Until the access structure is revised, to accommodate non-segregated traffic, pursuant to rules promulgated by the FCC or the Commission, separate trunk groups will be established wherever practical. Exceptions to this provision will not be based on technical infeasibility, but will be based on billing, signaling, and network requirements. For example, exceptions include: (a) billing requirements - switched access vs. local traffic, (b) signaling requirements - MF vs. SS7, (c) network requirements - Directory Assistance traffic to TOPS tandems, and (d) one-way trunks for 911/E911. The following is the current list of traffic types that require separate trunk groups, unless otherwise specifically stated in this Agreement:

(a) intraLATA toll and interLATA switched access trunks
(b) EAS/local trunks
(c) Directory Assistance trunks
(d) 911/E911 trunks
(e) Operator Services trunks
(f) Non-U S WEST toll (transit toll to other providers)
(g) Non-U S WEST local (transit local to other providers)
(h) Commercial Mobile Radio Service/Wireless Traffic

8.2.2 If AT&T desires to combine Local Traffic and Toll Traffic on the same trunk group, U S WEST and AT&T shall submit such issue to arbitration pursuant to the dispute resolutions provisions of Section 27 of Part A of this Agreement.

8.3 Separate trunk groups will be established connecting AT&T's switch or AT&T's Operator Service Center to U S WEST's Operator Service Center for operator-assisted busy line interrupt/verify. For traffic from the U S WEST network to AT&T for Operator Services, U S WEST will provide one trunk group per LATA served by the local U S WEST switch.

8.4 Trunk Servicing

8.4.1 Orders between the Parties to establish, add, change or disconnect trunks shall be processed by use of an Access Service Request ("ASR") or another industry standard for local service ordering.

8.4.2 As further described in this Agreement, both Parties will jointly manage the capacity of Local Interconnection trunk groups. U S WEST's trunk servicing group will send a Trunk Group Service Request ("TGSR"), or another industry standard eventually adopted to replace the TGSR, to AT&T to trigger changes U S WEST desires to the Local Interconnection trunk groups based on U S WEST's capacity assessment. AT&T will issue an ASR or other industry ordering standard to U S WEST:

(a) within ten (10) Business Days after receipt of the TGSR, upon review of and in response to U S WEST's TGSR, or

(b) at any time, as a result of AT&T's own capacity management assessment, to begin the provisioning process. The interval used for the

provisioning of Local Interconnection trunk groups shall be no longer than the standard interval for the provisioning of U S WEST's Switched Access service and shall be consistent with U S WEST's actual provisioning intervals for its own Switched Access customers.

8.4.3 U S WEST will attempt to meet AT&T requested due dates for the provision of Local Interconnect trunk groups. Where the installation of Local Interconnection trunk groups is required within a time that is shorter than the standard interval, the Parties will make all reasonable efforts and cooperate in good faith to ensure that the mutually agreed upon due date is met.

8.4.4 Orders that comprise a major project may be submitted at the same time, in which case their implementation shall be jointly planned and coordinated. Major projects are those that require the coordination and execution of multiple orders or related activities between and among U S WEST and AT&T work groups, including, but not limited to, the initial establishment of Local Interconnection or Meet Point trunk groups and service in an area, NXX code moves, re-homes, facility grooming, or network rearrangements.

8.5 Trunking Requirements

8.5.1 Trunk group connections will be made at a DS-1 or multiple DS-1 level for exchange of EAS/local, intraLATA toll, wireless/Commercial Mobile Radio Service, and Switched Access Traffic. Ancillary Service trunk groups will be made below a DS-1 level, as agreed to by the Parties.

8.5.2 Where CCS is not available, in-band multi-frequency (MF) wink start signaling will be provided. This MF arrangement will require a separate local trunk circuit between AT&T's switch and U S WEST's tandems. Reference Technical Pub. TR-314 and TR394.

9. Service Interruptions

9.1 Upon request by either Party, standards and procedures for notification of trunk disconnects will be jointly developed by the Parties. . Neither Party shall be expected to maintain active status for a trunk disconnected by the other Party for an extended or indefinite period of time.

9.2 The characteristics and methods of operation of any circuits, facilities or equipment of either Party connected with the services, facilities or equipment of the other Party pursuant to this Agreement shall not: (a) interfere with or impair service over any facilities of the other Party, its Affiliates, or its connecting and concurring carriers involved in its services; (b) cause damage to their plant; (c) violate any applicable law or regulation regarding the invasion of privacy of any communications carried over the Party's facilities; or (d) create hazards to the employees of either Party or to the public.

9.3 Each Party shall be solely responsible, and bear the expense, for the overall design of its services. Each Party shall also be responsible for any redesign or rearrangement of its services that may be required because of changes in facilities, operations or procedures, minimum network protection criteria, and operating or maintenance characteristics of the facilities. If one Party creates a circumstance causing additional costs to the other Party, the other Party may collect construction charges from the first Party.

9.4 To facilitate trouble reporting and to coordinate the repair of the service provided by each Party to the other under this Agreement, each Party shall designate and define a trouble reporting control office ("TRCO") for such service. Each Party shall furnish a trouble reporting telephone number for the designated TRCO. This number shall have access to the location where facility records are normally located and where current status reports on any trouble reports are readily available. Current and historical trouble reports will be made available, if necessary. Alternative out-of-hours procedures shall be established to ensure access to a location that is staffed and has the authority to initiate corrective action.

9.5 Where new facilities, services and arrangements are installed to rectify the service interruption, the TRCO shall ensure that continuity exists and take appropriate transmission measurements before advising the other Party that the new circuit is ready for service.

9.6 The Parties shall cooperate in isolating trouble conditions. Before either Party reports a trouble condition, it shall use reasonable efforts to isolate the trouble.

9.7 In cases where a trouble condition affects a significant portion of the other Party's service, the Parties shall assign the same priority provided to other interconnecting carriers.

10. Forecasting

10.1 The Parties agree that during the first year of interconnection, joint forecasting and planning meetings will take place no less frequently than once per quarter.

10.2 The Parties shall establish joint forecasting responsibilities for traffic utilization over trunk groups. Intercompany forecast information must be provided by the Parties to each other four (4) times a year. The quarterly forecasts shall include forecasted requirements for each trunk group identified in Paragraph 8.2.1 of this Attachment. In addition, for tandem-switched traffic, the forecast shall include the quantity of tandem-switched traffic forecasted for each subtending end office. The Parties recognize that, to the extent historical traffic data can be shared between the Parties, the accuracy of the forecasts will improve. Forecasts shall be for a minimum of three (3) (current and plus-1 and plus-2) years and shall include:

10.2.1 the use of Common Language Location Identifier (CLLI-MSG), which is described in Bellcore documents BR 795-100-100 and BR 795-400-100; and

10.2.2 a description of major network projects anticipated for the following six (6) months that could affect the other Party. Major network projects include trunking or network rearrangements, shifts in anticipated traffic patterns, or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecasting period. This planning will include the issues of network capacity, forecasting and compensation calculation, where appropriate.

10.2.3 If forecasts vary significantly, the Parties shall meet to review and reconcile such forecasts.

10.2.3.1 If the Parties are unable to reach such a reconciliation, the Local Interconnection trunk groups shall be provisioned to the higher forecast. At the end of three (3) months, the utilization of the Local

Interconnection trunk groups will be reviewed and if the average CCS utilization for the third month is under seventy five percent (75%) of capacity, either Party may issue an order to resize the trunk group, which shall be left with not less than twenty five percent (25%) excess capacity.

10.2.3.2 If the Parties agree on the original forecast and then it is determined that a trunk group is under seventy five percent (75%) of CCS capacity on a monthly-average basis for each month of any three-month period, either Party may issue an order to resize the trunk group, which shall be left with not less than twenty five percent (25%) excess capacity. In all cases, grade of service objectives identified in this Agreement shall be maintained.

10.3 Each Party shall provide a specified point of contact for planning, forecasting and trunk servicing purposes.

10.4 Trunking can be established to tandems or end offices or a combination of both via either one-way or two-way trunks. Trunking will be at the DS-0 level, DS-1 level, DS-3 level, or any other technically feasible level, subject to network disclosure requirements of the FCC. Initial trunking will be established between AT&T's switching centers and U S WEST's access tandem(s). The Parties will utilize direct end office trunking under the following conditions:

10.4.1 Tandem exhaust - If a tandem through which the Parties are interconnected is unable to, or is forecasted to be unable to, support additional traffic loads for any period of time, the Parties will mutually agree on an end office trunking plan that will alleviate the tandem capacity shortage and ensure completion of traffic between AT&T and U S WEST subscribers.

10.4.2 Traffic volume - The Parties shall install and retain direct end office trunking sufficient to handle actual or reasonably forecasted traffic volumes, whichever is greater, between an AT&T switching center and a U S WEST end office where the local traffic exceeds or is forecasted to exceed 512 CCS at the busy hour.

10.4.3 Mutual agreement - The Parties may install direct end office trunking upon mutual agreement in the absence of conditions (1) or (2) above and such agreement will not unreasonably be withheld.

11. Signaling

11.1 Signaling protocol. The Parties will interconnect their networks using SS7 signaling as defined in GR-317 and GR-394, including ISDN User Part ("ISUP") for trunk signaling and Transaction Capabilities Application Part ("TCAP") for CCS-based features in the interconnection of their networks. All appropriate industry standards for signaling interoperability will be followed.

11.2 The Parties will provide CCS to each other in conjunction with all trunk groups supporting Local, Transit, and Toll Traffic. The Parties will cooperate on the exchange of TCAP messages to facilitate full interoperability of CCS-based features between their respective networks, including all CLASS features and functions. All CCS signaling parameters will be provided, including automatic number identification (ANI), originating line information

(OLI), calling party category, charge number, etc. For terminating Feature Group D, the Parties will pass CPN if it receives CPN from Feature Group D carriers. All privacy indicators will be honored. Where available, network signaling information such as Transit Network Selection ("TNS") parameter (CCS platform) and CIC/OZZ information (non-CCS environment) will be provided by the Parties wherever such information is needed for call routing or billing. The Parties will follow all appropriate industry standards pertaining to TNS and CIC/OZZ codes.

11.3 Standard Interconnection facilities shall be Extended Superframe (ESF) with B8ZS line code. Where ESF/B8ZS is not available, AT&T will agree to using other Interconnection protocols on an interim basis until the standard ESF/B8ZS is available. U S WEST will provide anticipated dates of availability for those areas not currently ESF/B8ZS compatible.

11.4 Where AT&T is unwilling to utilize an alternate interconnection protocol, AT&T will provide U S WEST an initial forecast of 64 Kbps Clear Channel Capability ("64K CCC") trunk quantities consistent with the forecasting agreements between the Parties. Upon receipt of this forecast, the Parties will begin joint planning for the engineering, procurement, and installation of the designated 64K CCC Local Interconnection trunk groups and the associated B8ZS Extended Super Frame facilities, for the purpose of transmitting 64K CCC data calls between AT&T and U S WEST. Where additional equipment is required, such equipment will be obtained, engineered, and installed on the same basis and with the same intervals as any similar growth job for an IXC, AT&T or U S WEST internal customer demand for 64K CCC trunks. Where technically feasible, these trunks will be established as two-way.

12. Ordering

12.1 AT&T shall, on each order for Local Interconnection trunks, specify the AT&T NXXs that are assigned to the trunks.

13. Network Management

13.1 Protective Protocols

Either Party may use protective network traffic management controls such as 7-digit and 10-digit code gaps on traffic toward each others network when required to protect the public switched network from congestion due to facility failures, switch congestion or failure or focused overload.

13.2 Rerouting Protocols

Where the capability exists, originating or terminating traffic reroutes may be implemented by either Party to temporarily relieve network congestion due to facility failures or abnormal calling patterns. Reroutes will not be used to circumvent normal trunk servicing. Rerouting controls will only be used when mutually agreed to by the Parties.

13.3 Mass Calling

AT&T and U S WEST shall cooperate and share pre-planning information, where available and in compliance with federal and state regulations, regarding cross-network call-ins expected to generate large or focused temporary increases in call volumes, to prevent or mitigate the impact of these events on the public switched network.

Furthermore, INP numbers may only be used consistent with network efficiency and integrity, i.e., inhibitions on mass calling events.

14. Usage Measurement

14.1 When applicable, each Party shall provide to the other:

14.1.1 Bellcore AMA formatted records to generate bills to the other Party;

14.1.2 measurement of minutes of use over Local Interconnection trunk groups in actual conversation seconds. The total conversation seconds over each individual Local Interconnection trunk group will be totaled for the entire monthly bill-round and then rounded to the next whole minute; and

14.1.3 Within twenty (20) calendar days after the end of each quarter (commencing with the first full quarter after the Effective Date of this Agreement), a usage report with the total traffic volume described in terms of minutes and messages and by call type local, toll, and other terminated to each other over SS7 Local Interconnection trunk groups.

15. Audiotext and Mass Announcement Services

The Parties agree that access to the audiotext, mass announcement and information services of each Party may be made available to the other Party upon execution of a separate agreement or an amendment to this Agreement.

16. Interconnection to Network Elements

16.1 Technical Requirements

16.1.1 When requested by AT&T, U S WEST shall provide interconnection between U S WEST Network Elements provided to AT&T and AT&T's network at available transmission rates designated by AT&T. If additional equipment beyond that which U S WEST currently has in place, or that U S WEST is planning to put in place, or is otherwise required to have in place is required to meet such transmission rates, the installation and/or acquisition of such equipment shall be accomplished pursuant to the ordering process set forth in this Agreement. The construction of additional equipment shall be subject to the provisions of Attachment 1, Section 3 of this Agreement.[3]

16.1.2 Traffic shall be combined and routed as follows:

16.1.2.1 At AT&T's request, U S WEST shall receive AT&T traffic destined to the U S WEST Operator Systems Network Element, on trunks from an AT&T end-office or an AT&T tandem.

16.1.2.2 At AT&T's request, U S WEST shall receive AT&T CAMA-ANI (Centralized Automatic Message Accounting - Automatic Number Identification) traffic destined to the 911 PSAPs or U S WEST E911 tandems, on trunks from an AT&T end-office.

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[3] The Parties agree to this last sentence pursuant to the Eighth Circuit decision.

16.1.2.3 At AT&T's request, U S WEST shall receive AT&T SS7 traffic destined to any U S WEST E911 tandem on trunks from an AT&T end-office, when SS7 E911 signaling is available in U S WEST's network.

16.1.3 When requested by AT&T and a third party carrier, U S WEST shall provide interconnections between AT&T's network, and the other carrier's network through the U S WEST network at transmission rates designated by AT&T, including, but not limited to, DS-1, DS-3, and STS-1, where available. U S WEST shall combine and route traffic to and from other local carriers and inter-LATA carriers through the U S WEST tandem network. Under separate contract, U S WEST may record and keep records of such traffic for AT&T billing purposes to the extent possible.

16.1.4 U S WEST shall provide two-way trunk groups for interconnection. At AT&T's request, and consistent with an efficient network architecture, U S WEST shall provide unidirectional traffic on such trunks, in either direction, effectively operating them as if they were one-way trunk groups.

16.1.5 All trunking provided by U S WEST shall adhere to the applicable performance requirements set forth in the "General Performance Requirements" section of this Agreement, pursuant to Sections 52.5.1 and 52.5.2 of Part A of this Agreement.

16.1.6 Intentionally left blank for numbering consistency.]

16.1.7 U S WEST and AT&T shall agree on the establishment of two-way trunk groups for the exchange of traffic for other IXCs. These trunk groups can be provided in a "meet point" arrangement.

16.1.8 Interconnection shall be made available upon AT&T's request at any technically feasible Point of Interface. All trunk interconnections shall be provided, including SS7, MF, DTMF, Dial Pulse, PRI-ISDN (where available), DID (Direct Inward Dialing), CAMA-ANI, and trunking necessary so that INP can be provided.

16.2 Trunk Interface Requirements

16.2.1 911/E911 Trunks

16.2.1.1 U S WEST shall allow AT&T to provide direct trunking to each U S WEST E911 end office or tandem, as is appropriate for the applicable serving area. These trunks are to be provided as one-way trunks from a given AT&T end office to the U S WEST E911 end office or tandem.

16.2.1.2 U S WEST shall provide for overflow E911 traffic in the same manner that U S WEST provides E911 overflow for itself.

16.2.2 S911 Trunks

If and when S911 tandems become available in the U S WEST network, U S WEST shall allow AT&T to provide direct trunking to each U S WEST S911 tandem. Such SS7 trunks are to be provided as one-way trunks from a given AT&T end office to the U S WEST S911 tandem.

16.2.3 Local Switch and Access Tandem Trunks

16.2.3.1 U S WEST shall provide trunks groups provisioned exclusively to carry IntraLATA Toll Traffic, as designated by AT&T.

16.2.3.2 U S WEST shall provide trunk groups provisioned exclusively to carry interLATA traffic, as designated by AT&T.

16.2.3.3 U S WEST shall provide SS7 trunks which provide SS7 Interconnection. At the Parties' agreement, MF trunks may be substituted for SS7 trunks where applicable.

16.2.3.4 U S WEST shall simultaneously route calls based on dialed digits (in accordance with the standard GR-317-CORE), and Carrier Identification Code (in accordance with the standard GR-394-CORE) over a single SS7 trunk group.

16.2.4 U S WEST Operator Services Trunk

U S WEST shall provide Operator Services trunks as one-way trunks from the U S WEST network to the AT&T network.

16.3 Network Interconnection between U S WEST and AT&T shall meet or exceed all of the requirements for network interconnection set forth in the following technical references:

16.3.1 GR-317-CORE, Switching System Generic Requirements for Call Control Using the Integrated Services Digital Network User Part (ISDNUP), Bellcore, February 1994;

16.3.2 GR-394-CORE, Switching System Generic Requirements for Interexchange Carrier Interconnection Using the Integrated Services Digital Network User Part (ISDNUP), Bellcore, February 1994;

16.3.3 FR-NWT-000271, OSSGR Operator Services Systems Generic Requirements, Bellcore, 1994 Edition; and

16.3.4 FR-NWT-000064, LATA Switching Systems Generic Requirements (LSSGR), Bellcore, 1994 Edition.

17. Reciprocal Traffic Exchange

17.1 Scope

Reciprocal traffic exchange addresses the exchange of traffic between AT&T end users and U S WEST end users. If such traffic is local, the provisions of this Agreement shall apply. Where either Party acts as an intraLATA toll provider or interLATA IXC or where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective tariffs or

contractual offerings for such third party terminations. Absent a separately negotiated agreement to the contrary, compensation for reciprocal traffic exchange solely applies to traffic exchanged directly between the Parties without the use of third party transit providers.

17.2 Responsibilities of The Parties

17.2.1 U S WEST and AT&T agree to treat each other fairly, nondiscriminatorily, and equally for all items included in this Agreement, or related to the support of items included in this Agreement.

17.2.2 AT&T and U S WEST agree to exchange such reports and/or data as provided in this Agreement to facilitate the proper billing of traffic.

17.2.3 [Intentionally left blank for numbering consistency]

17.2.4 AT&T and U S WEST shall share responsibility for all Control Office functions for Local Interconnection trunks and trunk groups, and both Parties shall share the overall coordination, installation, and maintenance responsibilities for these trunks and trunk groups.

17.2.5 The Party that performs the End Office function is responsible for all Control Office functions for the meet point trunking arrangement trunks and trunk groups, and shall be responsible for the overall coordination, installation, and maintenance responsibilities for these trunks and trunk groups.

17.2.6 AT&T and U S WEST shall:

17.2.6.1 Provide trained personnel with adequate and compatible test equipment to work with each other's technicians.

17.2.6.2 Notify each other when there is any change affecting the service requested, including the due date.

17.2.6.3 Coordinate and schedule testing activities of their own personnel, and others as applicable, to ensure its Interconnection trunks/trunk groups are installed per the Interconnection order, meet agreed-upon acceptance test requirements, and are placed in service by the due date.

17.2.6.4 Perform sectionalization to determine if a trouble is located in its facility or its portion of the Interconnection trunks prior to referring the trouble to each other.

17.2.6.5 Advise each other's Control Office if there is an equipment failure which may affect the interconnection trunks.

17.2.6.6 Provide each other with a trouble reporting/repair contact number that is readily accessible and available twenty-four (24) hours per day, seven (7) days per week. Any changes to this contact arrangement must be immediately provided to the other Party.

17.2.6.7 Provide to each other test-line numbers and access to test lines.

17.2.6.8 *Cooperatively plan and implement coordinated repair procedures for the meet point and Local Interconnection Trunks and facilities to ensure trouble reports are resolved in a timely and appropriate manner.*

17.3 Types of Traffic

17.3.1 *The types of traffic to be exchanged or provided under this Agreement include, but are not limited to the following:*

17.3.1.1 *EAS/Local Traffic,*

17.3.1.2 *Transit Traffic,*

17.3.1.3 *Switched Access Traffic,*

17.3.1.4 *Ancillary traffic includes all traffic destined for ancillary services, or that may have special billing requirements, including, but not limited to the following:*

(a) *Directory Assistance*
(b) *911/E911*
(c) *Operator call termination (busy line interrupt and verify)*
(d) *800/888 database dip*
(e) *LIDB*
(f) *Information services requiring special billing.*

17.3.1.5 *Unless otherwise stated in this Agreement, ancillary traffic will be exchanged in accordance with whether the traffic is Local/EAS, intraLATA toll, or Switched Access.*

17.4 *Transport and Termination of Exchanged Traffic.*

17.4.1 *Termination of Local Traffic*

Local Traffic will be terminated pursuant to the Reciprocal Compensation described in Attachment 1.

17.4.2 *EAS/Local Traffic*

As negotiated between the Parties, the exchange of local traffic between the Parties may occur in several ways:

17.4.2.1 *While the Parties anticipate the use of two way trunks for the delivery of Local Traffic, either Party may elect to provision its own one-way trunks for delivery of Local Traffic to be terminated on the other Party's network at the "initial" point of Interconnection.*

17.4.2.2 *The Parties may elect to purchase transport services from each other or from a third party. Such transport delivers the originating Party's Local Traffic to the terminating Party's end office or tandem for call*

termination. Transport may be purchased as either tandem switched transport (which is included in the tandem call termination rate) or direct trunk transport.

17.4.2.3 To the extent that AT&T has established a Collocation arrangement at a U S WEST end office location, and has available capacity, the Parties agree that AT&T shall provide two-way direct trunk facilities, when required, from that end office to the AT&T switch. In all other cases, the direct facility may be provisioned by U S WEST or AT&T or a third party. If both AT&T and U S WEST desire to provision the facility and cannot otherwise agree, the Parties may agree to resolve the dispute through the submission of competitive bids.

17.4.3 Transit Traffic

17.4.3.1 U S WEST will accept traffic originated by AT&T and will terminate it at a point of interconnection with another CLEC, Exchange Carrier, IXC or Wireless Carrier. U S WEST will provide this transit service through Tandem Office Switches. AT&T may also provide U S WEST with Transit Service.

17.4.3.2 The Parties expect that all networks involved in transporting Transit Traffic will deliver calls to each involved network with CCS/SS7 protocol and the appropriate ISUP/TCAP message to facilitate full interoperability and billing functions. In all cases, the originating company is responsible to follow the EMR standard and to exchange records with both the transiting company and the terminating company, to facilitate the billing process to the originating network.

17.4.3.3 The Parties will use industry standards developed to handle the provision and billing of Switched Access by multiple providers (MECAB, MECOD and the Parties' FCC tariffs).

17.4.4 Toll Traffic

Toll Traffic routed to an access tandem, or directly routed to an end office, will be terminated as Switched Access Service.

17.5 Interface Code Availability And Optional Features

17.5.1 Interface Code Availability

Supervisory Signaling specifications, and the applicable network channel interface codes for Local Interconnection trunks, are the same as those used for Feature Group D Switched Access Service, as described in the Parties' applicable Switched Access tariffs.

17.5.2 Optional Features

17.5.2.1 Inband MF or SS7 Out of Band Signaling

Inband MF signaling and SS7 Out of Band Signaling are available for local trunks. MF signaling or SS7 out-of-band signaling must be requested on the order for the

new local trunks. Provisioning of the local trunks equipped with MF signaling or SS7 Out of Band Signaling is the same as that used for Feature Group D Switched Access. Common Channel Signaling Service, as described in this Agreement, must be ordered by AT&T when SS7 Out of Band signaling is requested on local trunks.

17.5.2.2 Clear Channel Capability

Clear channel capability permits 24 DS-0-64 kbit/s services or 1.536 Mbit/s of information on the 1.544 Mbit/s line rate. Clear channel capability is available for local trunks equipped with SS7 Out of Band signaling. Clear channel capability is only available on trunks to U S WEST's access tandem switch or U S WEST's end office switches (where available). Clear channel capability must be requested on the order for the new local trunks. The provisioning of the local trunks equipped with clear channel capability is the same as that used for Feature Group D Switched Access Service. U S WEST will provide AT&T with a listing of U S WEST end offices, local tandems and access tandems equipped with clear channel capability. (Clear channel capability is not available on trunks to U S WEST's local tandem switches or end offices where it is currently not deployed. AT&T agrees to use the Bona Fide Request process to request clear channel capability for such additional switches. In the event additional clear channel capability is required, costs and charges shall be assessed in accordance with Attachment 1, Section 3.

17.6 Measuring Local Interconnection Minutes

17.6.1 Measurement of terminating Local Interconnection minutes, as calculated per Attachment 5, begins when the terminating local entry switch receives answer supervision from the called end user's end office indicating the called end user has answered. The measurement of terminating call usage over local trunks ends when the terminating local entry switch receives disconnect supervision from either the called end user's end office, indicating the called end user has disconnected, or AT&T's Point of Interconnection, whichever is recognized first by the entry switch.

17.6.2 U S WEST and AT&T are required to provide each other the proper call information (e.g., originated call party number and destination call party number, etc.) to enable each Party to issue bills in a complete and timely fashion.

17.7 Testing

17.7.1 Acceptance Testing

At the time of installation of a local trunk group, and at no additional charge, the Parties will cooperatively test the same parameters tested for terminating Feature Group D Switched Access Service.

17.7.2 Testing Capabilities

17.7.2.1 Terminating Local Interconnection trunk testing is provided where equipment is available, with the following test lines: seven-digit access to balance (100 type), milliwatt (102 type), nonsynchronous or synchronous, automatic transmission measuring (105 type), data transmission (107

type), loop-around, short circuit, open circuit, and non-inverting digital loopback (108 type).

17.7.2.2 In addition to Local Interconnection trunk acceptance testing, other tests are available (e.g., additional cooperative acceptance testing, automatic scheduled testing, cooperative scheduled testing, manual scheduled testing, and non-scheduled testing) at the applicable tariff rates.

17.8 Mileage Measurement

Where required, the mileage measurement for Local Interconnection facilities and trunks is determined in the same manner as the mileage measurement for Feature Group D Switched Access Service.

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1. General Business Requirements

Notwithstanding any performance standard set forth in this Attachment, U S WEST will provide the services set forth in this Attachment to AT&T with the level of service quality set forth in Section 52, Part A of this Agreement.

1.1 Procedures

1.1.1 U S WEST Contact with Subscribers

1.1.1.1 AT&T at all times shall be the primary contact and account control for all interactions with its subscribers, except as specified by AT&T. AT&T subscribers include active Customers as well as those for whom service orders are pending.

1.1.1.2 U S WEST shall ensure that any U S WEST personnel who may receive customer inquiries, or otherwise have opportunity for subscriber contact: (i) provide appropriate referrals and telephone numbers to subscribers who inquire about AT&T services or products; (ii) do not in any way disparage AT&T or its products or services during such inquiry or subscriber contact; and (iii) do not provide information about U S WEST products or services during that same inquiry or subscriber contact.

1.1.1.3 AT&T shall ensure that any AT&T personnel who may receive customer inquiries, or otherwise have opportunity for subscriber contact: (i) provide appropriate referrals and telephone numbers to subscribers who inquire about U S WEST services or products; (ii) do not in any way disparage U S WEST, or its products or services during such inquiry or subscriber contact; and (iii) do not provide information about AT&T products or services during that same inquiry or subscriber contact.

1.1.1.4 U S WEST shall not use AT&T's request for subscriber information, order submission or any other aspect of AT&T's processes or services to aid U S WEST's marketing or sales efforts.

1.1.2 Expedite, Escalation and Disaster Procedures

1.1.2.1 Upon request by AT&T, the Parties shall develop mutually acceptable escalation and expedite procedures which may be invoked at any point in the Service Ordering, Provisioning, Maintenance and Subscriber Usage Data transfer processes to facilitate rapid and timely resolution of disputes. Within the said sixty (60) day period, U S WEST and AT&T will establish intercompany contact lists for purposes of handling subscriber and other matters which require attention/resolution outside of normal business procedures. To the extent possible, U S WEST shall notify AT&T of any changes to its escalation contact list at least one (1) week before such changes are effective.

1.1.2.2 Upon request by AT&T, the Parties shall jointly establish contingency and disaster recovery plans for those cases in which normal

Service Ordering, Provisioning, Maintenance, Billing and other procedures for U S WEST's unbundled Network Elements, features, functions and Resale Services are inoperable.

1.1.3 Operational and Technological Changes

1.1.3.1 U S WEST shall notify AT&T of any material operational or technological (e.g., network, systems interfaces) changes related to any services, Interconnection methods, or Network Elements purchased by AT&T. At the time U S WEST decides to make such a change, U S WEST will notify AT&T in sufficient time to allow AT&T to make necessary adjustments to accommodate the change, but in no case with less than thirty (30) days' notice, unless otherwise agreed to by the Parties. Objections to the proposed change must be given in writing to U S WEST in a reasonable time. For the purposes of this Section, material changes shall be defined as those changes which will likely impact current interactions between AT&T (or its customers) and U S WEST.

1.1.3.2 U S WEST agrees to notify AT&T whenever an AT&T subscriber who is provided local service through services for resale, INP/NP, or unbundled Network Elements changes AT&T PIC status.

1.1.4 Customer of Record

1.1.4.1 Providing AT&T has obtained proper Customer Authorization, U S WEST shall recognize AT&T as the Customer of Record for all Network Elements or services for resale ordered by AT&T and shall send all notices, invoices, and information which pertain to such ordered services directly to AT&T. AT&T will provide U S WEST with addresses to which U S WEST shall send all such notices, invoices, and information.

1.1.5 Work Center Interface Procedures

1.1.5.1 Upon request by AT&T, the Parties shall develop and implement work center interface procedures for each function/ business process necessary for fulfilling the terms of this Agreement.

1.2 Service Offerings

1.2.1 Changes in Retail Service Offerings

1.2.1.1 Pursuant to Section 23.2 of this Agreement, U S WEST shall provide summaries to AT&T describing the proposed change(s) of services which are available for resale pursuant to this Agreement.

1.2.1.2 [Intentionally left blank for numbering consistency.]

1.2.1.3 U S WEST shall provide AT&T with access to new services, features, and functions concurrent with U S WEST's notice to AT&T of such changes, so that AT&T may evaluate these services.

1.2.2 Essential Services

1.2.2.1 U S WEST shall designate trunks or lines as an Essential Service Line ("ESL") or Telecommunications Service Priority ("TSP"), whichever is applicable, upon AT&T's request, based on industry standards.

1.2.3 Blocking Services

1.2.3.1 Upon request from AT&T, U S WEST shall provide blocking in accordance with U S WEST standard intervals for 700, 900, and 976 services, or other services of similar type as may now exist or may be developed in the future according to industry standards, and shall provide Billed Number Screening ("BNS"), including required LIDB updates, or equivalent service for blocking completion of bill-to-third party and collect calls, on a line, trunk, or individual service basis.

1.2.4 Training Support

1.2.4.1 U S WEST will train its employees who may communicate with AT&T subscribers to treat AT&T in a nondiscriminatory manner. U S WEST will solicit and may take into account input from AT&T in the development of such training and will permit AT&T to review, but not approve, such training. Such training will comply with the branding requirements of this Agreement.

1.2.4.2 U S WEST or its agent shall train AT&T employees on U S WEST's systems and processes necessary to assure the accuracy of required information exchange between AT&T. Information/materials provided to AT&T should include, at a minimum, operational and procedural information, and U S WEST-specific system access/interface instruction for performing similar functions.

1.2.5 Carrier Identification Codes

U S WEST shall provide to AT&T the active Carrier Identification Codes (CIC) for both Dial 1 and toll free (e.g., 800, 888) services for each of its access tandems pursuant to industry guidelines.

2. Pre-Ordering

2.1 General Business Requirements

2.1.1 Street Address Guide (SAG)

Upon request by AT&T, U S WEST shall provide to AT&T the SAG data, or its equivalent, in a mutually agreed to format. All changes to the SAG shall be provided to AT&T on a weekly basis.

2.1.2 CLASS and Custom Features

2.1.2.1 AT&T may order the entire set of CLASS and Custom features and functions, or a subset of any one or any combination of such features. In addition, U S WEST shall provide AT&T with a list of features and functions available on an end office by end office basis.

2.1.3 Customer Payment History

2.1.3.1 AT&T and U S WEST agree to make available to a mutually agreed upon third-party credit reporting agency, on a timely basis, such of the following Customer payment history information available for each person or entity that applies for local service or intraLATA toll Telecommunications Service(s) from either Party:

2.1.3.1.1 Applicant's name;
2.1.3.1.2 Applicant's address;
2.1.3.1.3 Applicant's previous phone number, if any;
2.1.3.1.4 Amount, if any, of unpaid balance in applicant's name;
2.1.3.1.5 Whether applicant is delinquent on payments;
2.1.3.1.6 Length of service with prior local or intraLATA toll provider;

2.1.3.1.7 Whether applicant had local or intraLATA toll service terminated or suspended within the last six (6) months with an explanation of the reason therefore; and,

2.1.3.1.8 Whether applicant was required by prior local or intraLATA toll provider to pay a deposit or provide another form of security including the amount of each.

2.1.3.2 Such information shall be provided on the condition that the credit reporting agency only make such information available to the carrier to which the person or entity in question has applied for Telecommunication Service.

2.1.4 Number Administration/Number Reservations

2.1.4.1 Until Number Administration functions are assumed by a neutral third party in accordance with FCC rules and regulations, U S WEST shall assign NXXs to AT&T on a non-discriminatory and equivalent basis following NANP guidelines. In addition, U S WEST shall provide testing and loading of AT&T's NXX on the same basis as U S WEST provides itself or its Affiliates. Further, in U S WEST's role as number administrator, it shall provide AT&T with access to abbreviated dialing codes, access arrangements for 555 line numbers, and the ability to obtain telephone numbers, including vanity numbers, while a customer is on the phone with AT&T. U S WEST shall provide the same range of number choices to AT&T, including choice of exchange number, as U S WEST provides its own customers. Reservation and aging of numbers shall remain U S WEST's responsibility.

2.1.4.2 AT&T may reserve blocks of U S WEST telephone numbers in accordance with U S WEST's tariffs, or in the same manner U S WEST reserves telephone numbers for its own use.

2.1.4.3 Where AT&T has obtained its own NXX, but has purchased U S WEST services for resale or Network Elements, U S WEST agrees to recognize the AT&T NXX in U S WEST's switch according to the local calling area defined by AT&T and approved by the Commission.

2.1.4.4 For resale and the unbundled switching element, U S WEST shall accept AT&T orders for vanity numbers and blocks of numbers for use with complex services including, but not limited to, DID, CENTREX, and hunting arrangements, as requested by AT&T on a non-discriminatory, equivalent basis following NANP guidelines.

2.1.4.5 For simple services, U S WEST shall provide real-time electronic interfaces to AT&T to obtain telephone number confirmation while the customer is on the line. When real time electronic interfaces are not available for simple services number reservations, U S WEST shall provide alternative means for confirmation of the number reservation while the customer is on the line. For number reservations associated with complex services, U S WEST shall provide confirmation of the number reservation within forty-eight (48) hours of AT&T's request or within such time as U S WEST may provide to itself or Affiliates, whichever is less.

2.1.4.6 Number Resources Arrangements

2.1.4.6.1 Nothing in this Agreement shall be construed in any manner to limit or otherwise adversely impact either Party's right to the request and assignment of any NANP number resources including, but not limited to, central office (NXX) codes pursuant to the Central Office Code Assignment Guidelines (last published by the Industry Numbering Committee ("INC") as INC 95-0407-008, Revision 4/19/96, formerly ICCF 93-0729-010).

2.1.4.6.2 To the extent U S WEST serves as Central Office Code Administrator for a given region, U S WEST will support all AT&T requests related to central office code (NXX) administration and assignments in the manner required and consistent with the Central Office Code Assignment Guidelines.

2.1.4.6.3 [Intentionally left blank for numbering consistency]

2.1.4.6.4 The Parties will comply with (NXX) administration requirements as prescribed by the FCC, the Commission, and accepted industry guidelines.

2.1.4.6.5 It shall be the responsibility of each Party to program and update its own switches and network systems pursuant to the Local Exchange Routing Guide ("LERG") guidelines to recognize and route traffic to the other Party's assigned NXX codes at all times. Neither Party shall impose any fees or charges whatsoever on the other Party for such activities. The Parties will cooperate to establish procedures to ensure the timely activation of NXX assignments in their respective networks.

2.1.4.6.6 Each Party shall be responsible for notifying its customers of any changes in numbering or dialing arrangements to include changes such as the introduction of new NPAs or new NXX codes.

2.1.4.6.7 Until an impartial entity is appointed to administer

telecommunications numbering, U S WEST will assign NXX codes to AT&T in accordance with national guidelines at no charge and on a nondiscriminatory basis.

2.1.4.6.8 Each Party is responsible for administering NXX codes assigned to it. Each Party is responsible for obtaining Local Exchange Routing Guide (LERG) listings of CLLI codes assigned to its switches. Each Party shall use the LERG published by Bellcore or its successor for obtaining routing information and shall provide all required information to Bellcore for maintaining the LERG in a timely manner.

2.1.4.7 U S WEST shall provide provisioning support outside of scheduled work hours at the same level that U S WEST provides itself and as requested by AT&T. Such support may be subject to a minimum labor charge.

2.1.4.8 Service Assurance Warranties and Incentives: U S WEST shall provide to AT&T service assurance warranties and incentives as U S WEST provides such service warranties and incentives to its own end users or any other Person or as otherwise provided by the Commission.

2.1.4.9 Availability of Network Capacity: Consistent with AT&T's forecasts, U S WEST shall deploy and keep deployed network facilities for AT&T services in a non-discriminatory manner and in the same manner as U S WEST makes such facilities available to itself for its services.

2.1.4.10 Workcenter Interface Methods and Procedures: U S WEST and AT&T shall finalize interface methods and procedures between their respective work centers detailing systems and processes for ordering and provisioning. Such methods and procedures shall be completed within one hundred twenty (120) days after a written request of either Party. The lack of workcenter interface methods and procedures shall not inhibit the provision of services under this Agreement.

2.2 Service Order Process Requirements

2.2.1 [Intentionally left blank for numbering consistency.]

2.2.2 Specific Unbundling Requirements

2.2.2.1 When ordering Network Elements, AT&T shall have the option of ordering all features, functions and capabilities of such Network Elements.

2.2.2.2 When AT&T orders Network Elements, U S WEST shall provision all features, functions, and capabilities appropriate to the Network Elements which may include, but are not limited to:

2.2.2.2.1 the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to U S WEST's Customers, such as telephone number, white page listing, and dial tone; and

2.2.2.2.2 *all other features the switch has activated, including, but not limited to, custom calling, custom local area signaling service features and Centrex, as well as any technically feasible*[1] *customized routing functions provided by the switch.*

2.3 Systems Interfaces and Information Exchanges

2.3.1 General Requirements

[Intentionally left blank for numbering consistency.]

2.3.2 Pre-Ordering and Provisioning for Resale Services and Unbundled Network Elements

2.3.2.1 *U S WEST shall provide to AT&T a list of all intraLATA and interLATA carriers available for Customer selection on a central office level.*

2.3.2.2 *[Intentionally left blank for numbering consistency]*

2.3.2.3 *U S WEST shall provide AT&T with access to Customer Profile Information ("CPI") without requiring AT&T to produce a signed Letter of Authorization ("LOA") subject to proof of authorization requirements described elsewhere in this Agreement, based on AT&T's blanket representation that the Customer has authorized AT&T to obtain such CPI.*

2.3.2.3.1 *CPI shall be in the standard U S WEST format at the line and/or trunk level. U S WEST shall provide to AT&T a real-time, electronic interface to U S WEST Customer information systems which will allow AT&T to obtain the Customer profile, which may include, but not be limited to, Customer name, service addresses, billed telephone number(s), and identification of features and services provided by U S WEST on the Customer accounts, and to obtain information on all features and services available in the end office where Customer's services are currently provisioned. The preceding information may not include services deemed not to be Telecommunications Services by the Commission.*

2.3.2.3.1.1 *Until access is available via a real-time, electronic interface for CPI, U S WEST agrees that AT&T can obtain CPI in an interim mutually agreed to manner and in accordance with Section 3.2 of this Attachment to facilitate the service order process.*

2.3.2.5 *U S WEST shall provide to AT&T, via the ICON database or other mutually agreed upon means, a list of all current features and functions technically available from each switch by switch CLLI. Planned services*

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[1] Pursuant to the Eighth Circuit Decision, the Parties agree to delete the following: "technically feasible".

shall be provided to AT&T through network disclosure process and/or Commission Notification as appropriate.

2.3.2.6 [Intentionally left blank for numerical consistency]

2.3.2.7 Pending or Held Orders: U S WEST shall provide, when available, the AT&T information regarding a subscriber's previous pending or held orders. If the subscriber has a pending or held order, the status of the order shall not be negatively impacted as a result of the subscriber changing local service providers (i.e. due date for pending service changed to later date).

2.3.2.8 Special Construction: When U S WEST determines that special construction is required, U S WEST shall notify AT&T on a timely basis of special construction requirements and charges, and obtain AT&T authorization before beginning such construction.

2.3.3 Pre-Ordering and Provisioning for Unbundling

2.3.3. U S WEST shall provide to AT&T, upon reasonable request, sufficient engineering design and layout information for Network Elements for specific applications.

2.3.3.2 U S WEST shall provide to AT&T, upon request, advance information of the details and requirements for planning and implementing NPA splits in accordance with NANP Guidelines.

2.3.3.3 U S WEST shall make engineering support available to AT&T as is normal and customary in the provision of Telecommunications Services, Network Elements, Combinations or Ancillary Functions as described in this Agreement. AT&T may request additional engineering support.

2.4 Pre-ordering Functions

For internal purposes, the term "Service Order" as used in this Attachment 5 will be internally referred to as a Local Service Request.

"Pre-Ordering" and "Ordering" encompasses the preliminary set of activities whereby a service representative dialogues with the customer in order to obtain the information required to write a service order and consists of the following functions: verify an address, check service availability, reserve a telephone number, check for appointment availability, reserve an appointment and return customer service information. These functions are described as follows:

2.4.1 Address Verification - Provides AT&T with the ability to query for and receive the customer service location, serving central office, and facility indicators. The facilities indicator will indicate the availability of facilities for one access line at the address, if the cable pair is available or working. If the cable pair is working, an indication of a pending disconnect order and the due date will be provided. This function does not reserve cable pairs.

2.4.2 Telephone Number Reservation - Provides AT&T with the capability to identify if one or more telephone numbers are available and reserve them if available. This

includes the ability to reserve one or more specific numbers (vanity numbers), a block of sequential or random block of numbers by serving central office and/or NXX. If a work order is not received within a negotiated amount of time, the reservation will automatically expire.

2.4.3 Appointment Availability and Reservation - Provides AT&T with the capability to determine the next available due date, the availability of a specific date, an indication if the date is available or a selection of the next available date any closed dates beyond that date, and reservation of an available appointment.

2.4.4 Service Availability - Allows AT&T to determine the availability of services and facilities to a specific end-users' location(s). This capability indicates is the service is available, that tariff rates apply, the amounts of any additional recurring and non-recurring costs, and the interval to be used when ordering the service.

2.4.5 Customer Service Information Request - Gives AT&T the ability to request a listing of existing services, features, directory listing and equipment for a customer account.

2.4.6 Circuit Identification Request - Provides AT&T with the capability to identify and obtain circuit identifications. If a work order for a Circuit Identification Request is not received within a negotiated amount of time, the request will automatically expire.

3. Ordering and Provisioning

3.1 General Business Requirements

3.1.1 Ordering and Provisioning Parity

U S WEST shall provide AT&T with the same level of ordering and provisioning support as U S WEST provides itself in accordance with standards and performance measurements that U S WEST uses and/or which are required by law, regulatory agency, or by U S WEST's own internal procedures, whichever are the most rigorous. These standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as U S WEST may deploy) that U S WEST provides to AT&T under this Agreement.

3.1.2 Interconnection Service Center (ISC)/Single Point of Contact (SPOC)

3.1.2.1 U S WEST shall provide a Systems Interface Help Desk or equivalent which shall serve for all activities involved in the electronic interface for ordering and provisioning of U S WEST's unbundled Network Elements, features, functions, and Resale Services. The Systems Interface Help Desk or equivalent shall be available twenty-four (24) hours a day, seven (7) days a week.

3.1.2.2 U S WEST shall provide a Single Point of Contact ("SPOC") and shall provide to AT&T toll-free nationwide telephone numbers (available during U S WEST's scheduled work hours) answered by competent, knowledgeable personnel, trained to answer questions and resolve problems in connection with the ordering and provisioning of unbundled Network Elements, features, functions, capabilities, and Resale Services.

U S WEST will provide sufficient resources to provide equivalent, or as otherwise agreed to by the Parties, service to AT&T.

3.1.2.3 In addition to the electronic interfaces provided for elsewhere in this Agreement, U S WEST shall provide, as requested by AT&T through the SPOC, provisioning and dispatch in the form of coordinated scheduling, status, and dispatch capabilities equivalent to that which U S WEST provides itself or as otherwise agreed to by the Parties.

3.1.3 Carrier Selection

3.1.3.1 For Services for Resale or unbundled Network Elements, U S WEST shall provide to AT&T, no later than January 1, 1997, the capability to order local service, intraLATA, and interLATA, toll services by entering AT&T subscriber's choice of carrier on a single order. U S WEST will offer other carrier selection choices as they become available. U S WEST shall provide AT&T with the capability to order separate interLATA and intraLATA carriers on a line or trunk basis where 1+ presubscription is available.

3.1.3.2 Where intraLATA 1+ presubscription is not available, or if the subscriber does not select an intraLATA toll carrier, U S WEST agrees to provide intraLATA toll services for resale to AT&T and to recognize the end user as the customer of AT&T for intraLATA toll. AT&T shall designate the default carrier for all other toll calls if the subscriber does not select a carrier. In all cases, U S WEST will route toll calls to the appropriate carrier as designated by AT&T.

3.1.4 Notification to Long Distance Carrier

3.1.4.1 U S WEST will not accept PIC change requests through the CARE process for AT&T local service customers. AT&T's long distance operations may obtain such CARE transactions for AT&T long distance customers from the customer's local service provider. U S WEST agrees to notify IXCs using OBF approved CARE transactions, whenever an IXC Customer who is provided local service through Services for Resale, INP/NP, or unbundled Network Elements changes PIC status.

3.1.4.2 U S WEST shall implement new Transaction Code Status Indicators ("TCSIs") 2033, 2233, 3147, and 3148. The new local service provider identification ("LSPID") will be included on these transactions if the new local resale provider agrees U S WEST should provide the information to a long distance provider as defined by the OBF in support of Local Resale. U S WEST shall implement TCSIs used in conjunction with the new local service provider ("LSP") identification code for handling account maintenance, customer service, and trouble administration issues. These TCSIs include 4001/02/05, 4201-4205, 4301, 2033, 2233, 3147, 3148, 3149, and others as the OBF may define.

3.1.4.2.1 In addition, U S WEST shall implement TCSIs, when available, used in conjunction with the new Ported Telephone Number field to link "shadow" and ported telephone numbers in support of Interim Number Portability. These TCSIs include 2231, 3150, 3151, and others as the OBF may define.

3.1.5 Ordering Interconnection

The Parties agree to utilize the OBF-ASR process for ordering interconnection trunks, which is the same process used to order Access Services. When the ordering Party requests facilities, routing, or optional features different than those determined to be available, the Parties will work cooperatively in determining an acceptable configuration based on available facilities, equipment and routing plans.

3.2 Service Order Process Requirements

3.2.1 OBF Compliance

3.2.1.1 U S WEST and AT&T shall generally follow the OBF-developed ordering and provisioning process guidelines. These processes include, but are not limited to, pre-order service inquiry, pre-order service inquiry response, firm order, acknowledgment/rejection, firm order confirmation, delay notification, and completion notification. U S WEST agrees to work cooperatively to generally comply with future OBF developed guidelines.

3.2.2 Service Migrations and New Customer Additions

3.2.2.1 For Resale Services, U S WEST shall not require a disconnect order from a Customer, another local service provider, or any other entity, to process an AT&T order to establish AT&T Local Service and/or migrate a Customer to AT&T Local Service.

3.2.2.2 For Resale Services, U S WEST shall not disconnect any Customer service or existing features available under this Agreement at any time during the migration of that Customer to AT&T service without AT&T prior agreement.

3.2.2.3 For services provided through unbundled Network Elements, U S WEST shall recognize AT&T as an agent for the Customer in coordinating the disconnection of services provided by another CLEC or U S WEST.

3.2.2.4 Unless otherwise directed by AT&T, when AT&T orders Resale Services or Network Elements, All trunk or telephone numbers currently associated with existing services shall be retained without loss of feature capability and without loss of associated ancillary services including, but not limited to, Directory Assistance and 911/E911 capability for those services or features which U S WEST controls and which are available under this Agreement.

3.2.2.5 For Customer conversions requiring coordinated cut-over activities, U S WEST and AT&T will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. Unless expedited, U S WEST and AT&T shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for AT&T the duration of any service interruption that the cut-over might cause. The cut-over time will be defined as a thirty (30) minute window within which both the AT&T

and U S WEST personnel will make telephone contact to complete the cut-over.

3.2.2.5.1 U S WEST will coordinate activities of all U S WEST work groups involved with the conversion. This coordination will include, but not be limited to, work centers charged with manual cross-connects, electronic cross-connect mapping, and switch translations (including, but not limited to, implementation of Interim Number Portability translations).

3.2.2.5.2 As soon as possible, but in no event later than one (1) hour after completion, U S WEST will notify AT&T when coordinated cut-over is complete.

3.2.2.5.3 End user service interruption shall not exceed twenty (20) minutes during any cut-over. The average interruption caused by the cut-over of AT&T Customers shall not exceed ten (10) minutes. However, If any service interruption is to exceed twenty (20) minutes, U S WEST will immediately notify AT&T of such delay

3.2.2.5.4 Within the appointed thirty (30) minute cut-over time, the U S WEST personnel will call the AT&T personnel designated to perform cross-connection work and when the U S WEST personnel is reached in that interval such work will be promptly performed. If the AT&T personnel is not ready within the appointed interval, and if AT&T had not called to reschedule the work at least two (2) hours prior to the start of the interval, U S WEST and AT&T will reschedule the work order and AT&T will pay the non-recurring installation charge for the unbundled loops scheduled for the missed appointment. In addition, non-recurring installation charges for the rescheduled appointment will apply. If the U S WEST personnel is not available or not ready at any time during the thirty (30) minute interval, AT&T and U S WEST will reschedule and U S WEST will waive the non-recurring charge for the unbundled loops scheduled for that interval. If unusual or unexpected circumstances prolong or extend the time required to accomplish the coordinated cut-over, the Party responsible for such circumstances is responsible for the reasonable labor charges of the other Party. Delays caused by the customer are the responsibility of AT&T. In addition, if AT&T has ordered INP as a part of the unbundled loop installation, U S WEST will coordinate implementation of INP with the unbundled loop installation.

Issue 5-1 Parked

[U S WEST proposes the following]

3.2.2.6 Service Order: U S WEST shall provide AT&T the capability to issue a service order for unbundled Network Elements, [combinations] consistent with Attachment 3, Section 19 *and Resale Services.*

3.2.2.7 U S WEST shall provide AT&T the capability to transfer a customer with no feature changes to AT&T through a streamlined process.

3.2.2.8 Status: U S WEST shall provide the AT&T status on a service order when the status of the order changes.

3.2.2.9 Modifies: U S WEST shall provide AT&T the capability to modify the service order any time after it has been issued, however, U S WEST may require the issuance of a supplemental or change order.

3.2.2.10 Cancel: U S WEST shall provide AT&T the capability to cancel the service order any time after it has been issued.

3.2.2.11 Coordinated Service Request: U S WEST shall provide AT&T the capability to relate coordinated services requests, and identify those service requests that require coordination with AT&T, or subscriber, or subscriber's vendor. When so identified, U S WEST will follow any specific instructions indicated on the service request so that the subscriber's service is not negatively affected by the service turn-up activity.

3.2.2.12 Expedite Process: U S WEST and AT&T shall mutually develop expedite procedures to be followed when AT&T determines an expedite is required to meet subscriber service needs.

3.2.2.13 Expedites: U S WEST shall provide AT&T the capability to expedite a service request. Within two (2) business hours after a request from AT&T for an expedited request, U S WEST shall notify AT&T of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

3.2.3 Intercept Treatment and Transfer of Service Announcements

3.2.3.1 U S WEST shall provide unbranded intercept treatment and transfer of service announcements to AT&T Customers. U S WEST shall provide such treatment and transfer of service announcement for all service disconnects, suspensions, or transfers, in the same manner as that which U S WEST provides its own end users. U S WEST's current standard time periods for providing such announcements is three (3) months for residential service and twelve (12) months for business service. AT&T may request extensions at parity with that which U S WEST provides its end-users.

3.2.3.2 Pursuant to this Agreement, AT&T shall provide unbranded intercept treatment and transfer of service announcements to U S WEST Customers. AT&T shall provide such treatment and transfer of service announcement for all service disconnects, suspensions, or transfers, at parity with what AT&T provides its own end users. AT&T standard time periods for providing such announcements is three (3) months for residential service and twelve (12) months for business service. U S WEST may request extensions at parity with that which AT&T provides its end-users.

3.2.4 Due Date

3.2.4.1 *U S WEST and AT&T shall mutually agree on what services and circumstances are subject to the standard interval process to determine the due date or the requested/committed due date process.*

3.2.4.2 *For those services and circumstances that U S WEST and AT&T agree shall be handled by the standard interval process, U S WEST shall supply AT&T with standard due date intervals on a nondiscriminatory basis to be used by AT&T personnel to determine service installation dates. Under those circumstances U S WEST shall complete the provisioning within the standard interval.*

3.2.4.2.1 *If AT&T requests a due date earlier than the standard due date interval, then expedite charges may apply.*

3.2.4.3 *For those services and circumstances that U S WEST and AT&T agree shall be handled by the requested/committed due date process, AT&T may request a due date on each service request. U S WEST will provide an offered due date on a nondiscriminatory basis. If AT&T accepts the offered due date then such date shall become the committed due date. U S WEST will complete the order on the committed due date unless otherwise authorized by AT&T.*

3.2.4.3.1 *If AT&T requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the AT&T required due date then that required due date becomes the committed due date and expedite charges may apply.*

3.2.4.4 *Subsequent to an initial order submission, AT&T may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.*

3.2.4.5 *Any special or preferred scheduling options available, internally or externally, to U S WEST for ordering and provisioning services shall also be available to AT&T.*

3.2.5 Customer Premises Inspections and Installations

3.2.5.1 *AT&T shall perform or contract for all needs assessments, including equipment and installation requirements, at the Customer premises.*

3.2.5.2 *U S WEST shall provide AT&T with the ability to schedule dispatches for work under this Agreement.*

3.2.5.3 *U S WEST shall provide, at AT&T's request, extended demarcation beyond the NID using intrabuilding riser and lateral beyond the NID. This provision shall not require U S WEST to provide inside wire.*

3.2.6 Firm Order Confirmation (FOC)

Issue 5-2 Parked

[U S WEST proposes the following]

3.2.6.1 U S WEST shall provide to AT&T, via an electronic interface, a Firm Order Confirmation ("FOC") for each AT&T order. The FOC shall contain on a per line and/or trunk basis an enumeration of AT&T ordered unbundled Network Elements (and the specific U S WEST naming convention applied to those Network Elements), features, functions, Resale Services, options, physical interconnection, quantity, and U S WEST committed due date for order completion.

[AT&T proposes the following]

3.2.6.1 U S WEST shall provide to AT&T, via an electronic interface, a Firm Order Confirmation ("FOC") for each AT&T order. The FOC shall contain on a per line and/or trunk basis an enumeration of AT&T ordered unbundled Network Elements (and the specific U S WEST naming convention applied to those Network Elements or Combination), features, functions, Resale Services, options, physical interconnection, quantity, and U S WEST committed due date for order completion.

3.2.6.2 For a revised FOC, U S WEST shall provide order detail on a per line or per trunk level as well as the order detail from the prior FOC.

3.2.7 Order Rejections

3.2.7.1 U S WEST shall reject and return to AT&T any order that U S WEST cannot provision, due to technical reasons, missing information, or jeopardy conditions in accordance with performance measurements as defined herein. When an order is rejected, U S WEST shall, in its rejection notification, specifically describe all of the reasons for which the order was rejected. U S WEST shall not reject any orders on account of the requested due date.

3.2.7.2 On an exception basis, to the extent that errors cannot be corrected pursuant to electronic interface processes, U S WEST agrees to accept verbal order corrections from AT&T. U S WEST shall timely inform AT&T by telephone of any minor issues which can be handled over the phone. As required AT&T will provide a supplemental service request reflecting changes to the original service request.

3.2.8 Service Order Changes

3.2.8.1 If an installation or other AT&T-ordered work request requires a change from the original AT&T service request in any manner, U S WEST shall call AT&T in advance of performing the installation or other work to obtain authorization. U S WEST shall then provide AT&T an estimate of additional labor hours and/or materials. After all installation or other work is completed, U S WEST shall notify AT&T of actual labor hours and/or materials used in accordance with regular service order completion

executed by multiple analysts, are required in order to fully develop each factor. Each analyst works independently, without communicating with one another between steps. Thus, no controls are employed to assure consistent use of the results between each step. Similar problems exist with U S WEST'S Embedded Avoided Cost Study.

As a result, U S WEST has misclassified some direct costs into the indirect cost category, the markup used is inappropriately calculated, future costs have been improperly included, the source data is internally developed and, therefore proprietary, and the factors lack appropriate support and cannot be verified.

Q. IS U S WEST'S TREATMENT OF AVOIDED COSTS COMPLETE AND CONSISTENT WITH THE INTENT OF THE ACT?

A. No. As stated above, U S WEST improperly uses TELRIC costs to develop retail and wholesale factors that are then used to quantify avoided costs, in violation of section 252(d)(3) of the Act.

Q. HOW DOES U S WEST CALCULATE DIRECT AND INDIRECT COSTS IN ITS TELRIC MODEL?

A. First, retail factors and retail units are calculated based on TELRIC (forward looking costs of network elements) and "SC" (which appears to be

U S WEST's reference for total company shared and common costs). These calculations include future costs that have not yet been incurred and may never be incurred by U S WEST. Then, the retail units are used to calculate the retail ratio of units to total units which are used in conjunction with wholesale factors to determine the wholesale ratio. The difference between the retail ratio and the wholesale ratio represents the direct avoided discount percentage. This percentage is then applied to the indirect expenses to determine the avoided indirect expenses. In developing the TELRIC costs, U S WEST has included costs for establishing a wholesale environment, (costs such as wholesale computer systems). This attempt to recover costs is entirely inappropriate for two reasons. First, as discussed above, the use of future costs is inconsistent with both the Federal Act and the FCC Order. Second, it appears that U S WEST is also attempting to recover these same costs in other proceedings, such as through its recurring and nonrecurring cost studies for network elements, and in proceedings such as the Interconnection Cost Adjustment Mechanism ("ICAM") proceedings U S WEST has initiated throughout its region.

Q. HAS THE TELRIC MODEL PROPERLY ACCOUNTED FOR ALL DIRECT COSTS?

A. No. The FCC Order specifically identified accounts 6621 (Call Completion), 6622 (Number Services) and 6623 (Customer Services) as accounts that

should be treated as direct cost accounts. The U S WEST TELRIC model misclassifies these accounts as indirect cost accounts.

Q. WHAT EFFECT HAS THIS MISCLASSIFICATION HAD ON THE DISCOUNT PERCENTAGE CALCULATION?

A. By failing to include these accounts in the direct cost category, the direct avoided cost percentage is significantly reduced. Thus, when the direct avoided cost percentage is used to develop the indirect costs, the resulting indirect avoided costs are reduced, thereby artificially reducing the overall avoided cost discount.

Q. HOW DOES U S WEST'S TELRIC MODEL MISCALCULATE THE MARKUP?

A. U S WEST adds together TELRIC costs with "SC" costs, then subtracts that sum from the 1995 annual revenues for the state of South Dakota, and then divides it by the sum of TELRIC and SC to develop a markup percentage. This markup percentage is then utilized to divide into the percent difference in cost (retail factor less wholesale factor), but only after it is adjusted by another factor for avoided contribution.

Q. DOES THIS MARKUP CALCULATION VIOLATE THE FCC ORDER?

A. Yes. The FCC Order states that "a portion of contribution, profits, or markup may also be considered 'attributable to costs that will be avoided.'" U S WEST's calculation of markup reduces the wholesale discount percentage. If the markup was used in the manner contemplated by the FCC, the markup should increase the "costs that will be avoided" and increase, not reduce, the discount. Thus, U S WEST's markup calculation is counter-intuitive and is simply another obvious change in methodology designed to reduce the avoided cost discount.

Q. DOES THE U S WEST TELRIC AVOIDED COST STUDY ATTEMPT TO INCLUDE FUTURE COSTS IN ITS ANALYSIS?

A. Yes. First, the U S WEST TELRIC Avoided Cost Study incorporates cost onsets it claims it will experience when establishing and operating a wholesale business. U S WEST can provide no explanation of the various factors used in its study. In Mr. Flemming's deposition, he indicates that these factors are the relationship between investment and related expenses adjusted to be forward looking (See Exhibit DBS-1, Flemming Dep. Tr. at p. 50). Based upon our review, in developing the retail cost factors, the U S WEST study associates future shared costs and TELRIC data. However, it is difficult to determine from the U S WEST presentation the exact level of cost onsets that U S WEST is including and which of the cost onsets are recurring versus one time charges.

In addition, the U S WEST TELRIC Avoided Cost Study calculates the Net Present Value of the future annual costs and investments associated with new systems also referred to by U S WEST as "annual TELRIC." These costs are described in the workpapers as "system modifications to except (sic) resale orders." These appear to be cost onsets related to the provisioning of wholesale services but, other than the worksheets, U S WEST has presented no rationale for these costs.

Q. DOES THE 1996 ACT PROVIDE DIRECTION ON THE TREATMENT OF FUTURE COSTS?

A. Yes. As stated in the FCC Order, paragraph 915, "the 1996 Act requires that wholesale rates be based on existing retail rates, and thus, clearly precludes use of a "bottom up" TSLRIC study to establish wholesale rates that are not related to the rates for underlying retail services." It follows then that U S WEST's use of TELRIC costs and its inclusion of nonrecurring cost onsets is inappropriate and inconsistent with the FCC's Order and the Telecommunications Act.

Q. WHAT EFFECT DOES U S WEST'S INCONSISTENT TREATMENT OF FUTURE COSTS HAVE ON THE WHOLESALE DISCOUNT CALCULATIONS?

A. Not surprisingly, U S WEST's methodology tends to substantially understate the wholesale discount.

Q. WHAT OTHER CONCERNS DO YOU HAVE REGARDING U S WEST'S TELRIC AVOIDED COST STUDY?

A. U S WEST's TELRIC avoided cost study methodology is a complex set of mathematical formulas, that appears completely illogical and irrational. In addition, it is difficult to determine how many of the calculations were performed because the source data is unknown.

Q. WHAT IS THE PROBLEM WITH THE SOURCE DATA IN U S WEST'S TELRIC MODEL?

A. U S WEST's TELRIC model employs numerous data, the source of which is unknown, e.g., the special studies used to populate the model. This makes it difficult to analyze the veracity of the numbers and to ascertain whether the use of such data is consistent with the FCC Order.

Q. WOULD YOU RECOMMEND THAT THE SOUTH DAKOTA COMMISSION CONSIDER THE U S WEST TELRIC AVOIDED COST MODEL IN DETERMINING THE WHOLESALE COST DISCOUNT FOR THE STATE OF SOUTH DAKOTA?

A. No. For all the reasons stated above, the U S WEST TELRIC Avoided Cost

Study does not comply with the Federal Act and FCC Order. It utilizes inappropriate methodologies, factors and relationships that are unverifiable and clearly biased to calculate an unreasonably low wholesale discount percentage.

III. U S WEST'S EMBEDDED AVOIDED COST MODEL

Q. BRIEFLY DESCRIBE THE U S WEST EMBEDDED AVOIDED COST MODEL.

A. The U S WEST Embedded Avoided Cost Model ("Embedded Study") is a derivative of the AT&T Simplified Avoided Cost Model. However, while U S WEST starts with AT&T's model, U S WEST has so significantly and inappropriately modified AT&T's model, that the result is a clearly biased and unrealistically low discount percentage. Specifically, U S WEST has applied the same factors used in its TELRIC model, has inappropriately excluded relevant costs, added non-relevant revenues, and inappropriately allocated costs into product categories. In addition, U S WEST has modified the avoided cost calculation by inappropriately relating avoided costs to total costs. The sole purpose of each of these adjustments is to artificially reduce the avoided cost percentage and introduce unnecessary confusion.

Q. IS THE U S WEST EMBEDDED AVOIDED STUDY CONSISTENT WITH THE ACT AND THE RULES SET FORTH BY THE FCC IN

THE AUGUST 8TH ORDER?

A. No. While the Embedded Study complies more closely with study methodology required by the Act and the FCC Order than U S WEST's TELRIC, there are several instances that the Embedded Study deviates from the Act and the FCC's guidelines. Like the TELRIC Study, the Embedded Study improperly mixes embedded and future costs in the study by employing TELRIC factors to determine avoided cost percentages for marketing and service accounts. In addition, the Embedded Study does not include all relevant retail costs, and inappropriately uses Total Cost in calculating the wholesale discount.

Q. **HOW DOES THE U S WEST EMBEDDED STUDY DEVELOP SPECIFIC DISCOUNT FACTORS?**

A. U S WEST has not attempted to develop an embedded cost discount in its Embedded Study. Rather, U S WEST inappropriately relies on the forward-looking TELRIC factors developed in its TELRIC Avoided Cost Model and simply inserts the flawed TELRIC results into the Embedded Study. As discussed above, the use of TELRIC factors is inappropriate as it does not comply with the Act and the FCC Order. TELRIC is a forward looking cost methodology which is designed to replicate the costs that U S WEST will incur in a competitive environment. On the other hand, embedded costs reflect the actual costs incurred in providing retail services to U S WEST's

customers, including any inefficiencies of the provider operating in a monopoly environment. Thus, the use of TELRIC factors (rather than embedded costs) will significantly understate the amount of the costs U S WEST will avoid in a wholesale environment.

Q. **DOES THE U S WEST EMBEDDED STUDY APPROPRIATELY INCLUDE ALL RELEVANT COSTS?**

A. No. The Embedded Study excludes several retail services which are subject to resale, such as semi-public payphone and non-regulated services. Additionally, U S WEST has excluded specific portions of all retail product/service categories, claiming that these costs represent nonrecurring charges. The Act specifically requires in Section 251(c)(4) that the incumbent LEC must "... offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." These services are clearly offered to retail customers in a combination of recurring and nonrecurring rates, and therefore, must be included in the avoided cost model. The inappropriate exclusion of these services results in a lower wholesale discount.

In addition to the omissions listed above, U S WEST excludes all of the service order costs from its Customer Service Account 6623. This treatment suggests that it is U S WEST's position that it will continue to incur these

costs in a wholesale environment. This exclusion is inappropriate as the Customer Service order costs will be incurred solely by AT&T when creating service orders for its retail customers. U S WEST will not perform any of the customer facing functions for AT&T's retail customers. U S WEST should avoid all costs in the Customer Services Accounts. Therefore, these service order costs should not be excluded.

Q. THE U S WEST EMBEDDED COST STUDY EMPLOYS TOTAL COST AS THE DENOMINATOR WHEN DETERMINING THE WHOLESALE DISCOUNT PERCENTAGE. DOES AT&T AGREE WITH THE USE OF TOTAL COST IN THIS MANNER?

A. No. The Act states in Section 252(d)(3), "a state commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications services requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by the local exchange carrier." Using Total Cost as the denominator in the calculation of the wholesale discount percentage creates a discount that is the retail rate less the percentage of avoided cost to total costs as opposed to retail rate less the avoided cost itself. The result of using total cost is that the discount is too large where revenues exceed costs or too small where costs exceed revenues. It follows then that the use of Avoided Cost divided by Total Cost would be an inappropriate calculation to utilize when

determining the wholesale discount percentage as it would not comply with the Act and creates an inaccurate and unreliable wholesale discount. As AT&T demonstrated with its Simplified Avoided Cost Model and my initial direct testimony, the proper way to determine the avoided cost discount is to divide total avoided costs by total revenues for services subject to resale. Only in such a way can a wholesale rate based on the "retail rates charged to subscribers for the telecommunications services requested, excluding [the avoided costs]" be obtained.

Q. WHAT DATA DOES U S WEST USE IN THEIR EMBEDDED COST STUDY?

A. U S WEST uses internally developed, non-verifiable, proprietary CAAS data in its Embedded Study. As a result, the study uses information that cannot be examined and compared to any publicly verifiable data, such as the ARMIS data that is submitted to the FCC. Therefore, U S WEST has created another "black box" model.

Q. DOES AT&T CONCUR WITH U S WEST THAT CAAS DATA IS AN APPROPRIATE DATA SOURCE FOR AN EMBEDDED COST MODEL?

A. No. AT&T does not agree with the use of CAAS data for several reasons. First and foremost, CAAS data is collected on an aggregate basis and then

allocated to various areas in order to obtain the final CAAS reports. Most of these allocations occur as the result of special studies performed by U S WEST employees for the purposes of allocating costs for rate-rebalancing. These studies are performed without controls and without the benefit of administrative continuity from year to year, which may result in data that is not reliable or reproducible. In addition, the method utilized to create the data necessary to perform rate-rebalancing is directly contrary to the method that should be employed for the purposes of developing an avoided cost study. A rate-rebalancing proceeding attempts to match revenues with costs in order to determine appropriate rates. Problems arise with this approach because the costs of the local loop are allocated to match the subsidy revenues which are booked in a jurisdiction or for services other than where the costs are actually incurred. On the other hand, an avoided cost study must utilize activity-based costing and appropriately book costs where they are incurred in order to accurately represent the costs incurred in the delivery of a particular service.

Secondly, U S WEST has excluded from its model jurisdictional interstate costs resulting from the FCC's Part 36/69 separations procedures. The purpose of this jurisdictional separations procedure is to match the CALC subsidy with the cost of the local loop. The separations process therefore allocates a portion of cost of the local loop to the interstate jurisdiction solely

for the purposes of matching costs with the interstate CALC. This allocation process may be appropriate for rate setting in a monopoly situation. However, it is obviously inappropriate for developing a wholesale discount as the total cost of the local loop is associated with providing services within the state of South Dakota and should be included in the costs of providing retail services in the state. Moreover, while an allocation of loop costs may have been workable in a monopoly/revenue requirement environment, it cannot continue in a competitive environment where new entrants will pay 100% of the loop costs for the unbundled loop element. If it were continued, loop costs associated with the provision of services by U S WEST and other incumbent LECs would be subsidized, but the new entrants would not.

Furthermore, U S WEST utilizes an on/off methodology in its development of the CAAS data. This methodology is employed to determine whether or not costs should be allocated to a particular account. The methodology enables the analyst to determine which accounts actually are charged with expenses and which should not be charged. When this method is used, costs are allocated to particular accounts at the whim of the analyst, resulting in an unreliable source of data.

In addition to the concerns mentioned above, the CAAS data seem to be inaccurate simply on the basis of reasonableness. For example, it is

unreasonable for significant sums to be charged to account 6612 (Sales) in the product category Interstate Carrier Access. It is simply not logical for U S WEST to expend on a total company basis $2.621 million to sell a monopoly service such as carrier access. Similarly, it seems unreasonable to find large amounts of costs booked to sales and advertising accounts in the Operator Services product category. No advertising or sales need take place to attract Operator Services business.

Finally, the CAAS data is proprietary in nature. It is not publicly available, nor will it be in the future, even as the avoided cost wholesale discounts must be revised. For these reasons, AT&T believes that CAAS data is an inappropriate and unreliable data set for determining the avoided cost discount and should not be employed in this proceeding.

Q. WHAT TYPE OF DATA DOES AT&T EMPLOY IN ITS SIMPLIFIED AVOIDED COST MODEL?

A. AT&T employs ARMIS 43-03 Total State data in its Simplified Avoided Cost Model. In other proceedings U S WEST has asserted that ARMIS 43-04 data should be used. The ARMIS 43-04 data has been allocated to match state costs to subsidy revenues. This allocation process was developed to ensure that over-recovery of costs between federal and state jurisdictions did not occur. This data and the allocation methodology used to create this data does

not record costs in the jurisdiction in which they are incurred, but rather is used to allocate costs to support the CALC subsidy. Because ARMIS 43-04 data does not fully reflect all costs incurred in the state of South Dakota, it is inappropriate to use this data for the purpose of calculating the avoided cost discount. Use of the ARMIS 43-04 data will reduce the total retail costs incurred in the state and have the resultant effect of reducing the avoided cost discount. Therefore, AT&T uses the ARMIS 43-03 Total State data to develop its wholesale discount.

Q. **PLEASE DISCUSS THE SIX SERVICE DISAGGREGATIONS PERFORMED BY U S WEST IN ITS EMBEDDED COST STUDY.**

A. Because U S WEST has not produced activity-based costing data, the six service disaggregations proposed by U S WEST are unverifiable and unreliable. It develops inappropriate discounts off of data that is not meant for use in this manner. For this reason AT&T supports a composite discount of 28.14%. Only the composite discount can appropriately capture all revenues and costs and, therefore, all avoided costs.

Q. **DOES AT&T AGREE WITH U S WEST'S USE OF A COMPOSITE DIRECT AVOIDED COST PERCENTAGE TO CALCULATE PRODUCT SPECIFIC CATEGORY INDIRECT AVOIDED COSTS?**

A. No, as identified above, U S WEST has attempted to disaggregate the costs of

providing services. Unfortunately a number of problems become apparent when attempting to disaggregate services from a pool of data that was collected in aggregate. One of these problems occurs when the indirect avoidance factor is calculated in a disaggregate model. Because the indirect allocator varies with the proportion of Avoided Direct Costs to Total Direct Costs, it is difficult to force the avoided indirect total for all of the product service categories to equal the avoided indirect costs in aggregate. This problem arises due to inappropriate allocations. It is obvious that U S WEST recognizes that these problems exist and is attempting to resolve them through the efforts described in Ms. Gude's testimony. However, the indirect costs represent a large cost pool ($31.663 million) which contains significant inefficiencies associated with general support and executive planning. With this in mind, AT&T contends that it is absolutely essential that the indirect cost allocator is developed appropriately, and, therefore, supports the composite discount developed using AT&T's Simplified Avoided Cost Model. AT&T's Model includes publicly available and verifiable data which alleviates problems such as the one presented above, and eliminates the need to make adjustments to U S WEST's already inaccurate model.

Q. **SHOULD SERVICES THAT ARE PRICED BELOW COST BE SUBJECT TO RESALE?**

A. Yes. Without debating the issue of whether U S WEST is providing any

service below cost, a discount that is applied to a service offered below cost does not have an adverse effect on U S WEST. Because the avoided cost discount represents only those costs U S WEST will no longer incur in a wholesale operation, it will be no worse off than it is today by providing those services.

Q. AT&T'S MODEL PRESUMES 100% OF THE COSTS IN THE ACCOUNTS IDENTIFIED BY THE FCC WILL BE AVOIDED. HAS AT&T PERFORMED SENSITIVITY ANALYSIS ON ADJUSTMENTS TO THESE ACCOUNTS?

A. Yes. AT&T has performed two sensitivity analyses on the customer operations accounts in the AT&T Simplified Avoided Cost Model. The first analysis utilizes the 90% proxy data used by the FCC in their First Report and Order. As U S WEST has not provided the state-specific CAAS data that AT&T has repeatedly requested, the use of the 90% proxy discounts were used to analyze the relative impact of changes in these account level discounts. Utilizing the 90% discounts in accounts 6611-13 and 6621-23 results in a composite wholesale discount of 25.52%.

AT&T has performed a sensitivity analysis using U S WEST's access business as an approximation of the costs for its future wholesale business. The data that was employed to perform this analysis was obtained directly

from the U S WEST's Embedded Cost Model. In creating this sensitivity analysis, AT&T is in no way suggesting that U S WEST's model or the data contained within it is valid. Instead, the purpose of this analysis is to provide the Commission a baseline number which is at the low end of the discount range. Using the access business costs, the AT&T model results in a 24.54% discount.

The AT&T model, using the presumptive 100% for this account, results in a discount of 28.14%. Therefore, it would be reasonable for this Commission to consider a range of discounts between 24.54% to 28.14%. However, in the absence of verifiable data, AT&T continues to support the 28.14% discount.

Q. DO YOU HAVE ANY ADDITIONAL COMMENTS REGARDING THE U S WEST EMBEDDED AVOIDED COST MODEL?

A. Yes. AT&T has still not received the state-specific data it requested for the state of South Dakota. AT&T requested this information in the data requests served on U S WEST when this case was initiated. Therefore, it may be necessary to supplement this testimony when U S WEST produces this information.

IV. UNREASONABLE RESULTS

Q. DOES THE U S WEST MODEL PRODUCE RESULTS THAT ARE

CONSISTENT OR WITHIN REASON OF THE AVOIDED COST DISCOUNTS ORDERED BY OTHER STATES?

A. No. In fact, the Aggregate Avoided Cost discount generated by the U S WEST study produces an unreasonably low 9.36% composite discount when compared to the avoided cost discounts ordered in other state jurisdictions that have investigated the issue. Even the FCC proxy range was set at a range of 17% to 25%. Other state jurisdictions have determined that the following avoided cost discounts are appropriate:

RBOC	STATE	DISCOUNT %
U S WEST	Iowa	21.68%
U S WEST	Arizona	17.0%
GTE	Minnesota	24.9%
Ameritech	Illinois	22.05%
Ameritech	Indiana	21.0%
Bell South	Louisiana	20.72%
Bell South	Tennessee	21.56%
SWBC	Texas	21.64%
Bell Atlantic	DC	31.4%
Bell Atlantic	Pennsylvania	27.8%
PacTel	California	17.0%
NYNEX	New York	21.7%

Q. WOULD YOU RECOMMEND THAT THE SOUTH DAKOTA COMMISSION CONSIDER EITHER U S WEST'S TELRIC OR EMBEDDED COST STUDIES WHEN DETERMINING AN AVOIDED COST DISCOUNT?

A. No. It is clear that the discounts developed by U S WEST in this proceeding are unreasonably low. The methodologies incorporated, the internally developed proprietary data and the future looking nature of the factors used and account level discounts produce artificially low discounts.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Case No. 96A-345T

DEPOSITION OF GARRETT V. FLEMING September 18, 1996

IN THE MATTER OF THE INTERCONNECTION
CONTRACT NEGOTIATIONS BETWEEN AT&T
COMMUNICATIONS, INC., PURSUANT TO
47 U.S.C. Section 252

APPEARANCES:

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Q So let's take, for example, product management.

A Yes.

Q Now, this factor represents a ratio, a percentage? What does it represent?

A It's a factor that is applied against investment to get cost.

Q And that factor comes out of the USOA accounts?

A The factor is derived by an analysis of the USOA accounts, and adjusting them to be forward-looking.

Q And adjusting them to be forward-looking?

A Yes. Putting them in a -- putting them on a TELRIC basis. You take the accounts, you look at the costs, and then you put them on a TELRIC basis.

Q How do you do that?

A There's different calculations for different factors.

Q So you're taking historical data? That's correct, right?

A Yes. And then you determine whether it's appropriate to be going forward, you may need some adjustments for going forward, and then you take into account the base that you divide by. You make an

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IN THE MATTER OF AT&T'S PETITION FOR ARBITRATION WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. TC96-184

U S WEST COMMUNICATIONS, INC.

DIRECT TESTIMONY

OF

D. M. (MARTI) GUDE

January 17, 1997

EXHIBIT
2818
ATTACHMENT 3 30

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WITNESS QUALIFICATIONS

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is D. M. (Marti) Gude. My business address is 1314 Douglas-on-the-Mall, Omaha, Nebraska.

Q. PLEASE IDENTIFY YOUR EMPLOYER AND EXPLAIN YOUR POSITION AND RESPONSIBILITIES.

A. I am employed by U S WEST Communications Inc. (USWC) as a Cost Accounting Manager in the Finance Cost Accounting organization. In this position, I am responsible for various regulatory and management accounting functions, including the preparation and analysis of embedded cost studies for purposes such as deregulation, cost accounting and regulatory filings.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE?

A. I received a Bachelor of Science degree in Business Administration with a major in Accounting, from the University of Nebraska - Lincoln and a Masters of Business Administration (MBA) degree, with honors, from the University of Nebraska at Omaha. I am also a Certified Public Accountant, certified in the State of Nebraska as an inactive registrant.

I was a member of the audit staff of Arthur Anderson & Company (AA&Co.) for four years prior to joining USWC (then Northwestern Bell) in 1979. My experience at AA&Co. included audits for companies in various industries, which included the issuance of opinions on financial statements. Since leaving AA&Co. I have held various positions in the Budget, Finance and Corporate Accounting departments of USWC. I have been in my current assignment since January, 1986.

Q. **HAVE YOU FILED TESTIMONY AND/OR TESTIFIED PREVIOUSLY ON THE SUBJECT OF COST DISTRIBUTION AND/OR COST ACCOUNTING?**

A. Yes, I have. In Iowa, I filed Direct and Rebuttal testimony in Docket No. RPU-95-11 (Rate Rebalancing Proposal) regarding fully distributed cost studies on September 22, 1995 and February 20, 1996, and testified on April 17, 1996. Previous to that, I filed Direct Testimony in Docket No. RPU-93-9 (Iowa Earnings Investigation) on December 6, 1993 and testified on March 23, 1994; filed Direct Testimony and testified in Docket No. TCU-93-3 (McLeod Telemanagement, Inc. Application for Issuance of Certificate of Public Convenience and Necessity); filed Direct Testimony in Docket No. RPU-91-4 on September 25, 1991; and also filed testimony and testified in Docket No. RPU-88-9 on January 11, 1989 and June 22, 1989.

I have also testified in South Dakota in Docket Nos. F3848, F3849, and F3850 (on December 4, 1990); in North Dakota in Case No. 10,832 (on January 20, 1988); and in Minnesota Docket No. P-421/CI-86-354 (on November, 4, 1987).

Q. **HAVE YOU BEEN INVOLVED IN OTHER PROCEEDINGS INVOLVING RESALE DISCOUNTS FOR USWC?**

A. Yes, I have. I testified in Nebraska on October 31 and November 1, 1996 in the AT&T Arbitration proceeding regarding USWC's analysis of AT&T's proposed Model and in the MCI Arbitration proceeding in the State of Washington on November 19, 1996 regarding USWC's analysis of MCI's proposed Model for the determination of USWC's wholesale discount percentage in those states. I have also filed testimony in Utah in the MCI Arbitration proceeding and in Montana, New Mexico, and North Dakota in the Interconnection Contract Negotiations with AT&T. Furthermore, I am an instrumental member of USWC's team which has also analyzed the Discount Models proposed by MCI, AT&T, and other parties in the states of Arizona, Colorado, Idaho, Minnesota, and Wyoming.

PURPOSE OF TESTIMONY

Q. **WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?**

A. The purpose of my testimony is to present and describe the USWC South Dakota *Avoided Cost Study* as prepared on an "Embedded Cost" basis, and to recommend that if the Commission determines to employ an embedded cost methodology for determination of wholesale discounts that it adopt this Study and the following product specific discounts.

Category	Service Description	Discount
1	Business / PBX	9.52%
2	ISDN / ACS	13.26%
3	Toll	10.41%
4	Listings, CO Features, and Informational Services	45.97%
5	Residence	5.53%
6	Private Line	9.28%

The detailed results of this study are presented in Schedule 1 of my testimony.

Q. HAS USWC PROVIDED ANY OTHER AVOIDED COST STUDY INFORMATION IN THIS PROCEEDING?

A. Yes. Ms. Geri Santos-Rach has provided testimony on the USWC TELRIC based Product Specific Avoided Cost Model.

Q. WHY HAS USWC PROVIDED AN EMBEDDED AVOIDED COST STUDY IN THIS PROCEEDING?

A. After reviewing the FCC's Order relating to resale and avoided cost discounts, and after analyzing AT&T's and MCI's Avoided Cost Models filed in this and several other USWC jurisdictions, USWC determined that it should prepare its own "simplified" Embedded Avoided Cost Study for comparative purposes. Providing both a TELRIC Product Specific Avoided Cost Study and an Embedded Product Specific Avoided Cost Study provides a means of comparing historic and forward looking avoided costs and the similarities of the resultant resale discount calculations.

EMBEDDED AVOIDED COST STUDY OVERVIEW

Q. WHAT DATA SOURCES WERE USED TO DEVELOP THE USWC EMBEDDED AVOIDED COST STUDY?

A. The USWC Embedded Avoided Cost Study was prepared from the Company's booked financial records. Specifically, the USWC Embedded Avoided Cost Study was based on 1995 operating results. Data was drawn from 1995 FCC ARMIS Reports, certain TELRIC avoided cost study related assumptions and the Company's Embedded Cost Allocation Accounting System, CAAS/CARS. The CAAS (Cost Accounting Allocation System)/CARS (Cost Accounting Reporting System) system is the USWC accounting process which produces the Company's detailed, product specific, embedded cost data. An overview of the assignment methodologies used in CAAS as well as a description of the purpose, objectives and cost assignment principles used in the system are included in Schedule 2 of my testimony. This embedded cost data is used in many USWC jurisdictions, including South Dakota, where State Commissions have required the Company to provide embedded cost support and/or detailed product information on an embedded basis.

Q. WHY DID USWC EMPLOY COMPANY SPECIFIC DATA, OTHER THAN THE FCC ARMIS DATA, TO DEVELOP ITS EMBEDDED AVOIDED COST STUDY?

A. Relying solely on publicly available ARMIS data, as filed with the FCC, does not permit a comprehensive, State specific, product specific analysis. The FCC's

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U S WEST COMMUNICATIONS, INC.

EXHIBITS

OF

D. M. (MARTI) GUDE

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The detailed results of this study are presented in Schedule 1 of my testimony.

Q. HAS USWC PROVIDED ANY OTHER AVOIDED COST STUDY DOCUMENTATION IN THIS PROCEEDING?

A. Yes. Mr. Carl Danner has provided testimony on the USWC TELRIC based Product Specific Avoided Cost Model.

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A. After reviewing the FCC's Order relating to resale and avoided cost discounts, and after reviewing AT&T's and MCI's Avoided Cost Models filed in this and several other USWC jurisdictions, USWC determined that it should prepare its own "simplified" Embedded Avoided Cost Study for comparative purposes. Providing both a TELRIC Product Specific Avoided Cost Study and an Embedded Product Specific Avoided Cost Study provides a means of comparing historic and forward looking avoided costs and the similarities of the resultant resale discount calculations.

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Q. WHY DID USWC DEPLOY COMPANY SPECIFIC DATA, OTHER THAN THE FCC ARMIS DATA, TO DEVELOP ITS EMBEDDED AVOIDED COST STUDY?

A. Relying solely on publicly available ARMIS data, as filed with the FCC, does not permit a comprehensive, State specific, product specific analysis. The FCC's

Automated Reporting and Management Information System (ARMIS) contains only aggregated information for all the products offered by the Company in the State of South Dakota. The ARMIS reports do not lend themselves to a more refined product specific analysis which is desirable in establishing resale discounts to be applied to specific South Dakota tariffs. For example, the ARMIS 43-03 - Joint Cost Report, provides annual data for each account prescribed under the FCC Part 32 Uniform System of Accounts (USOA) for "Total State" operations prior to FCC Part 36 jurisdictional separations between Interstate and Intrastate operations. The ARMIS 43-04 - Access Report, further delineates the 43-03 Report Subject to Separations amount by splitting revenues, costs and investment between Interstate and Intrastate operations, as well as the various components of Interstate Access and Billing and Collecting. The jurisdictional split reflected in the 43-04 report reflects compliance with FCC Part 36 and Part 69 rules. Neither of these reports, nor any of the other ARMIS Reports, relates the Company's expense/investment data to product specific products. Although the FCC utilized "Total USWC" ARMIS data to prepare its overall default resale discount for application to all USWC states, more specific USWC - South Dakota product specific accounting data was and should be used where it is available.

Q. WHAT GUIDELINES DID YOU EMPLOY TO DEVELOP THE USWC EMBEDDED COST STUDY?

A. The principle guidelines for preparing the USWC embedded avoided cost study included:

1. *Employ a simple approach which reflects the FCC directives of identifying Embedded Direct and Indirect cost components for services subject to resale.* In

preparing its "simplified" embedded avoided cost study, USWC patterned its format to coincide with a format that has been previously filed by AT&T and MCI in many of USWC's jurisdictions. Although not identical, this format recaps and depicts (a) ARMIS Intrastate booked revenue and operating expense components, (b) "Retail" revenue, expense and capital cost components (exclusive of Non-Resale services), (c) the split of Direct and Indirect costs, (d) the avoided cost percentage assumptions for each Retail service Direct and Indirect cost element and (e) the resultant avoided cost amounts and calculated resale discounts. Where appropriate, the USWC embedded study coincides with the FCC's Interconnection Order directives (i.e. Plant Specific and Non-Plant Specific costs are presumed not avoidable and General Support costs are considered avoidable in proportion to avoided direct costs)[1].

2. *Employ "Intrastate Product Specific" data.* It is important to isolate intrastate operations in order to properly evaluate avoided costs and to calculate cost discounts for specific and disaggregated "intrastate retail services". Since the current USWC - South Dakota "intrastate" rates were originally established by the South Dakota Commission based on the jurisdictional intrastate cost assignments resulting from the FCC's Part 36/69 separations procedures,[2] the Embedded Avoided Cost Study and embedded discount calculations must reflect corresponding intrastate data. Exchange access services are not subject to discount under the requirements of Section 251(c)(4) of the Act. Therefore, elimination of all Interstate Access revenue and Part 36/69 separated costs (including all EUCL

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[1] See FCC First Interconnection Order at par. 915 and 918

[2] See CFR 47, Part 36 and Part 69

long costs, including the End User SLC[3]) is the only appropriate starting point for performing the embedded avoided cost analysis and subsequent resale discounts for retail related services that are subject to the jurisdiction of the South Dakota Commission.

3. Section and exclude "Non-Resale Services" *from the analysis of avoided costs* and the calculation of discounts. Non-Resale services must be removed so that the avoided costs identified and the resultant discount calculations are not artificially inflated or deflated for services that are not subject to resale discounting. Services such as Intrastate Access (Intrastate is jurisdictionally removed automatically by starting the analysis with Intrastate operations), Intrastate Billing and Collection (Intrastate is already removed), Public Services and Operator Services/Directory Assistance have been excluded in developing the USWC embedded study (see Schedule 1, Worksheet 1). USWC's embedded study removes the same services as those excluded in the development of the Company's TELRIC study. These services are one of the following: services that are not subject to the discount provisions of the Act, services that are grandfathered, or services that will be provided under separate agreement with resellers. More specific rationale for USWC's removal of these services is also discussed in the USWC TELRIC study[4].

4. Use appropriate Company-Specific Product Specific *assumptions and embedded cost data necessary to obtain the most meaningful embedded avoided costs and*

[3] See FCC First Interconnection Order at par. 172, 174 and 954

[4] See USWC TELRIC Study and Testimony of Mr. Geri Santos-Rach

resale discount results. The use of ARMIS public information, the FCC's generalized industry wide avoided cost proxies contained in their Order, "Total State" operating results, and aggregate product information is inappropriate for calculating meaningful resale discount percentages when more precise, although non-public, USWC - South Dakota data is available. The USWC Embedded Study employs USWC - South Dakota product specific inputs on USWC data and replaces FCC general industry assumptions regarding avoided cost where appropriate. The FCC's avoided cost assumptions were not USWC or USWC - South Dakota specific, nor were they product specific. Rather, they were compromise factors created from Total USWC data and comments collected from a variety of agencies and Companies other than USWC. Specific USWC - South Dakota data should be used whenever possible to create results that make for USWC - South Dakota intrastate rates.

5. *Incorporate USWC's previous experience with its non-resale Access Product in developing avoided costs for resale services.* USWC's non-resale wholesale Access product experience provides a good foundation for determining the avoided costs for Customer Operations (Marketing and Customer Services) and Uncollectible expense for resale services.

This experience has shown that significant Marketing expenses for Product Management will remain while other marketing expenses such as "retail" sales expense and "retail" advertising, would be eliminated. While it is true that Product Management costs may change, they will certainly not go away completely just because a service is provided on a wholesale basis. Although U S WEST product managers do some work that would apply specifically to retail

offerings (e.g., selling to sales promotions, etc.), these same U S WEST product managers also provide product development work that applies to the resold service. For example, costs associated with developing and implementing most product methods and procedures and rate and tariff filings will apply whether the service is provided on a retail or wholesale basis. Also, while U S WEST will avoid some retail product management expenses, it will also incur additional product management expenses to serve the resale market. U S WEST has employed wholesale product managers for years to serve the wholesale access needs of interexchange carriers. It is worth noting that U S WEST today has a "retail" market unit that is dedicated to serving the access needs of interexchange carriers by providing these customers with "wholesale" switched and dedicated access products. These are real marketing costs that are incurred to provide wholesale services. As U S WEST gears up to meet the needs of resellers, it will incur additional product management expenses. In fact, U S WEST has established a new market unit to service competitive local exchange providers and resellers. U S WEST also has product managers now in place that are specifically focused on serving the resale market. These product managers are responsible for developing the resale products that are presented in U S WEST's proposed interconnection agreement. The FCC Order is clear that these wholesale costs such as these should be netted against avoided costs.[5]

It was, of course, impossible to use the FCC's 17% avoided cost factor assumption for all marketing costs. Therefore, USWC's Embedded Study employs a separate factor for each resale product evaluated and for each of the three

[5] See FCC Part Interconnection Order at par. 914

components of total Marketing expense - Product Management, Sales and Advertising. As a result, the Product Management portion of Customer Operations "Marketing Costs", in the USWC Embedded Avoided Cost Study, reflects avoided cost factors ranging from 0% to 15%. These percentages have been determined to be appropriate and were applied in a product specific basis in the embedded study. They also correspond to the factors that were developed, documented and employed in the Company's TELRIC study.[4]

Customer Service costs for billing and collection expenses is another area of Customer Operations where costs may be avoided, but certainly not eliminated at the FCC's 90% and 100% price level. Although the USWC will not be billing reseller end users, it will be billing resellers for the wholesale service. These wholesale billing costs may be lower than retail billing costs, but they are real costs nonetheless, and should be included in the analysis. In addition, USWC will still continue to incur usage recording costs for unbundled local service and toll service. Like Product Management, specific product related avoided cost factors of approximately 65% to 90% are used for Customer Service expenses in the USWC embedded study.

Q. DOES THIS AVOIDED COST DISCOUNT STUDY PRODUCE A SINGLE AGGREGATE DISCOUNT OR PRODUCT SPECIFIC DISCOUNTS?

A. USWC's Embedded Study produces both an aggregate as well as product specific discount calculations. USWC does not endorse the use of a single aggregate discount

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4 See USWC Embedded Study Worksheet 3a.

[illegible] and is provided only for general reference. Aggregate discount calculations are inappropriate and incorrect as stated given the wide range in individual product resale cost recoveries, product capital costs and individual product margins. USWC supports the development and application of product specific resale discounts.

Q. ARE THE RESULTS OF THE USWC EMBEDDED AVOIDED COST STUDY PROVIDED AS AN ATTACHMENT TO YOUR TESTIMONY?

A. Yes. Schedule 1 is a summary of the USWC Embedded Avoided Cost Study. Exhibits 1 through 3 depict the aggregate and Product Category Avoided Costs and discount calculations. Worksheets 1 through 5 provide further supporting calculations for these Exhibits.

DESCRIPTION OF EMBEDDED COST STUDY

Q. PLEASE EXPLAIN MORE FULLY THE EMBEDDED STUDY DATA AND THE EXHIBITS THAT ARE ATTACHED TO YOUR TESTIMONY.

A. As previously stated, the data employed in this Embedded Avoided Cost Study is taken from the Company's jurisdictional results from operations. The initial data corresponds to the data reflected in the Company's FCC ARMIS 43-03 and 43-04 reports. The South Dakota CAAS/CARS system data also originates with this ARMIS data. However, the CAAS reports, which depict intrastate product specific operations, also incorporate the South Dakota Commission's ordered treatment for certain costs as depreciation and employee related benefit amortization costs. These

reports also reflect the "payment" of access charges ($6.7 million) by the U S WEST Toll provider, which is described as "Emerging Competition" under South Dakota's deregulation legislation, to the regulated intrastate access provider. In this study, 1995 ARMIS and intrastate data, as adjusted for Sprint Board ordered accounting treatments were used as the starting point. These numbers are shown in Column (b) of Exhibit 1 and also in Column (a) of Worksheet 1 of Schedule 1 of my testimony.

Schedule 1 contains the results of the embedded cost study. Exhibits 1 through 7 of that Schedule show the various Avoided Cost to Total (ACT) cost percentage calculations applicable to each product category and the overall composite Avoided Cost Percentage (ACP), as follows:

Exhibit 1:	Composite	8.46%
Exhibit 2:	Business/WX (Category 1)	4.52%
Exhibit 3:	IXC/WACS (Category 2)	11.58%
Exhibit 4:	U S WC Toll (Category 3)	10.45%
Exhibit 5:	Listings, CO Features, and Information and Services (Category 4)	4.27%
Exhibit 6:	Residence (Category 5)	3.70%
Exhibit 7:	Private Line (Category 6)	0.28%

Worksheets 1 through 3 of Schedule 1 provide the additional data necessary to calculate the avoided cost percentages shown in the above described Exhibits. As

follows:

Workpaper 1: Provides the individual financial statement detail for each of the [illegible] products. These amounts are subtracted from the Total Interstate results to arrive at the "Local Interstate" results which are used in the [illegible] percentage calculations.

Workpaper 2: Provides the financial statement detail for each of the six product categories used in the Avoided Cost percentage calculations.

Workpaper 3: Provides detail of avoided Customer Operations expenses by product.

Workpaper 4: Provides calculations of Depreciation expense split between Direct and Indirect Costs and calculation of product specific capital costs (return and tax gross up).

Workpaper 5: Provides detail for all other necessary excluding Non-[illegible] expenses.

Q. HOW WERE THE AVOIDED COST PERCENTAGES, OR DISCOUNT FACTORS, CALCULATED?

A. The Avoided Cost Discount percentages, referenced above, were calculated for each product category and composite as a percent of Avoided Costs to Total Costs, where Avoided Costs and Total Costs include both expenses and a Capital Cost component.

Q. HOW WERE INTRASTATE LOOP COSTS HANDLED IN YOUR STUDY?

A. The intrastate loop costs were assigned directly to Local Service, consistent with the Company's TELRIC loop assignment methodologies in the cost material filed in this proceeding.

Q. WHY WERE THE PRODUCTS SHOWN ON WORKSHEET 1 EXCLUDED FROM YOUR STUDY?

A. As I stated previously, these are services considered by US WEST to be not subject to resale, either by definition of the Federal Act (Interstate Access, Billing and Collection, Public, and Mobile), by virtue of the type of service offered (E911, Operator Services, DA, and Miscellaneous Other), or because the service is already

being offered on a volume discount basis to only grandfathered customers (Centrex). Current sub-recurring business office costs and revenues for the resale services are also excluded since the whole issue of what specific service order processing and other business office sub-recurring costs will be incurred by USWC on a resale basis, and how compensation will be received, is still under negotiation. Because this is a separate cost issue, which should be addressed on a stand-alone basis, the company's non-recurring customer service operations were excluded from this avoided cost study. This is consistent with the treatment of these costs in the TELRIC study sponsored by Ms. Geri Santos-Rach.[7]

Q. WHAT RATIONALE OR SOURCE WAS USED FOR THE AVOIDED COST PERCENTAGES APPLIED TO THE VARIOUS CUSTOMER OPERATIONS EXPENSES SHOWN ON WORKSHEET 3 OF SCHEDULE 1?

A. Each of the detailed Cost expense categories recorded in the various USOA expense accounts prescribed by the FCC, were evaluated as to the type of cost under functional description. Specific examples of this evaluation were described earlier in my testimony regarding the guidelines employed for the embedded study for Recurring Customer Operations Costs including Marketing, Sales,

[7] See Testimony and Avoided Cost Study sponsored by USWC witness Ms. Geri Santos-Rach

Advertising, Billing and Collecting etc.) and I won't repeat that here. I would note however, that this type of analysis is typical as a part of the CAAS allocation study process. In fact, many CAAS allocation study elements are incorporated by the USWC cost study group when TELRIC cost studies are prepared. After performing the embedded avoided cost analysis, the information and expectations were then reviewed and compared to the assumptions employed by USWC's TELRIC study group. After confirming avoided cost expectations, avoided cost factors/percentages as used the TELRIC study, were incorporated in processing the embedded study.[8]

Q. HOW DID YOU DETERMINE THERE WERE NO AVOIDED COSTS ASSOCIATED WITH ANY OF THE OTHER DIRECT COST AMOUNTS SHOWN IN COLUMN (d) OF YOUR EXHIBITS 1 THROUGH 7?

A. The FCC's First Interconnection Order states that Plant Specific and Non-Plant Specific costs are presumed to be not avoidable. This is a valid assumption. USWC's current level of maintenance and network operations costs should not change regardless of whether the service sold is to an end user or to a wholesaler since USWC is responsible for maintaining the same level of quality service to all

[8] See Schedule 1, Worksheet 3a which shows the specific references to the TELRIC Study.

customer, wholesale or retail. Depreciation/ Amortization and Capital Costs are split between direct and indirect costs, as shown on Worksheet 4 of Schedule 1. The same level of direct costs, comprised of central office equipment and cable and wire facilities, will be used to provision the requested service regardless of whether the customer is a wholesaler or a retail customer. Access expense incurred by the Toll product category will also not change regardless of whether the customer is purchasing USWC's Toll Service on a wholesale or retail basis.

Q. WHY DID YOU USE THE COMPOSITE DIRECT AVOIDED PERCENTAGE, SHOWN IN COLUMN (e) ON EXHIBIT 1 OF SCHEDULE 1, TO CALCULATE EACH PRODUCT CATEGORY'S INDIRECT AVOIDED COSTS?

A. The indirect costs incurred by USWC are not directly associated with any one product or service, hence the name "indirect". These are common, overhead type costs which are corporately incurred and allocated to the various products based on each product's direct and attributable costs. The FCC's Order requires that "a portion of indirect costs must be considered 'attributable to costs that will be avoided'."[9] The FCC went on to state that "the overall level of indirect expenses can

[9] See FCC First Interconnection Order at par. 912

reasonable be expected to decrease as a result of a lower level of overall revenues resulting from a reduction in retail activity." Thus, it follows that the level of reduction of indirect costs is associated with the total avoided costs for USWC's resale operations, rather than on an individual product category by product category basis. The validity of this methodology is confirmed by the fact that the amount of total indirect avoided costs for USWC on a composite basis (Exhibit 1) equals the sum of the avoided costs for each of the individual product categories (Exhibits 2 through 7).

Q. WHAT THE SOURCE OF THE UNCOLLECTIBLE REVENUES AVOIDED COST PERCENTAGE USED FOR EACH OF THE PRODUCT CATEGORIES?

A. The Uncollectible Revenues avoided cost percentage used for each of the product categories was also obtained from the TELRIC study. It was based on USWC's uncollectibles experience with carriers in the wholesale access market.

RECOMMENDATION

Q. WHAT CONCLUSIONS HAVE YOU REACHED OR RECOMMENDATIONS ARE YOU MAKING IN THIS PROCEEDING?

A. Product specific resale discounts, rather than a single composite discount, should be adopted in this proceeding. And, if the Commission determines to employ an embedded cost methodology for determination of avoided costs and wholesale discounts in this proceeding, it should adopt this USWC Embedded Avoided Cost Study and the product specific discounts listed here.

Category	Service Description	Discount
1	Business / PBX	9.52%
2	ISDN / ACS	13.26%
3	Toll	10.41%
4	Listings, CO Features, and Informational Services	45.97%
5	Residence	5.53%
6	Private Line	9.28%

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.

BEFORE THE

PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

***

IN THE MATTER OF AT&T'S	)	
PETITION FOR ARBITRATION WITH	)	
U S WEST COMMUNICATIONS, INC.	)	DOCKET NO. TC96-184
PURSUANT TO SECTION 252(b) OF THE	)	
FEDERAL TELECOMMUNICATIONS	)	
ACT OF 1996	)	

U S WEST COMMUNICATIONS, INC.

EXHIBITS

OF

D. M. (MARTI) CLUDE

January 17, 1997

2883

U S WEST COMMUNICATIONS
ACCOUNTING SEGREGATION MANUAL
SECTION I - INTRODUCTION

I. PURPOSE

The purpose of U S WEST Communications' Accounting Segregation Manual is to detail the methodology used to comply with the cost allocation methods for segregation of revenues, expenses, taxes and investments, as a telecommunications provider associated with U S WEST Communications' nonregulated service offerings.

II. OBJECTIVES OF THE COST MANUAL

This manual contains methodologies which ensure that no cross subsidization exists between the regulated and deregulated entities of the company. A definable and measurable assignment methodology between regulated and deregulated services reflects the use of cost causation and equitable assignment.

The manual ensures that an equitable interest of both ratepayer and stockholder is served and that each cost pool's assignment methodology reflects the fairest and most logical apportionment.

Internal controls have been established to verify the accuracy of the data utilized. These controls include balancing input and output to company books, performing variance analysis, and cross checking to assure complete carry forward of all driver table values.

Existing data sources are utilized to the maximum extent possible in preparation of assignment methodology. This eliminates the expense of duplicating data. The cost versus the benefit of obtaining data which will achieve an acceptable level of accuracy of the output is given high consideration in determining the methodology assignment of the cost pools. When cost pools are consolidated, cost attribution or causation should not be compromised and the results must be insignificant on a total state or product basis.

III. COST ASSIGNMENT PRINCIPLES

A. The manual assigns cost using the following causal or beneficial relationships endorsed by the Cost Accounting Standards Board (CASB):

1. Direct identification of costs with final cost objectives is required when the beneficial or causal relationship is clear and exclusive and the amount is readily measurable.

2. Where costs cannot be directly identified with cost objectives, they should be grouped into logical and homogeneous expense pools and completely distributed to final cost objectives in accordance with a hierarchy of reasonable allocation techniques.

3. Traceability is the preferred basis for attributing costs to final cost objectives. Costs should be assigned to the cost objective which causes the cost to be incurred or, alternatively, which is intended to benefit from the resource expended.

B. These CASB principles were incorporated into the manual utilizing the following cost assignment principles.

1. Costs are directly assigned to specific products or services wherever practicable.

2. Costs which cannot be directly assigned to specific products or services are allocated using a cost causal methodology in accordance with the following hierarchy:

a. Whenever practicable, the allocation of cost is based on a logical assignment method, such as a direct measurement of usage by the product or service.

b. Other costs, to the extent practicable, are assigned by employing surrogate measures having an observable or logical correlation with some other function or investment.

c. Some costs, such as the President's salary, have no readily identifiable measure of specific causal or beneficial relationship; they are considered general overheads. These expenses are allocated based on the methodology as described in Section IV.B below.

C. The criteria considered in selecting the appropriate assignment method follows:

1. The information necessary to apply the assignment methodology is consistently available over time and measurable in objective terms, i.e., units, usage.

2. The assignment drivers are available in the Company's existing accounting structure. If other information is required, the analyst versus the benefit of the method of obtaining the information is weighed against other alternatives.

3. The methodologies treat similar revenues and costs consistently throughout the system.

4. The methodologies are reviewed to determine their susceptibility to creating artificial volatility and variability in results from period to period.

IV. ASSIGNMENT METHODOLOGY OVERVIEW

The methodology for assigning revenues, expenses, taxes and investment is summarized below.

A. Revenues are reported in the Uniform System of Accounts (USOA) code series. These accounts include recurring, nonrecurring, and usage sensitive revenues generated by residence, business, public, interexchange carrier, and transport services. They also include miscellaneous and uncollectible operating revenues.

Revenues are directly assigned to products based on USOA where possible. For revenue USOA accounts that are applicable to more than one product, an analysis of billed revenues by Uniform Service Order Codes (USOC) in the billing system is conducted. Special studies are conducted to assign packaged revenues if the packaged revenue is applicable to more than one product category. Miscellaneous revenues are assigned to the products based on an appropriate secondary assignment procedure. Uncollectible revenues are assigned to the products based on the related revenues.

2. The Functional Accounting (FA) database is used as the primary data source in assigning expenses (Account 6000 series) to products. Expenses are directly assigned to products where practicable; however, a large percentage of expenses cannot be directly assigned to products. These expenses are assigned using a cost causative or equitable assignment methodology. Examples of such methodologies are:

   1. Maintenance expenses are assigned to products in one of two ways:

      a. Service order generated maintenance expenses, such as line testing, are assigned to products based on movement or the applicable investment.

      b. Repair and facilities generated expenses are assigned to products on the same basis as the applicable investment.

   2. Depreciation expenses are assigned to products on the same basis as the distribution of related investment.

   3. Customer Operations and Services are divided into the following categories of expenses:

      a. Service order generation and associated expenses are assigned to products using Time Distribution studies.

      b. Product management and related expenses are assigned based on a study of product managers' time.

      c. Advertising expenses are assigned first to groupings of customer markets, i.e., residence, business, and public customers. These groupings are then allocated based on an analysis of advertising campaigns.

      d. Operator expenses are directly assigned to Operator Services products based on work units.

      e. Directory Assistance expenses are directly assigned to Directory Assistance.

      f. Revenue Accounting expenses are assigned using studies of end user bills and are finally allocated to the products based on messages or in-service quantities.

4. Corporate Operations expenses are assigned primarily using associated wages and salaries. Other assignment methods for this account include investment, the General Allocator or the General Marketing Allocator. (See Section VII for definition.)

C. Taxes and Interest Expense (Account 7000 series) reflect monthly amounts, with some monthly amounts expenses and others accrued. Taxes and Interest Expense are assigned as follows:

1. Income taxes are assigned based on tax benefits.

2. Property and Other Taxes are assigned based on Telephone Plant in Service.

3. Interest Expense is assigned using other investment or the General Allocator.

D. Some cost pools are not readily assignable to products using a cost causation basis. These expenses are referred to as Common costs and are initially assigned to Common 1 product or Common 2 product. Common 1 is later spread to all products based on all previously assigned expenses. Common 2 is later spread to all products based on total wages and salaries.

E. Gross Investments (Accounts 1230 and 2000 series) are categorized as primary or secondary (support) investment. Primary investments consist of Central Office Equipment and Cable and Wire Facilities (Outside Plant). Secondary investments consist of Land, Building, Vehicles, Furniture and Other Equipment, Station Equipment and Material and Supplies.

1. Central Office investment is first categorized into usage related and subscriber related pools using Jurisdictional Separations data or special studies. The usage related pools are assigned based on various measures of usage. The subscriber related pools are generally assigned to products using a facilities sensitive methodology.

2. Cable and Wire Facilities investment is apportioned using a two tier process. The first tier, the non-loop portion, is assigned using Jurisdictional Separations data or usage studies. The second tier, loop portion, is assigned using a special study which identifies loop costs by loop types other the Private Line portion is identified and assigned using Jurisdictional Separations Part 36 data.

3. Secondary investments are generally assigned using the expense or investment pool that the particular investment supports.

4. Depreciation and Deferred Tax Reserves are assigned secondarily using the investment relationships to products on a end-to-end basis for each cost pool.

preparation fee over 2,000, and the entrance facility charge over 3,000. Foremost of these, too, I want to add especially on the unbundled element these are just the one-time charges in addition to the monthly charges they're proposing.

The local service provider change charge, AT&T's rate here is 45 cents. And this is some of the corrections made to my testimony. I kind of went to explain what that position was based on. In my direct testimony at the time AT&T was unable to properly cost this and due to lack of information. So what we did was and on an interim basis used something similar in the long distance industry, the PIC charge, which is $5.00. Since that time then, my rebuttal testimony, we've gained access to some information from another ILEC, Bell South, based on a complaint filed by MCI with the FCC against U S West for their excessive PIC charges. This gave us a lot of information. It outlined all the steps involved in actually processing a change of this type and the cost associated with all of those steps. So that in how we determined the 45 cents. Of the actual study, I guess, had some mechanized process and some manual based on a forward-looking environment. AT&T's costing is based on totally mechanized option.

MR. WELK: I'm going to make an objection. I don't believe this was testified in her testimony any place about this new study and Bell South. That has not been in the profiled or rebuttal.

A. It's in my rebuttal testimony.

MR. WELK: The study attached?

A. No.

MR. WELK: It was $5.00 before, right?

A. Correct. And in my rebuttal it stated that at that time we hadn't done complete analysis. The rebuttal says less than a dollar until we could clearly determine what it would be. Since the rebuttal was filed we've done our costing and determined 45 cents is reasonable.

MR. WELK: But that information hasn't been provided U S West in connection with this proceeding, has it?

A. Well --

MS. TRIBBY: You're not seeking to introduce the study at this time, are you?

MR. WELK: Just the rate?

MS. TRIBBY: Yes.

MR. WELK: I'll continue to object to the reference.

MS. WIBST: Objection overruled.

A. I guess just continuing on, then, the charges here that U S West are providing range from $11.16 to $22.20. They are by res service, business service mechanized and at manual option.

The last thing I want to talk about is operational interfaces. AT&T's position is that cost recovery should be based on cost causation. All carriers utilizing the interface should pay their own development costs, thus U S West paying their own development costs. Any recurring transactions transaction cost should be determined using a TELRIC methodology, and they should be included in the one-time per order charge.

Just to briefly summarize AT&T's position in terms of pricing, we believe that prices should be consistent with the Federal Act. They should be based on sound economic principles. Impose the same impact on AT&T as U S West when it incurs the same facilities. And they should be competitively neutral amongst all providers.

That concludes my presentation.

MS. WIBST: U S West.

MR. WELK: Thank you.

CROSS-EXAMINATION

BY MR. WELK:

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December 2, 1999

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UTILITIES COMMISSION

Clerk, United States District Court
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Pierre, South Dakota 57501

RE: 99-5024

Dear Clerk:

Enclosed please find an original and one copy of AT&T Communications of the Midwest, Inc.'s Opposition To U S West's Merits Brief.

Yours very truly,

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Enclosures

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC. A Colorado Corporation,	)	Civ. No. 99-5014
Plaintiff,	)	
JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC. an Iowa Corporation	)	CERTIFICATE OF SERVICE
Defendants.	)	

I HEREBY CERTIFY that I have served a true and correct copy of AT&T COMMUNICATIONS OF THE MIDWEST, INC.'S OPPOSITION TO US WEST'S MERITS BRIEF upon the following:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

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UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC., Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation. Defendants.	)	Civ. No. 99-5024

AT&T COMMUNICATIONS OF THE MIDWEST, INC.'S
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Date: December 2, 1999

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

U S WEST COMMUNICATIONS, INC. a Colorado corporation, Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation. Defendants.	)	Civ. No. 99-3024

AT&T COMMUNICATIONS OF THE MIDWEST, INC.'S
OPPOSITION TO U S WEST'S MERITS BRIEF

Defendant AT&T Communications of the Midwest, Inc. ("AT&T"), by its attorneys and pursuant to the Joint Case Management Statement entered by the Court on June 2, 1999, respectfully submits its Brief in Opposition to U S WEST Communications, Inc.'s ("U S WEST") Merits Brief.

INTRODUCTION

A. The Act's Mandate Of Competition in Local Telephone Markets.

Local telephone service has historically been provided by regulated monopolies, in part because "[s]tate and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive

entry." First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 1 (1996) ("First Local Competition Order"). Guaranteed the opportunity to realize a profit free of competition, incumbent local exchange carriers ("LECs") like U S WEST built ubiquitous local telephone networks in their service areas, and thus came to exercise exclusive control of the facilities through which consumers place and receive all local and long-distance telephone calls. AT&T Communications of Cal., Inc. v. Pacific Bell, No. C 97-0080 SI, 1998 WL 246652, at *1 (N.D. Cal. May 11, 1998).

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act" or "1996 Act"), Congress enacted a new subchapter of the Communications Act of 1934 to "end [] the longstanding regime of state-sanctioned monopolies." AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 726 (1999) ("AT&T Corp."), and "to shift monopoly markets to competition as quickly as possible." H.R. Rep. No. 104-204, at 89 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 55; Iowa Utils. Bd. v. FCC, 120 F.3d 753, 816 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998) ("Iowa I"). The Act strips away many of the legal and economic impediments to all forms of local entry so that consumers can enjoy the myriad benefits of competition, including lower prices, higher quality, and greater choices.

Congress recognized, however, that even if the legal protections of monopoly were removed, an incumbent LEC's established local telephone network serving nearly every customer in its region gave it a formidable advantage over new entrants. H.R. Rep. No. 104-204, at 74 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 39; First Local Competition Order ¶ 10. The local telephone network begins with "local loops" -- the cables strung on telephone poles or buried underground -- that connect each telephone subscriber to an incumbent LEC's service area

to local or "central-office" switches, which route "traffic" along the network. These switches, in turn, are connected to each other through "trunks" and other transport facilities. These transport facilities include "dark fiber" -- fiber-optic cable which is "dark" because the incumbent, at the moment, has chosen not to provide the electronic equipment needed to power (or "light") the fiber, including dark strands that are interwoven with "lit" fiber in the same sheathing.[1] These facilities are integrated by various computer systems and databases that support network operations, the provision of services, connections to the facilities of other telecommunications carriers, and the business side of offering telecommunications services (such as billing, marketing, and collection).

It was clear to Congress that no new entrant could effectively compete with an incumbent LEC if it had to build its own loops, switches, trunks, databases and computer systems from scratch. Iowa I, 120 F.3d at 816; Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, at 148 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 160; Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, mem. op. and order ¶ 12 (FCC Aug. 19, 1997); First Local Competition Order ¶ 10. Recognizing that incumbents would use their exclusive control over local networks "to discourage entry and robust competition," id., Congress prescribed a series

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 1999 WL 1008985, ¶¶ 125,126 (FCC Nov. 5, 1999) ("Third Local Competition Order") (Dark fiber is a network element used for interoffice transport); Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd. 2589, ¶ 1 (FCC 1993) ("Dark Fiber Order"), remanded on other grounds, Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994); MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 77 F. Supp. 2d 8, 9 (D.D.C. 1998).

of duties in § 251(c) of the Act requiring the incumbent "to share its network with competitors." AT&T Corp., 119 S. Ct. at 726.

> Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network.

Id.; see § 251(c)(1)-(4).[2] Congress further obligated incumbents to allow new entrants to lease space in incumbents' premises to "collocate" the equipment necessary for interconnection and access to unbundled network elements. § 251(c)(6). Congress also provided that state commissions shall set just, reasonable, and nondiscriminatory rates that incumbent LECs may charge new entrants for interconnection, access to network elements, and collocation. Id. § 252(d)(1), and determine wholesale rates for resale services based on the retail rate for the service less the "costs that will be avoided" when the competitor does the reselling of the service. § 252(d)(3).

B. Implementation Of The Act.

1. FCC Regulations. Pursuant to the Act, the FCC issued the First Local Competition Order implementing the Act's provisions on August 8, 1996. U S WEST and other incumbent LECs challenged the entirety of the First Local Competition Order. After extensive review of the Act and the FCC's rules, the Eighth Circuit "ha[d] [the incumbent LECs'] request to vacate the . . . entire [First Local Competition Order]." Iowa Ut. 120 F. 3d at 819. It did, however, vacate the FCC's pricing rules on jurisdictional grounds, and struck

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[2] Sections 251-261 of the Act are codified at 47 U.S.C. §§ 251-261. In this brief, AT&T will simply refer to these provisions of the Act by section number without providing a duplicative U.S. Code citation.

down a handful of the nonpricing rules. Id. at 819 & n.39. Both sides sought certiorari in the United States Supreme Court on various aspects of that ruling. See AT&T Corp., 119 S. Ct. at 729. The Supreme Court held that Congress gave the FCC jurisdiction to issue its pricing rules, and upheld all but a single FCC rule: Rule 319, 47 C.F.R. 51.319, regarding the application of the "necessary-and-impair" standard to network elements set forth in Section 251(d)(2) of the Act. AT&T Corp., 119 S. Ct. at 738.

Following the Supreme Court's decision, the FCC initiated further rulemaking to address the necessary-and-impair standard. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 1999 WL 221834 (FCC Apr. 16, 1999). On November 5, 1999, the FCC released its Third Report and Order and Fourth Further Notice of Proposed Rulemaking in which it adopted new unbundling standards in response to the Supreme Court's Iowa Utils. Bd. decision. See Third Local Competition Order. Applying this standard, the FCC reaffirmed that incumbents must provide unbundled access to six of the seven original network elements that it required be unbundled in its original 1996 order.[3] These rules are binding and dispositive; it is a "well established" principle that properly promulgated agency regulations "have the force and effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979).

2. Procedures For Establishing "Interconnection" Agreements. Congress established expedited procedures in § 252 to implement the Act's substantive requirements. Congress directed incumbents to "negotiate in good faith" with requesting carriers seeking

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[3] Pursuant to the revised standard adopted by the FCC, incumbents must provide unbundled access to: loops; subloops; network interface devices; circuit switching; interoffice transmission facilities; shared transport (where unbundled local circuit switching is provided); signaling and call-related databases; and, operations support systems. See Third Local Competition Order, Executive Summary at 11-13, 47 C.F.R. § 51.319.

interconnection, § 251(c)(1), such that the parties are free to enter voluntary agreements, subject to the approval of state utility commissions. § 252(e)(2)(A). Incumbents have little incentive to facilitate competition, however, and Congress thus provided that "if private negotiations fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." AT&T Corp., 119 S. Ct. at 727; see § 252(b)-(d). The arbitrated agreement is then submitted to the state commission for approval, to determine whether the agreement meets "the requirements of section 251 . . ., including the regulations prescribed by the [FCC] pursuant to section 251 . . ., [and] the standards set forth in [section 252(d)]." § 252(e)(2)(B). After a state commission approves an interconnection agreement, § 252(e)(6) of the Act provides that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements" of §§ 251 and 252. See generally Iowa I, 120 F.3d at 792; GTE South, Inc. v. Morrison, 6 F. Supp. 2d 517, 521-22 (E.D. Va. 1998) ("Morrison I").

C. Proceedings In South Dakota.

After negotiations between AT&T and U S WEST in South Dakota failed to resolve all issues, AT&T filed a petition for arbitration with the South Dakota Public Utilities Commission ("PUC") on November 20, 1996. In a series of orders, the PUC resolved most of the open issues, sometimes adopting the position of one of the parties, and sometimes reaching another resolution. See Complaint at Attach. A-E, U S WEST Communications, Inc. v. Hunt, Civ. 99-5024 (D.S.D. April 5, 1999) ("USW Complaint"). On February 3, 1999, the parties filed an interconnection agreement ("Agreement") with the PUC incorporating its rulings along with certain "parked" issues to be decided in subsequent negotiations. Joint Request for

Approval of the Arbitrated Interconnection Agreement between AT&T Communications of the Midwest, Inc. and U S WEST Communications, Inc., Interconnection Agreement Contract Negotiations between AT&T Communications of the Midwest, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. TC 96-18 (P.U.C. S.D. Feb. 2, 1999) ("Agreement"), Attach. 3 §§ 1.5.2, 2.4, 19. The PUC then approved the Agreement without modification. USW Complaint ¶ 27. Pursuant to § 252(e)(6), U S WEST filed this complaint that contested the lawfulness of PUC-imposed terms of the Agreement.

SCOPE AND STANDARD OF REVIEW

The issue before this Court is "whether the agreement . . . meets the requirements of section[s] 251 [and 252]" of the Act. § 252(e)(6); see, e.g., GTE South, Inc. v. Morrison, 957 F. Supp. 800, 804 (E.D. Va. 1997) ("Morrison I"); GTE Fla., Inc. v. Johnson, 964 F. Supp. 333, 335 (N.D. Fla. 1997). In addition, this Court must determine whether the Agreement complies with FCC rules, both because the PUC was required to apply the FCC regulations in conducting the arbitration and approving the Agreement, see § 252(c)(1), (c)(2)(B); First Local Competition Order ¶ 134, and because agency regulations "have the force and effect of law." United States v. Fox, 60 F.3d 181, 184 (4th Cir. 1995); see U S WEST v. MFS Intelenet, Inc., F.3d __, 1999 WL 799082 *2 (9th Cir. Oct. 8, 1999) ("MFS 9th Cir.") (court reviews "whether the agreements are in compliance with the Act and the implementing regulations"); AT&T Communications of Cal., Inc. v. Pacific Bell, No. C 97-0083 SI, 1998 WL 246653, at *14 (N.D. Cal. May 11, 1998) ("the FCC's Local Competition Order is enforceable and binding on the

[]PUC"); see also, e.g., Chrysler Corp., 441 U.S. at, 295-96 (terming this principle "well established").[4]

In determining whether the Agreement comports with the requirements of federal law, this Court reviews legal issues de novo. See, e.g., MFS 9th Cir., 1999 WL 799082, at *2; AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998); AT&T v. Pacific Bell, 1998 WL 246632, at *3-*4 (citing cases); U.S. West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997) ("Hix II") (review under section 252(e)(6)); Morrison II, 6 F. Supp. 2d at 523-24. The Court should review the PUC's factual findings "under an arbitrary and capricious standard." MFS 9th Cir., 1999 WL 799082, at *2.

Moreover, in challenging provisions of the Agreement, U S WEST may not, in this forum, challenge FCC regulations currently in effect, including both the First Local Competition Order and the Third Local Competition Order because "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals." FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984); 28 U.S.C. § 2342 ("Hobbs Act"); 47 U.S.C. § 402(a). The Hobbs Act provides that "[t]he court of appeals . . . has exclusive jurisdiction to

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[4] The FCC's statements in its commentary section of the First Local Competition Order likewise have the force of law. See 47 U.S.C. § 408 ("all orders of the Commission . . . shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order"); see also Iowa Utils. Bd., 120 F.3d at 801 (noting that the "fact that the FCC asserts its [statutory] authority in the commentary section of its First Report and Order as opposed to stating its position as a rule is immaterial to [ripeness determination]"); id. at 819 ("declin[ing] the petitioners' request to vacate the FCC's entire First Report and Order"); MFS 9th Cir., 1999 WL 799082 at *8-*10 (applying provision of First Local Competition Order); Illinois Bell Telephone Co. v. Worldcom Technologies, 179 F.3d 566, 571-72 (7th. Cir. 1999) (applying declaratory ruling of FCC because "[w]e have long given deference to the pronouncements of the FCC"); cf. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (holding that, unless statute provides otherwise, administrative agencies have discretion to announce legal rules in any form they choose).

enjoin, set aside, suspend (in whole or in part), or to determine the validity of--(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." Id. (emphasis added); see, e.g., MFS 9th Cir., 1999 WL 799082, at *5 ("The FCC order is not subject to collateral attack in this proceeding. The Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC.").[5]

Further, the Supreme Court's decision in AT&T Corp. applies here. See, e.g., MFS 9th Cir., 1999 WL 799082, at *5. In Harper v. Virginia Dep't of Taxation, the Supreme Court made clear that when it decides an issue of federal law, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. 86, 97 (1993); see also Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994) ("judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"). Because the Supreme Court's decision in AT&T Corp. states what the Act "meant before as well as after the decision," the reinstated rules are binding and fully applicable

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[5] Numerous other federal courts have likewise held that the FCC's rules and regulations cannot be challenged in district court. See AT&T Communications, 1998 WL 24665?, at *2 ("[T]his Court may not inquire into the validity of an FCC regulation." "FCC regulations have the force of law and are binding upon state PUCs and federal district courts."); Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., No. A97-CA-132 SS, 1998 WL 657717 at *1 (W.D. Tex. Aug. 31, 1998) ("FCC rules and regulations which were upheld by the Eighth Circuit . . . are controlling and are not subject to collateral attack here"); AT&T v. BellSouth, 7 F. Supp. 2d 661, 674 (E.D.N.C. 1998) ("[I]t is not within this Court's authority to review the propriety of an FCC regulation . . . . Instead, BellSouth's only recourse to challenge any of the FCC's rules is to proceed directly to a Court of Appeals."); see also FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals.").

in this Court's review of the Agreement "regardless of whether [the arbitration and approval of the agreements] predate or postdate" the Supreme Court's decision applies to this case.

Finally, under "fundamental principles of judicial review," the Court must judge the legality of the Agreement based on "the administrative record already in existence, not some new record made initially in the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); see also, e.g., U S WEST Communications, Inc. v. Thoms, No. 4-97-CV-70082, 1997 WL 880744 at *1 (S.D. Iowa Mar. 17, 1997) (Section 252(e)(6) "authorizes judicial review of the state commissions' actions based on the record before the state commission."); Southwestern Bell Tel. Co. v. AT&T Communications, Inc., No. A-97-CA-132-SS, slip op. at 1-2 (W.D. Tex. June 18, 1997) (Attach. 2); Hix II, 986 F. Supp. at 15. As one district court put it, "the statute does not contemplate a replay -- in whole or in part -- of the State commission proceedings, but rather calls only for the district court to analyze whether the interconnection agreements produced by those proceedings comport with the Act." U S WEST Communications, Inc. v. Garvey, No. 97-913, slip op. at 3 (D. Minn. Feb. 12, 1998) (Attach. 3).

ARGUMENT

I. THE COURT SHOULD REJECT U S WEST'S CHALLENGES TO THE AT&T AGREEMENT'S "COMBINATIONS" PROVISIONS.

U S WEST claims that the "Commission unlawfully required U S WEST to combine network elements in violation of the Act." U S WEST Communications, Inc.'s Opening Brief on the Merits of its Affirmative claims at 6, U S WEST Communications, Inc. v. Hoey, Civ. No. 99-5024 (D.S.D. Sept. 13, 1999) ("USW Br."). As set forth below, U S WEST's assertion is plainly incorrect. Nevertheless, AT&T agrees with U S WEST that the parties agreed to "park" this issue pending further negotiations and it is therefore not necessary for the Court to "address

this issue at this time." Id. at 5. To the extent that the Court does choose to rule on this issue, the Commission correctly required U S WEST to provide network elements that were already combined in its network and to combine network elements where technically feasible.[6]

A. The Commission's Decision Requiring U S WEST Not To Disconnect Network Elements That Have Already Been Combined Is Required By Binding FCC Rules Upheld By The Supreme Court.

The Commission's Order that U S WEST not disconnect combined network elements is consistent with, and mandated by, 47 C.F.R. § 51.315(b) ("Rule 315(b)"), which provides that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." This rule was reinstated by the Supreme Court. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 737-38 (1999), and thus is controlling and dispositive here. MFS 9th Cir., 1999 WL 799082 at *6; Hix II, 57 F. Supp 2d at 1117; see also Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994); National Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995).

U S WEST's assertion that the Supreme Court's decision to vacate 47 C.F.R. § 319 ("Rule 319") relieves U S WEST of its duty to provide combinations under Rule 315(b), see USW Br. at 9-10, is both wrong and, in all events, now completely irrelevant. It is wrong because Rule 315(b) was expressly upheld by the Supreme Court, and thus constitutes

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[6] The Court should dismiss U S WEST's first claim in its Complaint which contends that it was illegal under the Act to grant AT&T the right to pick and choose from various interconnection agreements, which U S WEST designates as "Most Favored Nation" status. This claim is now barred by the Supreme Court's decision upholding the FCC's "pick and choose rule" because "it tracks the pertinent statutory language almost exactly." See AT&T Corp., 119 S. Ct. at 738. Apparently, now realizing that this claim is frivolous, U S WEST's Merits Brief is silent on this claim and it is therefore waived. See, e.g., Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993); Greenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 678 (1st Cir. 1995).

controlling law, regardless of the Supreme Court's decision to vacate Rule 319. See AT&T Corp., 119 S. Ct. at 737-38 (upholding Rule 315(b)).

Moreover, even if U S WEST's argument ever had merit, it is now moot because the FCC has completed its rulemaking and has issued new regulations in place of Rule 319. U S WEST assertion that "there is no current FCC rule that establishes which network elements incumbent LECs must unbundle," USW Br. at 9, is now wrong because the FCC recently released its Third Local Competition Order which explicitly lists the network elements that U S WEST must unbundle. Third Local Competition Order ¶¶ 162-465. Accordingly, because the Supreme Court upheld Rule 315(b) requiring U S WEST not to unbundle combined network elements, and because the FCC has now completed its rulemaking on remand as to which network elements must be unbundled, allowing U S WEST to separate combined network elements would violate the Act. Therefore, the Commission's Order requiring U S WEST not to unbundle combined network elements is required by the Act and should be upheld by the Court.[7]

B. The PUC's Decision Requiring U S WEST To Combine Network Elements That Are Not Already Physically Connected Is Consistent With The Act.

U S WEST likewise claims that the PUC's decision requiring it to combine network elements that are not already combined in its network is inconsistent with the Eighth Circuit's interpretation of the "plain meaning" of section 251(c)(3) of the Act. See USW Br. at 11. But the Supreme Court emphatically rejected the Eighth Circuit's interpretation of this provision. Whereas the Eighth Circuit believed that section 251(c)(3) "unambiguously indicates

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[7] U S WEST's complaints about "sham unbundling" are meritless. See USW Br. at 12 n.11. Although U S WEST may claim that combining all elements to provide a service constitutes "sham unbundling," id., the United States Supreme Court refers to this as the application of the "all elements" rule and explicitly affirmed that FCC rule permitting new entrants to purchase on an unbundled basis all the elements necessary to provide a telecommunications service. AT&T Corp., 119 S. Ct. at 736.

that requesting carriers will combine the unbundled elements themselves," and "cannot be read to levy a duty on the incumbent LECs to do the actual combining of elements," Iowa I, 120 F 3d at 813, the Supreme Court disagreed, holding that section 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in [separated] fashion and never in combined form." AT&T Corp., 119 S. Ct. at 737 (emphasis added). Instead, "[t]he reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated," and "'Rule 315(b) could allow entrants access to an entire preassembled network." Id. Thus, "[i]t is well within the bounds of the reasonable" for the PUC "to opt in favor of ensuring against an anticompetitive practice" by requiring U S WEST to combine network elements. Id. at 738. Accordingly, as the Ninth Circuit recently held on this exact issue, it "necessarily follows from AT&T that requiring U.S. West to combine unbundled network elements is not inconsistent with the Act . . . because the Act does not say or imply that network elements may only be leased in discrete parts." MFS 9th Cir., 1999 WL 799082 at *7 (9th Cir. 1999). Accordingly, this Court should affirm the provisions of the Agreement requiring U S WEST to provide combinations of network elements.

II. THE AGREEMENT'S PERFORMANCE STANDARDS ARE CONSISTENT WITH THE ACT.

Apparently in the name of fostering competition, U S WEST requests this Court to permit it to provide lower quality service to AT&T than it does to itself, claiming that requiring it to provide "its highest level of service at all times is unreasonable" and that "it is not required to provide access that is in all respects equal to what it provides itself." USW Br. at 14. U S WEST's claims are foreclosed by the Act and binding FCC rules that require it to provide service equal in quality to that which it provides to itself and that otherwise preclude the

discriminatory treatment U S WEST asks this Court to permit. Accordingly, this Court should reject U S WEST's claim.

A. U S WEST Must Provide Interconnection Equal In Quality To What It Provides Itself.

U S WEST, citing no authority and no evidence, argues that it need not provide AT&T with the same quality interconnection that it provides to itself. It claims that it cannot "commit to any carrier to provide its highest possible level of service at all times because there are numerous factors beyond [its] control," USW Br. at 13, and that "[i]t is unreasonable to penalize U S WEST for failing to meet a service standard for reasons beyond its control," id. at 14. U S WEST cannot demonstrate that the Agreement violates the Act.

First, U S WEST does not even mention the language in the Agreement that requires it to "provide interconnection to AT&T with at least the level of service quality . . . as U S WEST provides itself." Agreement, Attach. A ¶ 52.2. This language closely parallels that of the Act which requires that interconnection be "at least equal in quality to that provided by [the incumbent LEC] to itself." § 251(c)(2)(C). Language in the Agreement that is identical to that of the Act cannot violate the Act.

Second, binding FCC rules likewise require U S WEST to provide access equal in quality to that which it provides itself. The FCC unambiguously mandated that

> An incumbent LEC shall provide . . . interconnection with the incumbent's network . . . (3) that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party . . . At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier.

47 C.F.R. § 51.305(a); see First Local Competition Order ¶ 224. Plainly, then, U S WEST's request that this Court exclude it from its obligation to provide equal quality interconnection violates FCC rules as well as the Act.

Third, the Agreement does not penalize U S WEST for failing to meet "service standards for reasons beyond its control" because the Agreement explicitly states that the service standards are based "upon the 'technical feasibility' of providing that service." Id. ¶ 52.4. Therefore, if U S WEST demonstrates that it is not "technically feasible" to provide certain service, it would not violate the Agreement.

B. U S WEST Must Provide AT&T The Same Quality Of Access To Network Elements That It Provides Itself.

U S WEST next argues that it need not provide AT&T with access to network elements which "is in all respects equal to what [U S WEST] provides itself." USW Br. at 14. Rather, it claims that it can provide AT&T a lower quality of access than that it provides itself so long as it provides all new entrants an equally low level of access and therefore "does not discriminate between [competitive] carriers." Id. at 17.

The FCC has explicitly (and repeatedly) rejected this anticompetitive reading of the Act, and U S WEST's contrary argument is foreclosed by binding FCC rules. The FCC has held that "the quality of the access to [an] unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier, shall be at least equal in quality to that which the incumbent LEC provides to itself." 47 C.F.R. 51.311(b) (emphasis added). The FCC thus requires U S WEST to offer access that is "at least equal in quality" to that which it provides itself, independent of the standard that U S WEST proposes, namely "a meaningful opportunity to compete." USW Br. at 16 (quotation omitted).

Indeed, the FCC has rejected U S WEST's reading of the nondiscrimination provisions of the Act on three separate occasions. In the First Local Competition Order, the incumbent LECs made exactly the same argument that U S WEST makes now: the term nondiscriminatory only means nondiscrimination among new entrants, not nondiscrimination among new entrants and between any new entrant and the incumbent LEC. See First Local Competition Order ¶ 301. The FCC soundly rejected this argument holding: "it would be insufficient to define . . . 'nondiscriminatory access' to mean that the quality of the access and unbundled elements incumbent LECs provide to all requesting carriers is the same" and instead held that nondiscriminatory access includes both nondiscrimination among new entrants and nondiscrimination between the incumbent and new entrants. Id. ¶ 312 (emphasis added). Likewise, in its Second Local Competition Order, the FCC reiterated this conclusion, holding that the term "nondiscriminatory requires the LECs to offer access equal to what it provides itself." Second Report and Order and Memorandum Opinion and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 19392, ¶¶ 100-105 (1996) ("Second Local Competition Order").[8] Because "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals," FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984), U S WEST may not contest the FCC's

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[8] In the Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, Implementation of the Telecommunications Act of 1996, FCC 99-227 (Sept. 9, 1999) ("Second Order on Reconsideration"), the FCC again affirmed that "'nondiscriminatory access' means that providing LECs must offer access equal to that which they provide themselves. . . . [A]ny standard that would allow a LEC to provide access to any competitor that is inferior to that enjoyed by the LEC itself is inconsistent with Congress' objective of establishing competition in all telecommunications markets." Id. ¶ 128.

conclusion in this Court. Therefore, U S WEST's claim that it may provide a lower quality of access to network elements than that which it provides to itself must be rejected.[9]

III. THE PUC PROPERLY REQUIRED COLLOCATION OF REMOTE SWITCHING MODULES PURSUANT TO AN FCC REGULATION NOT SUBJECT TO CHALLENGE IN THIS ACTION.

Section 251(c)(6) of the Act requires U S WEST "to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the [incumbent] local exchange carrier." § 251(c)(6). "[C]ollocation" is "an offering by an incumbent LEC that enables a requesting telecommunications carrier to . . . [p]lace its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." 47 C.F.R. § 51.5. The Agreement allows, consistent with FCC rules, for collocation of equipment "necessary" for interconnection and access to network elements, including the multifunctional equipment known as Remote Switching Modules ("RSMs"). Agreement §§ 40.1.5, 40.1.6. U S WEST's claim that the Agreement violates the

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[9] U S WEST makes much of the slight difference in wording between the interconnection provision of § 251(c)(2) and access to network elements provision of § 251(c)(3), asserting that interpreting the "nondiscriminatory" language of § 251(c)(3) to mean "equal in quality" is "unlawful." USW Br. at 14. This argument is frivolous, as the FCC has repeatedly held that the nondiscrimination language of 251(c)(3) means equal in quality. See, e.g., Second Order on Reconsideration ¶ 126. The FCC has recognized that the only reason the wording is slightly different is "because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such elements, that are equal in quality to what the incumbent LECs provide to themselves." First Local Competition Order ¶ 313. Therefore, other than the "rare circumstance" where it is technically unfeasible to provide equal access to unbundled network elements, the equality standard is the same for both interconnection and unbundled network elements.

Act is predicated on an improper collateral attack on binding FCC rules that expressly recognize RSMs as equipment covered by the Act's collocation obligation. That claim is therefore baseless.

The PUC's determination that RSMs are eligible for collocation under the Act was in full accord with FCC regulations in effect during the arbitration and is now unquestionably mandated by recent amendments to those regulations. The FCC's regulations explicitly require that "[a]n incumbent LEC shall permit the collocation of any type of equipment used for . . . interconnection or access to unbundled network elements," and afford the incumbent LEC the right to object to collocation by "prov[ing] to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements." 47 C.F.R. § 51.323(b) (1999). AT&T presented uncontroverted evidence during the arbitration that RSMs would be used by AT&T for interconnection and access to the unbundled local loop network element, and that such equipment promised efficiency gains for both parties. See, e.g., Direct Testimony of Roger Riggert, November 20, 1996 at 51-52 (Attach. 7). The Commission credited this evidence in making its decision. Interconnection Contract Negotiations between AT&T Communications of the Midwest, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252, TC 96-184, Findings of Fact and Conclusions of Law; Order and Notice of Entry of Order ¶ 53 (P.U.C.S.D. Mar. 20,1997) ("Decision"). The fact that RSMs provide a function in addition to providing interconnection and access to network elements is irrelevant under the Act and the FCC's regulation. Because the FCC collocation standard applied by the PUC is immune from collateral attack in this action (as well as an eminently reasonable interpretation of § 251(c)(6)), it conclusively establishes the lawfulness of the PUC-imposed Agreement provision requiring collocation of RSMs. See, e.g., MCI v. Bell Atlantic, 36 F. Supp. 2d 419, 428 (D.D.C. 1999). U

> [R]emote switching modules, which terminate circuits and perform multiplexing and switching functions, do not function as stand-alone switches, but rather provide integrated functionalities in a single piece of equipment. By clarifying that incumbent LECs must permit such equipment to be collocated on their premises, we take an important step towards elimination of obstacles to competition. In order to compete effectively in the advanced services marketplace, competitive telecommunications providers must be permitted to collocate integrated equipment that lowers costs and increases the services they can offer their customers.

Id. ¶ 29. The modified FCC regulations now specifically identify remote switching modules as "[e]quipment used for interconnection and access to unbundled net work elements." 47 C.F.R. § 51.323(b)(3).

Because the FCC has spoken directly on the issue of collocation of RSMs, its ruling is dispositive. The FCC collocation regulations, as amended in the Advanced Services Order, are in effect and unstayed, and no court is entitled to "determine the validity of" those regulations except a court of appeals exercising direct-review jurisdiction under 28 U.S.C. § 2342(1), or the Supreme Court reviewing the decision of that court. See FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984). Any arguments U S WEST may have regarding the validity of the FCC collocation regulations must be addressed in those courts, not here.[10]

Because the FCC has held that the incumbent LECs must allow CLECs to collocate RSMs used for interconnection, and because its regulations cannot be attacked in this forum, the Court should uphold the decision of the PUC allowing AT&T to collocate RSMs.

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[10] The Supreme Court did not address any of the collocation regulations in AT&T Corp., which, in any event, were not even before it. Rather, the Court explicitly declared that its decision "invalidate[d] only Rule 319, the standard for access to proprietary network elements." S. Ct. at 738; see also Advanced Servs. Order ¶ 28 n. 57 5 *n.11* (AT&T Corp. did not address or affect the collocation regulations). Therefore, the Agreement provision regarding RSM collocation is unquestionably lawful.

IV. THE AGREEMENT PROVISIONS REQUIRING U S WEST TO PROVIDE ACCESS TO DARK FIBER AND THE VERTICAL FEATURES OF THE LOCAL SWITCHING ELEMENT ARE REQUIRED BY BINDING FCC REGULATIONS THAT MAY NOT BE ATTACKED IN THIS FORUM.

A. The FCC's Ruling That Dark Fiber Is A Network Element Forecloses U S WEST's Argument That It Need Not Provide It.

U S WEST next challenges provisions of the Agreement that require it to provide access to "dark fiber." USW Br. at 21. Because the FCC has now explicitly held that dark fiber is a network element, U S WEST's contention that dark fiber is not a network element is groundless and may be summarily dismissed.

Although the FCC originally declined to determine whether dark fiber was a network element that incumbents must make available to new entrants based on the record then before it (instead expressly leaving that question to state commissions), First Local Competition Order ¶ 450, the FCC has now held that incumbent LECs must provide unbundled access to dark fiber whether it is used for loops or interoffice transport. Third Local Competition Order, ¶¶ 349-50; 47 C.F.R. 51.319(2)(1). Because "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals," FCC v. ITT World Communications Inc., 466 U.S. 463, 468 (1984); 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a), U S WEST may not contest that decision in this Court. Therefore, U S WEST's claim that dark fiber is not a network element is without merit and should be summarily dismissed.[11]

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[11] Moreover, even if the FCC had not explicitly required access to dark fiber in its recent order, the FCC's preexisting regulations required such access. The Act defines a network element as "a facility or equipment used in the provision of a telecommunications service," as well as "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). As both the Eighth Circuit and the Supreme Court have recognized, this definition is extremely broad. Iowa I, 120 F.3d at 808-09; AT&T Corp., 119 S. Ct. at 734. The definition of "network element" unquestionably encompasses fiber optic cable that has been

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B. The PUC Correctly Held That U S WEST Must Provide Vertical Features As Part Of The Local Switching Element.

"Vertical features" of the local switch include many of the now-familiar features made available to local telephone customers, including call waiting, call forwarding, and caller ID. U S WEST and other incumbent LECs have consistently resisted any requirement that these features be available to new entrants as part of the unbundled switch element. U S WEST has lost that issue before the FCC, the Eighth Circuit, the Supreme Court, and the PUC. Because the FCC rules require U S WEST to provide such access, this Court should not entertain U S WEST's collateral attack here.

The FCC flatly rejected the view that the local switching element does not include the vertical features of the switch. See First Local Competition Order ¶¶ 400, 404. The FCC concluded that when a new entrant purchases the local switching element, it is entitled to receive all the features, functions, and capabilities of that element, including vertical features. First Local Competition Order ¶ 412. As the FCC's binding rules hold, "the local switching element... encompass[es] line-side and trunk-side facilities plus the features, functions, and capabilities of the switch." Id. Those "features" include "all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically

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[11](...continued)
deployed in the network, Southwestern Bell, 1998 WL 657717, at *6, and the provision and maintenance of which is offered as a "wire communication" service to customers who light it by providing their own electronic equipment. See Dark Fiber Order ¶ 1. Thus, district courts, noting the Eighth Circuit's discussion of network elements and the FCC's Dark Fiber Order, have almost unanimously determined that dark fiber is a network element. See, e.g., MCI v. BellSouth, 7 F. Supp. 2d at 679 ("dark fiber is completely different from . . . rolls of copper wire and stacks of switches," and "is thus more a part of the network than it is inventory"); MCI, 36 F Supp. at 423 (same); Southwestern Bell, 1998 WL 657717, at *6; MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 40 F. Supp. 2d 416, 425 (E.D. Ky. 1999) (dark fiber is a network element "because it is in the ground ready to go and in some cases wrapped around lit fibers that are classified as [elements]") (citing cases).

feasible customized routing functions." Id. In short, "vertical switching features are part of the unbundled local switching element" because they "are provided through operation of hardware and software comprising the 'facility' that is the switch." Id. ¶¶ 412-413.

U S WEST and other incumbent LECs challenged these FCC rules in both the Eighth Circuit and the Supreme Court, again claiming that these features are "services" and not network elements, and that their price should be based on retail prices. Iowa I, 120 F.3d at 808. Both courts rejected those challenges and affirmed the FCC's pricing rules, recognizing that "vertical features, such as caller I.D., are 'functions . . . provided by means of' the switch, and thus fall squarely within the statutory definition" of network elements. AT&T Corp., 119 S. Ct. at 734; Iowa I, 120 F.3d at 809. There is no question that the FCC, affirmed by the Eighth Circuit and then the Supreme Court, has definitively established that vertical features are part of the unbundled switching element. See id.; First Local Competition Order ¶¶ 412-413.

Nevertheless, U S WEST argues that because the Supreme Court invalidated Rule 319, it no longer must provide the vertical features of the switch. USW Br. at 24. The FCC has completed its rulemaking regarding unbundled network elements and has reaffirmed that local switching must be offered as an unbundled network element, and that the unbundled switch "encompasses all of the features, functionalities, and capabilities of the switch." Third Local Competition Order, Executive Summary at 12 (emphasis added). Therefore, under these existing FCC regulations U S WEST must include the vertical features of the switch as part of the unbundled switching element.

V. U S WEST'S PROPOSED IMPOSITION OF CONSTRUCTION CHARGES FOR RESOLD SERVICES VIOLATES THE ACT AND DISCRIMINATES AGAINST AT&T.

U S WEST also challenges the PUC's Decision regarding construction costs for resold services. USW Br. at 24. The PUC held that "AT&T shall only pay those nonrecurring charges of construction that U S WEST charges to an end user." Decision at ¶ 178. U S WEST claims this provision is unlawful, effectively arguing that the Act authorizes it to impose charges on AT&T that it does not impose on retail customers. USW Br. at 25. Not only does no such right exist under the Act, but such a requirement would affirmatively violate the Act's resale pricing rule and its prohibition on discriminatory restrictions on resale.

The charges U S WEST proposes would flatly violate §§ 251(c)(4) and 252(d)(3) of the Act. The Act unequivocally limits U S WEST's resale charges to AT&T to a wholesale price, set at the retail rate charged to subscribers for the service "excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[12] § 252(d)(3). U S WEST's proposed charges for construction are indisputably not based on the retail rate for a service, and the imposition of such a charge would violate the Act.

The rule favored by U S WEST not only violates the pricing standard of § 252(d)(3); it is also unreasonable and discriminatory in violation of § 251(c)(4)(B). U S WEST's proposed rule is unreasonable because there would be no mechanism for AT&T to recover a forced, up-front subsidy of the cost of building U S WEST facilities if the customer

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[12] In fact, if any party has cause to complain about the construction charges, it is AT&T. The PUC erred because AT&T should only pay the charge U S WEST assesses against its own end users minus the wholesale discount. § 252(d)(3). AT&T has chosen, however, not to appeal this ruling.

soon thereafter switched to another reseller (or back to U S WEST). U S WEST, by contrast, is always compensated for providing service over those facilities no matter whether the service is provided by it at retail or by any reseller of its service. U S WEST's proposal that it charge AT&T more than it does its retail customers is plainly discriminatory and violates the Act. See § 252(d)(3). A blanket rule requiring resellers to pay an up-front 100% subsidy for U S WEST's construction of new facilities would be a formidable, discriminatory, and unreasonable barrier to competition, and, as the PUC determined, would lead to AT&T "paying twice for a portion of those construction charges." Decision ¶ 178.[13]

None of the authority cited by U S WEST relates to resale and instead applies to entirely different provisions of the Agreement not at issue on appeal. For example, U S WEST relies on the FCC's determination that, where a new entrant purchases a local loop as a network element and requests conditioning of that loop, "the requesting carrier must compensate the incumbent LEC." See USW Br. at 25 citing First Report and Order ¶ 382. But loop conditioning is covered by section 4.6 of Attachment 1 of the Agreement, which provides that "U S WEST may charge a fee of $58.50 for conditioning of loops at the request of AT&T." Agreement, Attach. 1 § 4.6. Similarly, U S WEST cites to the Eighth Circuit's discussion vacating the FCC's rules requiring incumbents to provide superior quality interconnection and access to network elements upon request to new entrants. See USW Br. at 24 (citing Iowa I, 120 F.3d at 812). But this issue has nothing to do with superior quality service. Moreover, as both the FCC and the Eighth Circuit have noted, resale is fundamentally different from interconnection and access to

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[13] The Agreement in fact requires AT&T to pay 50% of these non-recurring charges up front when it places its order. Agreement, Attach. 1 ¶ 3.5.

network elements. First Local Competition Order ¶ 332; Iowa I, 120 F.3d at 814-15. And U S WEST's "authority" is inapposite for that reason as well.[14]

Accordingly, U S WEST has not -- and cannot -- demonstrate that the PUC acted arbitrarily and capriciously in limiting recovery of construction costs to those that it would charge to its customers buying service directly from U S WEST. Indeed, had the PUC done otherwise, it would have violated the Act. U S WEST's challenge to section 3.2 of Attachment 1 of the Agreement fails.

VI. THE PUC'S DECISIONS REGARDING THE RESERVATION OF FACILITIES WAS REQUIRED BY BINDING FCC REGULATIONS.

Citing no authority, U S WEST complains that the PUC's order that it "may not reserve space for its local exchange service to the detriment of an entrant into the local exchange business" was beyond the PUC's authority. USW Br. at 28. This argument is frivolous.

The FCC observed that the recognition of a right by a utility "to reserve capacity to meet anticipated future demand for those utility services" "could conflict with the nondiscrimination requirement of section 224(f)(1)" and that "allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress." First Local Competition Order ¶ 1168. The FCC then "balance[d] these concerns" by permitting electric utilities to reserve space under certain limited circumstances, id.

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[14] Although its brief is not clear, U S WEST is apparently complaining about the cost of constructing "new facilities to an area not currently served or an area with limited existing facilities," such as a new subdivision. See Direct Testimony of John Lehner at 117 (Attach. 5). Although U S WEST claims it never has to construct such facilities, the Agreement and the PUC's order require it to "construct when necessary to meet its general obligations as an incumbent LEC as ordered by the Commission or federal law." Agreement, Attach. 1 § 3.1. U S WEST is generally required under state law to construct new facilities to meet new customer demand in areas where it is the predominant carrier. See S.D.Codified Laws § 49-31-3-1.

¶ 1169, while prohibiting incumbent LECs such as U S WEST from reserving such space. Id. ¶ 1170. The FCC held that "[p]ermitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC," in direct violation of the Act. Id. Accordingly, the provision of the Agreement challenged by U S WEST is fully consistent with the Act and the FCC's rules, and this Court cannot entertain U S WEST's contrary claim here.

VII. THE PUC PROPERLY PERMITTED AT&T TO ESTABLISH ONE POINT OF INTERCONNECTION PER LATA.

U S WEST contends the PUC violated the Act by requiring U S WEST to provide a single point of interconnection per Local Access and Transport Area ("LATA") as opposed to requiring one point of interconnection for each local exchange area. See USW Br. at 29-31. Other courts have already rejected U S WEST on this precise argument, unambiguously stating that U S WEST "is wrong." U S WEST v. AT&T (Wash), at 17; see MFS 9th Cir. at *9. This Court should likewise reject U S WEST's argument.

Both the Act and binding FCC regulation require incumbents such as U S WEST to permit new entrants to interconnect with their facilities "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2)(B); 47 C.F.R. § 51.305(a).[15] "The ILEC is relieved of this duty to provide interconnection at a particular point only if it proves to the state

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[15] Indeed, in promulgating the interconnection regulations properly applied by the PUC, the FCC made clear that "Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points." First Local Competition Order ¶ 209. Thus, by permitting new entrants "to select the points in an incumbent LEC's network at which they wish to deliver traffic," the PUC plainly acted properly. See id.

commission that interconnection at that point is not technically feasible." U S WEST v. AT&T (Wash.) at 20 (citing 47 C.F.R. § 51.305(e)). U S WEST made no showing below that interconnecting at a single point per LATA was not technically feasible.[16] Thus, the PUC properly applied the technical feasibility requirement of the Act and binding FCC regulations.

VIII. ALL THE SO-CALLED "ADDITIONAL OBLIGATIONS" CHALLENGED BY U S WEST ARE FULLY CONSISTENT WITH THE ACT.

A. The PUC Correctly Held That Either Party Could Be Liable For Lost Profits And Punitive Damages.

The PUC held "that there is no liability for either party for indirect, incidental, special, or consequential damages; and that the limitations do not apply to willful or intentional conduct. Parties shall be liable for lost profits." Decision ¶ 16; see Agreement at 19.3. Without citing to any provision of the Act, U S WEST argues that because courts usually refer to lost profits as consequential damages, "[c]onsistency requires that the proposed liability for lost profits be stricken." USW Br. at 31.

Notwithstanding U S WEST's strained attempt to read an inconsistency into the Agreement, the most natural reading of the provision challenged by U S WEST demonstrates that it is entirely consistent. Simply put, the provision states that, barring willful or intentional

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[16] U S WEST does not even contend that it is technically infeasible to establish only one POI per LATA. Rather it merely complains "that one POI per LATA would impose additional unwarranted costs on U S WEST." USW Br. at 31 n.20. But any increase in cost does not constitute technical infeasibility as a matter of law. See 47 C.F.R. § 51.5 ("[A] determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns."); U S WEST v. AT&T – Wash. at 20 (Attach. 1); U S WEST Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, slip op. at 9 (W.D. Wash. Jan. 7, 1998) (Dwyer, J.) (Attach. 5) aff'd MFS 9th Cir., __ F.3d __, 1999 WL 799082 (9th Cir. Oct. 8, 1999). And the evidence cited by U S WEST, such as it is, falls far short of demonstrating that the PUC acted in an arbitrary or capricious manner in concluding that U S WEST failed to demonstrate "technical or operational concerns that prevent" U S WEST from permitting interconnection at a single point per LATA. See 47 C.F.R. § 51.5.

conduct, the parties are liable for lost profits but no other consequential, incidental or special damages. Although U S WEST makes much of the fact that courts sometimes refer to lost profits as a category of consequential damages, id., that does not alter the plain language of the Agreement.[17] The PUC's Order is not vague or ambiguous, and the imposition of this provision was a legitimate exercise of its discretion.

U S WEST also challenges the punitive damage provision claiming that the PUC lacks authority to include such provision in the Agreement. USW Br. at 31-33. U S WEST is wrong. U S WEST remains subject to the jurisdiction, and as the district court in Colorado found in ruling against U S WEST on virtually this identical issue, "the Telco Act gives [PUCs] the authority to 'adopt[], inter alia, specific rules . . . and any other specific conditions they deem necessary to provide new entrants . . . with a meaningful opportunity to compete in local exchange markets.'" Hix, 57 F. Supp. 2d at 1121; see also U S WEST Communications Inc. v. Minn. PUC, 55 F. Supp. 2d 968, 985-86 (D. Minn. 1999) (PUC may "impose [] requirements not expressly contained in the Act"). Consequently, the punitive damages provision is "designed to encourage compliance with the agreement[]" and is "within the scope of the [PUC's] authority in that it is designed to provide new entrants with a fair and a meaningful opportunity to enter the local exchange market." Id. Accordingly, the PUC acted well within its authority in adopting such a provision.

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[17] Indeed, courts do not always include lost profits within consequential damages. For example, the Eighth Circuit has distinguished between incidental damages, consequential damages and lost profits. Porterco, Inc. v. Igloo Products Corp., 955 F.2d 1164, 1172 n.10 (8th Cir. 1992).

B. The PUC Properly Held That The Remedies Under The Agreement Should Not Be Exclusive.

U S WEST also argues that the PUC exceeded its authority by holding that "all remedies in the Agreement 'shall be cumulative and not exclusive.'" USW Br. at 35 (quoting Decision, ¶ 18). U S WEST's argument is wrong for the same reason that its argument about punitive damages was wrong. The PUC's decision on election of remedies is "designed to encourage compliance with the agreement[]" and is "within the scope of the [PUC's] authority in that it is designed to provide new entrants with a fair and a meaningful opportunity to enter the local exchange market." Hix, 57 F.Supp. 2d at 1121.

C. The PUC Properly Rejected U S WEST's Service-By-Service Wholesale Discount Study.

"The 1996 Act neither forbids nor mandates setting the wholesale discount on a 'service-by-service basis.'" GTE South Inc. v. Morrison, 6 F. Supp. 2d 517, 526 (E.D. Va. 1998). Here, the PUC rejected U S WEST's aggregated discounts for specific services for two reasons. First, U S WEST "failed to provide a discount for all services that are subject to resale." Decision ¶ 195. Although U S WEST claims it provided service-specific discounts for each "disaggregated discounts it proposed," the PUC concluded that it did not "provide a discount for all services that are subject to resale." Second, U S WEST "failed to show that its disaggregated discounts [were] based on individual data that [was] collected by product or service." Decision ¶ 195. U S WEST also complains that this statement is clearly erroneous because it "presented detailed cost information." But the fact that U S WEST alleges it presented detailed cost information does not rebut the PUC's factual finding that U S WEST did not present "individual data . . . . collected by product or service."

Because U S WEST's flawed study constituted the only service-by-service evidence, the PUC's decision not to adopt U S WEST's proposed service-by-service discount cannot be questioned.[18] The PUC did not reject the service-by-service approach per se;[19] it merely acted on the basis of the best information available to it -- as the Act expressly contemplates. See 47 U.S.C. § 252(b)(4)(B) ("the State commission may proceed on the basis of the best information available to it"). Accordingly, because the only service-by-service avoided cost evidence before the Commission was flawed, it was not arbitrary and capricious for the PUC to apply an aggregated wholesale discount rate.

D. The PUC Correctly Required U S WEST To Negotiate, To The Extent It Is Even Necessary, For The Use Of Third Party Intellectual Property.

The telecommunications network that U S WEST has assembled in South Dakota contains components that it has purchased or leased from third parties. The use of many of these components may be governed by licenses or other agreements between U S WEST and the manufacturers of those components. Under the Act, incumbent LECs such as U S WEST are required to provide new entrants such as AT&T with access to elements of their network on an unbundled basis on nondiscriminatory terms and conditions. Accordingly, to ensure that U S WEST complied with its nondiscriminatory access obligation, the PUC correctly required U S WEST upon the request of AT&T "to negotiate with its existing vendors to obtain the use of Third Party Intellectual Property." Interconnection Contract Negotiations between AT&T

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[18] The PUC also found that U S WEST improperly excluded certain costs and revenues from its pricing module. Decision ¶¶ 192-94.

[19] A small minority of states have adopted multiple discounts, finding that the Act permits them -- when they are supported by a cost study that otherwise complies with the Act. But the overwhelming majority of state commissions have set an aggregate cost discount. See State Commissions Setting Aggregate Avoided Cost Discount, Attach. 10.

Communications of the Midwest, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C Section 252, Second Arbitration Order, TC 96-184, Notice of Entry Order ¶ 8 (P.U.C.S.D. Dec. 30, 1998) ("Second Arb. Order").

Under § 251, U S WEST has the explicit and unconditional obligation to provide "nondiscriminatory" access to the elements of its network. § 251(c)(3) (emphasis added). In its binding rulings, the FCC has held that "[t]he duty to provide unbundled network elements on 'terms, and conditions that are just, reasonable, and nondiscriminatory' means, at a minimum, that whatever those terms and conditions are . . . they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself." First Local Competition Order ¶ 315.[20] In light of this clear duty, U S WEST is obligated to obtain from its vendors any modifications to existing licenses necessary to ensure that new entrants may obtain access to U S WEST's network elements at no greater risk of intellectual property liability than U S WEST itself faces.

Indeed, it would have been the very essence of discrimination to have allowed U S WEST to opt out of the Act through procuring or accepting contractual conditions with third-party vendors that preclude new entrants from effectively exercising their statutory rights to obtain access to U S WEST's essential network elements on the same terms that U S WEST now enjoys. Consequently, the PUC correctly required U S WEST to ensure that new entrants may

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[20] See also 47 C.F.R. § 51.311(b) ("the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself"); id. § 51.313(b) ("the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements . . . shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself"); First Local Competition Order ¶¶ 218, 312.

obtain access to its network elements without incurring potential intellectual property liabilities -- a risk U S WEST itself does not face. AT&T and other new entrants have no way of assessing these intellectual property risks, much less addressing them in a manner that would allow entrants to exercise their statutory rights to nondiscriminatory access on the same terms as the incumbent. The Department of Justice has thus observed that "use of the claim of [third-party intellectual property] rights to place burdens on parties seeking access to unbundled elements has unreasonable consequences, potentially delaying and increasing the expense of entry." Evaluation of the United States Justice Department of Justice at 65, Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121 (FCC 1997).

It is beyond reasonable dispute that a requirement that AT&T secure its own intellectual property licenses from U S WEST's vendors would have imposed disparate costs on AT&T, and would thereby have violated the Act's nondiscrimination requirement. U S WEST, of course, had choices among numerous vendors when it purchased the facilities and software in its existing network, and thus could use competition among vendors to negotiate the cheapest possible access to information and other intellectual property. By contrast, if the Court were to overturn the correct holding of the PUC, AT&T would be a captive "customer" of, and have no choice but to deal with, U S WEST's previously selected vendors -- and thus AT&T would almost certainly be required to pay more for the same rights that U S WEST currently enjoys. Further, to the extent that U S WEST incurs "costs" resulting from obtaining access to intellectual property rights associated with unbundled elements, those costs are recoverable in the cost-based rates set for those elements. Under U S WEST's proposed rule, AT&T would be

required to pay that cost twice -- once as part of the network element rate and a second time to obtain licensing rights. Such double recovery is the essence of discriminatory pricing.

Moreover, as a party to the license agreement, U S WEST is in a considerably better position than an entrant to assess whether in fact any amendments are necessary. That is so not only because U S WEST already has ready access to each agreement, but also because a license, like any other contract, is generally construed in accordance with the parties' intent. At a minimum, it would take much longer for an entrant to negotiate amendments than U S WEST and impose far greater costs on the entrant.

For these reasons, the FCC expressly ruled in an analogous context under § 259(a) of the Act, which governs access to incumbent networks by a defined class of "qualifying carriers," that:

> [I]ncumbent LECs may not evade their . . . obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, i.e., without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly. We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under [the Act].

Report & Order ¶ 70, Implementation of Infrastructure Sharing Provisions, 12 FCC Rcd. 5470 (1997) (emphasis added). The nondiscrimination requirement of § 251 mandates the same outcome here -- U S WEST, and not AT&T, must secure any third-party authorizations necessary to provide access to the elements of its network

In the face of these principles, U S WEST offers only one argument to support its contention that "AT&T should bear the responsibility of negotiating arrangements with third-party providers if it wishes to use the property of a third party." U S WEST Br. at 36. According to U S WEST, "the Commission failed to recognize that U S WEST is not in a position to mandate that a third-party sell its property to anyone." Id. This argument is frivolous. The vendors of telecommunications-related hardware and software (including associated intellectual property), like any enterprise that is in the business of selling goods or services, have a natural incentive to sell their property to as wide an array of customers as possible, for the greater their sales, the greater their profits. The PUC's Order merely requires U S WEST to contact its vendors, and, where necessary, to purchase from those vendors (in return for compensation) modified intellectual property licenses that would enable U S WEST to provide access to new entrants. Contrary to U S WEST's suggestion, nothing in the PUC's order imposes legal obligations on third party vendors.

For the reasons set forth above, had the PUC adopted U S WEST's position that AT&T be required to secure its own intellectual property licenses from U S WEST's vendors, that requirement would have unlawfully excused U S WEST from its nondiscrimination obligation. The PUC was thus lawfully compelled to require U S WEST to secure any license modifications that might be necessary to enable U S WEST to comply with its nondiscrimination obligations. At a minimum, the PUC's decision to impose this requirement on U S WEST was neither unlawful or arbitrary, and the decision of the PUC should be affirmed.[21]

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[21] Although AT&T believes that the PUC's decision on this issue is entirely correct, because the propriety of requiring that new entrants obtain their own intellectual property licenses is currently pending before the FCC in a proceeding that is fully ripe for decision on a record that includes nearly thirty briefs (including briefs filed by, inter alia, AT&T and U S WEST, as well as

(continued...)

E. The PUC Did Not Abuse Its Discretion By Setting The Customer Transfer Charge At Five Dollars.

A customer transfer charge ("CTC") is a nonrecurring charge paid to U S WEST when a customer currently served by U S WEST selects AT&T to provide local service. U S WEST argues that the $5.00 per line CTC selected by the PUC is insufficient to allow U S WEST to recover its costs, and is otherwise unsupported by the evidence. USW Br. at 36-37. This precise argument was rejected by the Washington court in U S West v. AT&T-Wash., slip op. at 19-20 (Attach. 1), which held that the state commission's imposition of a $5.00 CTC was not arbitrary or capricious.

U S WEST's argument likewise should be rejected here. AT&T presented substantial evidence based on a cost study that the appropriate charge for providing a customer transfer for local service is $.45. See Decision, ¶182 (citing Tr. 1352, lines 6-22). AT&T also noted that the charge for transferring long distance customers, which is a similar operation to local customer transfer, is $5.00. Direct Testimony of Arlene M. Starr, at 27, (Attach. 9). U S WEST offers no analysis and cites no record evidence in support of its claim that the $5.00 charge per line CTC is improper, instead merely asserting that the PUC should have adopted its proposed nonrecurring charge for this item. USW Br. at 38. Because the PUC had concluded that U S WEST's cost studies were infected with errors, it was not required to accept those studies at face value. Cf. Decision at ¶ 192-94. Rather, it concluded that a $5.00 fee was "reasonable," and may "alleviate customer confusion" by using the same charge to switch both

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[21](...continued)
telephone equipment and software manufacturers), see Public Notice, Petition of MCI for Declaratory Ruling, 12 FCC Rcd. 3223 (1997), the Court may wish to stay its consideration of this issue pending a ruling by the FCC. See Allnet Communication Serv., Inc. v. NECA, 965 F.2d 1118, 1120 (D.C. Cir. 1992) (courts should strive to ensure that the goal of "uniform outcomes" is not "defeated" by "disparate courts resolv[ing] regulatory issues inconsistently").

local and long distance service. Decision, ¶ 182. Accordingly, the Commission's decision was not arbitrary or capricious.

IX. THE COURT SHOULD REJECT U S WEST'S MERITLESS TAKINGS CLAIM.

U S WEST claims that the PUC's decisions "will, if allowed to stand, effect an uncompensated taking of U S WEST's property," and that the "principle of constitutional avoidance therefore requires that the Court interpret the act to prevent this result." USW Br. at 37-38. Similar arguments have been repeatedly rejected by federal district courts analyzing takings claims under the Act. See, e.g., Thoms, slip op. at 64 (Attach. 4) (dismissing U S WEST's takings claim); U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 31 F. Supp. 2d 839, 857-58 (D. Or. 1998) (same); Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. A-97-CA-108-SS et al., slip op. at 13 (W.D. Tex. Aug. 10, 1998) (Attach. 6) (rejecting incumbent's taking challenge); see also Texas Office of Pub. Util. Council v. FCC, 183 F.3d 393, 413 & n.14 (5th Cir. 1999).

The federal courts have properly rejected the incumbent LECs' takings arguments because the Constitution does not prohibit the taking of private property for public use, but rather only requires that the owner of the property be paid just compensation. U.S. Const. amend. V. Under the express terms of the Act, U S WEST will receive "just and reasonable" compensation for AT&T's and TCG's use of its facilities. See 47 U.S.C. § 252(d); U S WEST, 31 F. Supp. 2d at 858 (rejecting U S WEST's takings claim because "no taking has yet occurred," and, "since the Act mandates that U S WEST receive just and reasonable compensation, a determination by this court that the Agreement complies with the Act (or setting aside a provision that does not comply with the Act) is fatal to any claim that U S WEST's property has been taken without just compensation").

Furthermore, the Fifth Amendment does not require that "just compensation" be determined by a particular rate formula. See, e.g., FPC v. Hope Natural Gas Co., 320 U.S. 591, 602-603 (1944) (agencies are "*not* bound to the use of any single formula or combination of formulae in determining rates"); FERC v. Pennzoil Producing Co., 439 U.S. 508, 517 (1979) (agencies are not required to adhere to any cost-based determination of rates or to base rates on firm's actual costs); Southwestern Bell Corp. v. FCC, 896 F.2d 1378, 1381 (D.C. Cir. 1990) ("The Commission 'may adopt any method of valuation for rate base purposes so long as the end result of the rate order cannot be said to be unjust or unreasonable'"). In fact, the only restraint imposed by the Fifth Amendment on an agency's choice of ratemaking is that the agency's chosen methodology not produce rates as a whole that are so low that they "jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989). See also FPC v. Texaco, Inc., 417 U.S. 380, 391-92 (1974) ("All that is protected against, in a constitutional sense, is that rates fixed by the Commission be higher than a confiscatory level").

U S WEST could not, and does not, claim that its financial integrity is threatened by the provisions of the Agreements. Absent such a showing, "adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation." Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 816 (D.C. Cir. 1993) (internal citations omitted); see also Thoms, slip op. at 64 (Attach. 4) (dismissing takings claim because U S WEST presented no evidence that a taking without just compensation had occurred). Accordingly, and contrary to U S WEST's assertions, no "narrowing construction" of the Act is required because there is no

unconstitutional taking to avoid. See First Local Competition Order ¶ 738 (rates based on forward-looking costs are not confiscatory under the Takings Clause because "[n]o incumbent LEC has provided persuasive evidence that prices based on a forward-looking economic cost methodology would have a significant impact on its 'financial integrity.'"); Texas Office of Pub. Util. Council, 183 F.3d at 413 & n.14 (rejecting GTE's takings claim because "GTE . . . cannot show that it will lose *any* revenue at all, much less enough to constitute a taking").

U S WEST's reliance on Bell Atlantic is misplaced. In that case, the D.C. Circuit was called upon to determine whether section 201(a) of the Communications Act of 1934 authorized the FCC to require incumbents to allow physical collocation at their facilities. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1444-1445 (D.C. Cir. 1994). The court of appeals applied a "strict test of statutory authority" because it determined that the FCC's interpretation created a potential class of takings that would expose the U.S. Treasury to liability and encroach upon Congress's power to raise revenue. Id. at 1445; see also U.S. Const. art. I, § 8. Applying this test, the Court held that the underlying statute "does not expressly authorize an order of physical co-location." 24 F.3d at 1447. Here, by contrast, the Act expressly requires incumbent LECs to provide collocation, as well as access to poles, ducts, conduits, and unbundled network elements. 47 U.S.C. § 251(b)(4), (c)(3), (c)(6). Indeed, it was the D.C. Circuit's decision in Bell Atlantic that spurred Congress to include these provisions in the Act:

> Paragraph (4)(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations . . . Finally, this provision is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. See Bell Atlantic Tel. Co. v. Federal Communications

Commission, No. 92-1619 (D.C. Cir. June 10, 1994) [24 F.3d 1441 (1994)].

H.R. Rep. No. 104-204, at 73 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 38-39. Accordingly, U S WEST's taking arguments are without foundation in the law, and should be rejected by this Court.

CONCLUSION

Judgment should be entered in favor of AT&T on all Counts of U S WEST's Complaint.

Respectfully submitted,

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BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC., Plaintiff, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., et al. Defendants.	CASE NO. C97-1320R (Consolidated) ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

U S West Communications, Inc. ("U S West") brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between U S West and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). AT&T seeks to compete in the local telecommunications market. The defendants are AT&T and the WUTC and its commissioners. The FCC has filed a brief amicus curiae.

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All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, AT&T v. Iowa Utilities Bd., 118 S. Ct. 879 (1998), and with FCC regulations. AT&T says that the agreement should have provided for "shared transport" as an unbundled network element. The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

I. BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains many issues substantially similar or identical to two other cases involving U S West and the WUTC: MCI Telecommunications Corp. v. U S West Communications, Inc., No. 97-1508R (consolidated); and U S West v. Sprint Communications Co., No. 97-1764R. As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the MCI and Sprint cases contemporaneously with this one.

markets across the country." Iowa Utilities Bd., 120 F.3d at 791. Specifically, the Act forces an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (interconnection); (2) to provide entrants access to the ILEC's individual "network elements" on an unbundled basis (unbundled access); and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (resale). 47 U.S.C. §§ 251-52.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

AT&T and U S West seek review of their final agreement under

47 U.S.C. § 252(e)(6).[2]

II. SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. See United States v. Bianchi & Co., Inc., 373 U.S. 709, 715 (1963); see, e.g., GTE South Inc. v. Morrison, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); TCG Seattle, slip op. at 3.

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. See Orthopaedic Hosp., 103 F.3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. See MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc., No. C97-7[illegible]WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter GTE

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. See U S West Communications, Inc. v. TCG Seattle, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter TCG Seattle].

Northwest]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. See 47 U.S.C. § 252(b)-(e); Iowa Utilities Bd., 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-CV-405-BR, slip op. at 15-16 (E.D.N.C. May 22, 1998) [hereinafter "AT&T v. BellSouth"].

III. U S WEST'S CLAIMS

A. Combining Unbundled Elements

Prices for unbundled access are "cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the AT&T agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price.[3]

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[3] (See AT&T Agreement, Att. 3 ¶ 1.2.2 ("AT&T may purchase unbundled network Elements individually or in Combinations without restrictions as to how those elements may be rebundled."); id., Att. 5 ¶ 3.2.15.1 ("AT&T may order and U S West shall provision unbundled Network Elements either individually or in any combination

It is correct.

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." Iowa Utilities Bd., 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." Id. The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

AT&T contends that U S West waived any challenge to the combining provisions because it did not raise this particular legal argument before the WUTC. U S West's omission is immaterial. The arbitrator applied an FCC interpretation of the law that has since been repudiated. This court need not refrain from applying the current law.

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on a single order. Network Elements ordered as combined shall be provisioned as combined.").)

AT&T and the WUTC also argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's dispute resolution mechanism. Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's negotiation clause does not purport to deprive the court of this power, or purport to be a mandatory first step.

AT&T maintains that the dispute resolution provision has not been triggered because of the Supreme Court's grant of certiorari of the Eighth Circuit decision. This court will follow the existing precedent set by Iowa Utilities and will not adopt a wait and see approach.

Substantively, AT&T and the WUTC contend that Iowa Utilities constrained only the FCC's authority to require combining, leaving it open for state commissions to order combining of network elements based upon independent state grounds and their rate-setting authority. Iowa Utilities cannot be read so narrowly. According to Iowa Utilities, requiring ILECs, at cost-based rates, to combine or not to separate already combined network elements violates the Act. See Iowa Utilities Bd., 120 F.3d at 813; see also GTE Northwest, slip op. at 7-8.

The court vacates the requirements that U S West combine/restrain from separating network elements at cost-based rates, and remands to the WUTC to negotiate replacement language.

B. Performance Standards

Section 251(c)(2)(C) provides that ILECs must provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself . . . ." The Eighth Circuit explained that "this phrase mandates only that the quality be equal--not superior." Iowa Utilities Bd., 120 F.3d at 812. U S West contends that the AT&T agreement requires it to meet technical standards on tight deadlines that exceed its standards for itself, thereby violating 47 U.S.C. § 251(c)(2)(C). This argument is unpersuasive.

First, U S West confuses requirements for the quality of interconnection with the timeliness for complying with such requirements. Section 251(c)(2)(C) addresses only the quality of interconnection, so any U S West complaints regarding timelines and penalties for not meeting them have no merit.

Second, most of the provisions about which U S West complains were negotiated, not arbitrated.[4] Accordingly, the WUTC could reject such negotiated provisions only if they discriminated against a third-party telecommunications carrier or they were inconsistent with public policy. 47 U.S.C. § 252(e)(2)(A). The court finds that the WUTC properly accepted the agreement provisions.

Finally, U S West's other challenges to arbitrated

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[4] These include: AT&T Agreement, Part A ¶¶ 40.3.16-.18; AT&T Agreement, Att. 2, ¶¶ 3.1, 4.2.1.1, 4.4, 6.2.2, 7.2, 7.4.

provisions do not require superior quality interconnection.[5]

C. Reciprocal Access to Poles, Ducts, Conduits, and Rights-of-Way

Section 251(b)(4) provides that all local exchange carriers have "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224." (emphasis added) U S West argues that because it is required to provide such access to AT&T, but AT&T is not required to provide similar access to it, the agreement violates the Act. This is incorrect if one examines the cross-referenced Section 224.

Section 224(f)(1) provides that "[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Section 224(a)(5), however, provides that "[f]or the purposes of this section, the term 'telecommunications carrier' . . . does not include any incumbent local exchange carrier as defined in Section 251(h)." U S West is an incumbent local exchange carrier as defined in Section 251(h); therefore, AT&T is not obligated to provide reciprocal access to U S West.[6]

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[5] AT&T Agreement, Part A ¶¶ 51.3-51.4 require only that U S West make available to AT&T unused transmission media and dark fiber.

[6] The FCC, whose opinion was not relied upon here, agrees. See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC Docket No. 96-98, First Report

The WUTC did not err.

D. Expanding Facilities

U S West argues that certain provisions require it to provide superior quality access to AT&T in violation of Section 251(c)(2)(C) because it must expand its facilities to accommodate competitors.[3] It also contends that the agreement improperly requires it to exercise eminent domain authority for the benefit of AT&T.[4] Because all telecommunication providers can exercise eminent domain under Wash. Rev. Code 80.36.010, U S West argues that AT&T should be required to expand its own rights-of-way. These assertions lack merit.

First, such expansion does not create superior quality access; it creates equivalent access. Because U S West can expand its capacity to suit its needs, "[t]he principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers . . . ." FCC Order ¶ 1162. The Eighth Circuit endorsed the FCC's statement

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and Order (August 8, 1996) ¶ 1231 [hereinafter FCC Order]. This paragraph was untouched by Iowa Utilities.

[3] The AT&T agreement provides: "U S WEST shall take all reasonable steps to expand its facilities to accommodate AT&T's request . . . . Before denying access based on lack of capacity, U S WEST must explore potential accommodations with AT&T." (AT&T Agreement, Part A ¶ 47.4.19.)

[4] U S West refers to language in the agreement that provides that it will exercise its eminent domain authority when necessary to expand an existing right-of-way over private property in order to accommodate a request for access to that right-of-way. (See AT&T Agreement, Part A ¶ 47.4.4)

that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." Iowa Utilities, 120 F.3d at 813 n.33 (quoting FCC Order ¶ 198 (discussing technical feasibility)). The FCC declined to craft a rule categorically prescribing when a utility must expand an existing facility as requested versus when it may choose to decline due to infeasibility. FCC Order ¶ 1163. Nevertheless, it interpreted the Act "to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." Id. The WUTC relied upon the language of these valid FCC statements in approving these provisions.

Second, U S West bases its argument regarding its inability to exercise eminent domain on an imprecise interpretation of the law. Under state law, all telecommunications carriers indeed can exercise eminent domain. What's important is whether a competing carrier can have access to U S West's right-of-way, and consequently, U S West's existing network.

This court agrees with the WUTC's conclusions.

E. Non-Reciprocal Reservation of Excess Capacity

U S West argues that it is forced to provide superior quality access because it must permit AT&T to reserve excess space on its poles, ducts, conduits, and is prevented from

reserving such space for its own future use beyond emergency or maintenance spare. U S West is incorrect.

These agreement provisions exist to prevent U S West from discriminating in favor of itself:

> Permitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.

FCC Order ¶ 1170. The focus is on current use by AT&T, rather than speculative future use by U S West. After a confirmed request for space is made, U S West must reserve it for ninety days, within which time AT&T chooses whether to use or decline it. (AT&T Agreement, Part A ¶¶ 47.4.10, 47.4.20, 51.5.) Quality is not the issue, parity is: the space either will be used or remain unused, not remain reserved for U S West indefinitely, unless safety dictates such a use.

The WUTC relied upon valid FCC proscriptions in approving these provisions.

F. Collocation of Remote Switching Equipment

U S West argues that the requirement that it collocate AT&T's remote switching units (RSUs) in U S West's facilities violates the Act.* It is incorrect.

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* It refers to AT&T Agreement, Part A ¶¶ 40.1.5-.6. Collocation "enables a requesting telecommunications carrier to . . . [p]lace its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." 47 C.F.R. § 51.5.

Section 251(c)(6) provides that U S West has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." The FCC defines "necessary" as "used" or "useful," not "indispensable. FCC Order ¶ 579. Thus, transmission equipment may be collocated and state commissions may designate additional types of equipment to be collocated. FCC Order ¶ 580. The FCC held:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

FCC Order ¶ 581 (emphasis added).

The WUTC here determined that RSUs are equipment necessary for interconnection or access to unbundled network elements and that without RSUs CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. (See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Commission Order Modifying Arbitrator's Decision and Arbitrator's

Recommendations, and Approving Interconnection Agreement with Modifications, Docket No. UT-960309 (July 11, 1997), at 10 (hereinafter "AT&T Approval Order".) The WUTC distinguished between RBOCs and fully equipped switching equipment. (See id.) This determination was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide.

G. Unbundling of Dark Fiber

U S West challenges the requirement that it provide AT&T with "dark fiber" as an unbundled network element. Dark fiber is "fiber-optic cable that has been laid into a telecommunications provider's network but which is not 'lit' by electronics on either end of the cable, or at least not by electronics provided by the local carrier. No switches are routing digital impulses onto this fiber and it consequently carries no information." MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., No. 5:97-CV-425-BR, slip op. at 6 (E.D.N.C. May 22, 1998) (hereinafter "MCI v. BellSouth"). A "network element" is "a facility or equipment used in the provision of a telecommunications service," which includes "features, functions, and capabilities" provided by such facilities. 47 U.S.C. § 153(29). The FCC declined to address whether dark fiber should be unbundled as a network element because it lacked a sufficient record to decide. FCC Order ¶ 450. States may impose additional unbundling requirements so long as such requirements are consistent with the Act and FCC regulations. Id. at ¶ 244.

This is a two-step inquiry: (1) is dark fiber a network element; (2) if so, should it be unbundled? U S West argues first that "dark fiber" is not a network element because it is not actively "used" in the provision of telecommunications services. Alternatively, it argues that because dark fiber is proprietary, AT&T must show a heightened need to use it. U S West's interprets "network element" too narrowly and has not shown that dark fiber should not be unbundled.

Dark fiber is a physical component that, if lit, undoubtedly would be a network element. The fiber is not on spools in a warehouse, it is already in the ground as part of a network, awaiting only an LEC's desire to attach the proper equipment. U S West's distinction is, therefore, purely temporal. It argues that "used" means only "currently used," not used in the sense of "employed for some purpose." Because the Act's does not specify a particular, technical definition of "used," such preciseness should not be implied.

In MCI v. BellSouth, slip op. at 6, the Eastern District of North Carolina found dark fiber to be a network element, vacating the state commission's order to the contrary. It relied on construing "network element" broadly, in the spirit of Iowa Utilities, and previous FCC language that dark fiber service was "wire communication." Id. at 6-9. Its reasoning is persuasive.

If a state commission determines that it is technically feasible for an ILEC to provide access to an unbundled network element, the commission may decline to require unbundling only

if: (1) the network element is proprietary and the CLEC could provide the same service by using nonproprietary elements; or (2) failure to provide access "would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service" a CLEC seeks to offer. 47 C.F.R. § 51.317(b); see 47 U.S.C. § 251(c)(3), 251(d)(2). The burden is upon the ILEC to prove that an element is proprietary. FCC Order ¶ 283.

U S West argues for the first time that dark fiber is proprietary because revealing the existence of "dark fiber" shows its business plan for expansion. This argument is inapposite. Whether an element is proprietary is a factual, not a legal, question. U S West provided no evidence before the WUTC that dark fiber was proprietary and therefore never satisfied its burden of proof.

AT&T, on the other hand, presented evidence that denying it access to dark fiber would decrease the quality and increase the cost of providing services. (See AT&T Record, at 5231-32 (Testimony of John P. Lynott).)

The WUTC did not err legally nor act arbitrarily or capriciously.

H. Pricing Claims

U S West contends that the WUTC approved prices, terms, and

conditions that unjustly denied U S West adequate compensation."[10] The court reviews de novo whether the WUTC employed a methodology that, as a matter of law, violates the Act. The court reviews whether the WUTC's fact-finding, including choice of methodology, was arbitrary or capricious.

1. Unbundled Loop Prices

Simply stated, a local loop is the portion of the network that connects the customer with the network. The state commission determines whether the rates, terms, and conditions for such unbundled elements are just and reasonable. 47 U.S.C. §§ 251(c)(3), 252(d)(1). This determination is "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," must be nondiscriminatory, and "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A).

The parties acknowledge that this means that price should be based on the forward-looking, i.e., incremental, costs of providing the element rather than on historic or embedded costs, and that the WUTC should, therefore, employ a TELRIC ("Total Element Long Run Incremental Cost") methodology. See FCC Order ¶ 678 (describing TELRIC). They disagree about which TELRIC model was better. The arbitrator accepted AT&T's "Hatfield model," which produced a price of $11.33, and rejected U S West's

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[10] The prices set in the agreement and approved by the WUTC are interim prices: they are subject to change during the WUTC's generic price and cost proceeding.

independent cost study, which produced a price of $36.20.

The choice of the Hatfield model was neither legal error nor arbitrary or capricious. In a pre-Act proceeding, the WUTC approved an earlier version of the Hatfield model. See Washington Utilities and Transportation Comm'n v. U S West Communications, Inc., WUTC, Fifteenth Supplemental Order, Docket No. UT-950200, slip op. at 86 (April 11, 1996), aff'd, U S West Communications, Inc. v. Washington Utilities and Transportation Comm'n, 134 Wash. 2d 74 (1997). The FCC specified the Hatfield model as the kind of generic, forward-looking model that best comports with TELRIC principles. FCC Order ¶ 834.

The WUTC found U S West's proposed cost studies less reliable. While the Hatfield model used inputs consistent with inputs the commission had found to be reasonable, U S West's cost studies used unverifiable cost data, inputs that were inconsistent with the WUTC's rate order, and excessive allocation of costs that appeared to be an attempt to recover embedded costs. (See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Arbitrator's Report and Decision, Docket No. UT-960309 (Nov. 27, 1996), at 43-44 (hereinafter "First AT&T Arbitration Order").)

U S West argues nonetheless that the WUTC behaved arbitrarily and capriciously because it relied upon improper prices for inputs. In support, U S West points to the evidence that it presented to the arbitrator. This is an attack on the

choice of the Hatfield model and an attempt to retry the facts.[11] While conflicting interpretations of the evidence exist, none of the arbitrator's choices were arbitrary or capricious.

2. Customer Transfer Charge

U S West challenges the $5.00 customer transfer charge selected by the AT&T arbitrator and approved by the WUTC. It had proposed $55.00. This charge is a nonrecurring fee paid to U S West to compensate it for transferring its customer to a competitor's service or for transferring a customer from one competitor to another. The FCC concluded that states should determine reasonable and nondiscriminatory rates for such charges. FCC Order ¶ 970.

The arbitrator relied upon testimony by AT&T that U S West's estimates for nonrecurring charges were excessive and difficult to verify. (See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC Arbitrator's Supplemental Order, Docket No. UT-960309 (Jan. 16, 1997), at 3 (citing AT&T Record 564).) In light of this lack of reliable information, he found the AT&T's figure, which was the same rate for transferring long-distance customers to different companies, to be a reasonable proxy on an interim basis. Id.

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[11] Earlier, this court struck a U S West affidavit, the primary purpose of which was to criticize the Hatfield model. That the Hatfield model may be improving with time is no indication that the WUTC either chose it improperly or that the inputs should now be revised for this interim price proceeding.

This was not arbitrary or capricious.

1. One Point of Interconnection Per LATA

U S West challenges the WUTC's determination that AT&T may establish a single point of interconnection ("POI") per Local Access Transport Area ("LATA"). U S West contends that the Act requires a CLEC to have a POI in each local calling area in which that CLEC offers local service and that the present plan compensates U S West inadequately. It is wrong.

Under the Act, a new entrant may interconnect with the ILEC's facilities "at any technically feasible point." 47 U.S.C. § 251(c)(2); see FCC Order ¶ 209. The ILEC is relieved of this duty to provide interconnection at a particular point only if it proves to the state commission that interconnection at that point is not technically feasible. 47 C.F.R. § 51.305(e). U S West does not contest that such a connection is technically feasible. The WUTC properly declined to consider the cost of a single POI per LATA because "[a] determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5; see U S West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, slip op. at 9 (W.D. Wash. Jan. 7, 1998) (reaching same conclusion for same reasons) (hereinafter "MFS Intelenet").

4. "Bill and Keep" Compensation

U S West contends that the interim "bill and keep" arrangement adopted by the WUTC in the AT&T agreement violates

the Act because it provides for inadequate cost recovery. It is wrong.

Compensation provisions must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other carrier's network facilities. 47 U.S.C. § 252(d)(2)(A)(i). An agreement may "afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." 47 U.S.C. § 252(d)(2)(B)(i). In an independent proceeding, the WUTC approved of bill and keep as a method of reciprocal compensation. See WUTC v. U S West Communications, Inc., WUTC, Fourth Supplemental Order, Docket No. 941464, slip op. at 29-32 (Oct. 31, 1995) [hereinafter "Fourth Supplemental Order"]. Similarly, the FCC found that a state may impose a bill and keep arrangement when neither party can rebut the presumption that traffic between carriers is balanced. FCC Order ¶ 1111-13.

U S West never rebutted the presumption that traffic was balanced with anything other than conclusory statements. (See AT&T Record 6079-80, 6286-92, 6305-07; AT&T Transcript 657-58.) In consideration of this, and that U S West's proposed alternative was previously found to be inferior, see Fourth Supplemental Order, slip op. at 28, the WUTC did not act arbitrarily or capriciously by choosing bill and keep because it is consistent with the Act, WUTC policy, and FCC statements. See

TCG Seattle, slip op. at 7 (approving bill and keep because permitted by Act, approved in independent WUTC proceeding, and approved by FCC).

5. Construction and Conditioning Charges on Local Loops

U S West challenges two aspects of the AT&T agreement. It argues that: (1) U S West must "make changes to its network facilities, services and operations to provide interconnection and unbundled elements" upon request, which means providing "superior services"; and (2) the WUTC failed to require AT&T to pay conditioning charges for the local loop. Both contentions lack merit.

First, U S West improperly proposes that this is a "superior access" issue; this is a question of equivalent access for resale services. U S West is providing AT&T no more than it provides itself: local loop for an end user. AT&T must pay for construction the same charges that apply to a similarly situated U S West retail end user pursuant to U S West's retail tariffs. (See AT&T Agreement, Att. 1, at ¶ 3.1.) Modification of an ILEC's facilities to accommodate interconnection or access to network facilities, as is required here, is contemplated by the Act. See Iowa Utilities Bd., 120 F.3d at 813 n.33.

Second, the WUTC did not act arbitrarily or capriciously when it rejected conditioning costs for local loops. In both cases, U S West provided no evidence that the cost of conditioning wasn't already included in the TELRIC price of a

conditioned loop. (See First AT&T Arbitration Decision, at 47.) As in U S West Communications v. TCG Seattle, "U S West presented no evidence of the actual costs of making changes to its network. . . . The arbitrator noted that U S West did not state in its proposal what is involved in conditioning, why a charge is needed, or how much the charge should be." TCG Seattle, slip op. at 6.

I. Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. See 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the AT&T agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreement is consistent with the Act and with binding FCC orders.

U S West says that the WUTC erred by allocating the costs of number portability in the AT&T agreement based on the amounts of active local numbers each carrier has rather than on the number

of calls actually forwarded. The FCC explicitly authorized allocation of cost recovery based on the number of active lines. Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 8352, at ¶ 136 (1996). It specifically rejected the kind of plan proposed by U S West because it would impose the full cost of number portability on new entrants. Id. at ¶ 138; see also TCG Seattle, slip op. at 9 (rejecting same U S West contentions).

J. Due Process

U S West contends that the WUTC violated its due process rights because its decisions were not based on evidence in the record. The record refutes this contention.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 319, 333 (1976). This was provided here. If the WUTC made errors, the errors were legal and not of constitutional magnitude. All its determinations were based on adequate evidence and none of its decisions were arbitrary or capricious. See TCG Seattle, slip op. at 10 (denying U S West's due process claim).

K. Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property, and (b) the plaintiff has attempted to obtain just compensation for the

property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985). TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim is identical to the ones disposed of in GTE Northwest, TCG Seattle, and MFS Intelenet, U S West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to prevent a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment provides that property cannot be taken "without just compensation." U S West's claim is still not ripe because the WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

IV. AT&T'S SHARED TRANSPORT CLAIM

AT&T contends that the Act requires that "shared transport" be offered as an unbundled network element. "Shared transport" is a function performed by interoffice transmission facilities in an ILEC's network. AT&T seeks to share (with other CLECs and U S West) the capacity to transport calls between two U S West end offices directly, rather than having the calls routed through an

extra "tandem" switch, or purchasing more costly "dedicated" transport.

As mentioned earlier, a "network element" includes features, functions, and capabilities of any facilities that are used to provide telephone service. 47 U.S.C. §§ 153(29). The FCC is authorized to determine what network elements must be unbundled. 47 U.S.C. § 251(d)(2); see Iowa Utilities Bd., 120 F.3d at 802 n.23. It determined that network elements include shared transport. FCC Order ¶ 440-41. These FCC determinations were untouched by the Eighth Circuit. See Iowa Utilities Bd., 120 F.3d at 808-810, 818 n.38.

The FCC regulations define "shared transport" as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(1)(iii). This description was clarified by another FCC order: "[T]he obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and a tandem." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 12 F.C.C.R. 12460 (Aug. 18, 1997), at ¶ 25.

The arbitrator did not permit AT&T access to shared transport because he thought the issue too complex and evidence-intensive to resolve during post-arbitration proceedings. (See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Arbitrator's Report and Recommendations, Docket No. UT-960309 (June 6, 1997), at 24.) The WUTC declined to do so for the same reason, and noted that the Bona Fide Process for Further Unbundling (BFR) process should be used. (See AT&T Approval Order, at 12.)

The WUTC and U S West argue that AT&T should be procedurally barred from raising this issue outside of the BFR process because it sought shared transport too late. This argument is unpersuasive because the question is legal, not factual: is shared transport a network element subject to unbundling? The court concludes that it is.

The BFR process provides an alternative process in which a CLEC can gain additional, not-yet-specified elements. Here, shared transport was a specified network element, so no alternative process need be invoked.

U S West also argues that shared transport is a service rather than a network element. This is irrelevant because capabilities may be offered simultaneously as services or unbundled elements. Iowa Utilities Bd., 120 F.3d at 809.

V. WUTC'S CLAIMS

The WUTC moved for summary judgment on issues that U S West has decided not to pursue. (U S West Summary Judgment Motion, at 41 n.30.) These issues are moot.

VI. CONCLUSION

The summary judgment motions of AT&T, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

ORDER
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FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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U.S. CLERKS OFFICE
BY
DEPUTY

SOUTHWESTERN BELL TELEPHONE COMPANY,
Plaintiff,

VS.

AT&T COMMUNICATIONS OF THE SOUTHWEST, et al.,
Defendants

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§

NO. A-97-CA-132 SS

ORDER

BE IT REMEMBERED on this the 12th day of June 1997 the Court reviewed the file in the above-styled cause and in particular MCI's Objection to and Motion to Strike Affidavits Filed by Southwestern Bell [#75], the Motion to Strike Extra-Record Affidavits filed by the Public Utility Commission ("PUC") and the Commissioners [#76], and AT&T's Motion to Strike Affidavits [#78], as well as the responses and replies thereto. MCI, the PUC, and AT&T request that the Court strike the extra-record affidavits of Jon R. Lochmann, Paul L. Cooper, and William C. Deere tendered by Southwestern Bell Telephone Company ("SWBT") as Exhibits B, C, and D to SWBT's Motion for Summary Judgment.

SWBT seeks judicial review of several interconnection agreements between SWBT and the corporate defendants and arbitrated by the PUC under 47 U.S.C. § 252 of the Telecommunications Act of 1996 (the "Act"). SWBT filed this suit pursuant to section 252(e)(6) of the Act, which states in relevant part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and

section." 47 U.S.C. § 252(e)(6). Where, as here, the relevant statute is silent as to the scope and standard of review, judicial review of an agency action is limited to the record developed during the administrative proceeding:

> [I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held.

United States v. Carlo Bianchi and Co., 373 U.S. 709, 715, 83 S. Ct. 1409, 1413 (1963) (citations omitted); *see Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1406 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

SWBT makes the slightly disingenuous claim that the extra-record affidavits "are not offered as summary judgment evidence, but are intended to provide the Court with relevant historical and contextual information concerning the telecommunications industry, and to show that the application of incorrect legal standards in the Award and Orders results in substantial prejudice to SWBT." Even assuming the affidavits are offered for that limited purpose, the affidavits concededly do not relate *undisputed* historical and contextual information. Allowing SWBT to present new evidence on appeal—to which the defendants would be forced to respond—would likely render the administrative proceedings below a nullity, a circumstance not contemplated by the Act and in clear contravention of at least three decades of well-settled law.

Finally, as evidenced by the sixteen boxes of administrative record awaiting the undersigned in chambers, the parties appear to have extensively examined the issues presented on appeal during the three-week evidentiary arbitration hearing held before the PUC. It is extremely doubtful whether the undersigned needs—or can take—any additional elucidation on the telecommunications industry. Thanks, but no thanks.

In accordance with the foregoing, the Court now enters the following orders:

IT IS ORDERED that MCI's Objection to and Motion to Strike Affidavits Filed by SWBT [#75], the Motion to Strike Extra-Record Affidavits filed by the Public Utility Commission ("PUC") and the Commissioners [#76], and AT&T's Motion to Strike Affidavits [#78] are GRANTED as follows: The affidavits tendered by SWBT as Exhibits B, C, and D to its Motion for Summary Judgment, as well as any portions thereof quoted by SWBT in the text of its Motion for Summary Judgment, are stricken from the record; and

IT IS FURTHER ORDERED that the Motion to Expedite Consideration of Motions to Strike SWBT's Affidavits, filed by the PUC, MCI, and AT&T on May 19, 1997 [#81] is DISMISSED AS MOOT.

SIGNED on this 18th day of June 1997.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

US WEST Communications, Inc.,

Plaintiff,

v.

EDWARD GARVEY, et al.,

Defendants.

ORDER

Civil No. 97-915 (ADM/JGL)

AT&T Communications of the Midwest, Inc.,

Plaintiff,

v.

US WEST Communications, Inc., et al.,

Defendants.

Civil No. 97-917 (ADM/JGL)

MCI Telecommunications Corporation, et al.,

Plaintiffs,

v.

US WEST Communications, Inc., et al.,

Defendants.

Civil No. 97-919 (ADM/JGL)

FEB 1 [illegible]

I. INTRODUCTION

The above-entitled matters are before the Court pursuant to US West Communications, Inc.'s ("US WEST") objections to Magistrate Judge Jonathan G. Lebedoff's December 9, 1997, Order granting MFS Communications Company's ("MFS") motion to determine the nature of the proceedings. In the Order, Magistrate Judge Lebedoff ruled that the Court would conduct appellate review of the record established before the Minnesota Public Utilities Commission (with supplementation allowed only upon good cause shown) and that US WEST is not entitled to a jury trial. US WEST objects to both rulings, arguing that Section 252(e)(6) of the Telecommunications Act of 1996 ("the Act") provides for an original action in federal district court.

II. BACKGROUND

The underlying facts of the above-captioned matter are sufficiently laid out in Magistrate Judge Lebedoff's Order and the parties' numerous memoranda concerning the motion. The Court incorporates those facts by reference.

III. DISCUSSION

The standard of review applicable to an appeal of a magistrate judge's order is extremely deferential. The district court must affirm an order by a magistrate judge unless it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Banbury v. Omnitrition Int'l, Inc., 818 F. Supp. 276, 279 (D. Minn. 1993). "A finding is clearly erroneous if it lacks substantial

evidence to support it or if, even when there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." Day v. Johnson, 119 F.3d 650, 654 (8th Cir. 1997) (citations omitted).

After carefully reviewing US WEST's objections and the opposing parties' responses, the Court is confident that a mistake has not been made in this instance. For the same reasons stated in Magistrate Judge Lebedoff's discussion of the issues involved, the Court will affirm the Order limiting the instant actions to an appellate review of the record established before the Minnesota Public Utilities Commission ("MPUC"), with a few brief supplementary remarks.

The Court is cognizant of the fact that 252(e)(6) provides that "any party aggrieved by [a State commission] determination may bring an *action* in an appropriate Federal district court." 47 U.S.C. § 252(e)(6) (emphasis added). Interpretation of the statute is complicated, however, because the statute simultaneously characterizes the procedure provided for as a "*Review* of State Commission Actions" and specifically limits the action to a determination of "whether the agreement or statement meets the requirements of section 251 and this section." Id. Consequently, it seems evident that the statute does not contemplate a replay--in whole or in part--of the State commission proceedings, but rather calls only for the district court to analyze whether the interconnection agreements produced by those proceedings comport with the Act. At this point, allowing the parties to present additional evidence which was not presented to the MPUC, unless good cause can be shown for failure to do so, would serve only to substantially duplicate what has come before, and further complicate the Court's task.

IV. CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that the December 9, 1997, Order of Magistrate Judge Lebedoff granting MFS' motion to determine the nature of the proceedings (Civil No. 97-913; Docket No. 46) is AFFIRMED in its entirety.

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: 2/11/98

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

U S WEST COMMUNICATIONS, INC.,	*	
Plaintiff,	*	CIVIL NO. 4-97-CV-70082
v.	*	ORDERS AFFIRMING SOME PROVISIONS OF THE INTERCONNECTION AGREEMENTS AND REMANDING OTHERS
ALLAN T. THOMS et al.,	*	
Defendants.	*	

US West Communications, Inc. ("US West") brings this action under section 252(e)(6) of the Telecommunications Act of 1996 (the "Act") against The Iowa Department of Commerce Utilities Board (the "Board"); Allan T. Thoms, Paula S. Dierenfeld, Ewait J. George, Jr., in their official capacities as members of the Board (collectively, the "Board Members");[1] AT&T Communications of the Midwest, Inc. ("AT&T"); and MCI Metro Access Transmission Services, Inc. ("MCI"), challenging the substantive provisions contained in, and the procedures culminating in, the interconnection agreements adopted by the Board after remand. In its answer to US West's claims, MCI includes two affirmative claims brought under the Act against US West, the Board, and the Board Members, challenging pricing and cost methodology decisions adopted by the Board in a "Final Decision and Order" issued on April 23, 1998. Answers to all affirmative claims have been filed, the issues thoroughly briefed, and oral arguments heard. The court's duty is to review the interconnection agreements and other decisions of the Board for compliance with the requirements of the Act.

PROCEDURAL OVERVIEW

US West is challenging Board decisions and orders establishing the terms under which US West must make its local

[1] Unless otherwise indicated, any reference to the Board implicitly includes a reference to the Board Members.

telephone network available for use by AT&T and MCI. These terms are embodied in two identical interconnection contracts approved by the Board after arbitration and a limited remand from this court. These contracts will hereinafter be referred to as, collectively, the "Agreements."

Through the Telecommunications Act of 1996, Congress sought to create local telephone competition in a field that has long been regulated as a monopoly. To facilitate immediate competition, the Act requires incumbent local exchange carriers ("ILECs") to open their network to potential competitors, competitive local exchange carriers ("CLECs"), in three significant ways: (1) requiring ILECs to allow CLECs to interconnect with the ILECs' local telephone networks, (2) requiring ILECs to make available to CLECs parts of the incumbents' local telephone networks, referred to as unbundled network elements, and (3) requiring ILECs[2] to sell complete telephone services to CLECs at wholesale rates so that the CLECs can resell the services to end-users. See 28 U.S.C. § 251(c). Through these methods, Congress envisioned that new entrants could begin competing before their own networks were in place.

On March 1, 1996, US West received a request from AT&T for interconnection, resale services and access to network elements. On March 26, 1996, US West received a similar request from MCI. The Act requires incumbents and new entrants to attempt to satisfy the requirements of the Act by voluntarily negotiating interconnection agreements. See 28 U.S.C. § 251(c)(1). State commissions (in this case the Board) are vested with limited authority to approve negotiated agreements and, if negotiations fail, to arbitrate disputes between the incumbents and new entrants. See 28 U.S.C. § 252. Negotiations between US West and AT&T and between US West and MCI did not result in interconnection agreements. Accordingly, AT&T and MCI each petitioned the Board for arbitration pursuant to section 252(b) of the Act. Both AT&T and MCI attached voluminous proposed contracts to their petitions. Thereafter, the Board consolidated

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[2] US West is an ILEC, and AT&T and MCI are CLECs.

the petitions and determined that it would serve as both the arbitrator and the ultimate approval authority in the case. US West responded to the petitions and submitted its own proposed interconnection agreements.

On August 30, 1996, and September 13, 1996, the Board issued its procedural orders. The Board determined that the arbitration would not be treated as a "contested case," and therefore, the parties were not entitled to a hearing. Rather, the Board fashioned procedural rules pursuant to which each party would have 2.5 hours to present its initial case, 20 minutes to cross examine all opposing witness, 45 minutes to present its rebuttal case, and ten minutes to cross-examine all rebuttal witnesses. Because the two proceedings were consolidated, the Board granted US West an additional 45 minutes to present its rebuttal case. The Board also determined that the arbitration would be conducted by the submission of "last best offers," or what is commonly referred to as "baseball arbitration." On September 19, 1996, as required by the Board, the parties submitted their last best offers in the form of proposed interconnection agreements.

On October 18, 1996, the Board issued its Preliminary Arbitration Decision, in which the Board preliminary adopted AT&T's proposed contract with some modifications. On November 27, 1996, the Board issued its Final Arbitration Decision, which further modified AT&T's proposed contract. On December 12, 1996, pursuant to an order from the Board, US West executed separate agreements with AT&T and MCI which tracked the Board's proposed agreement. US West executed the agreements under protest, expressly reserving its right to seek judicial review of the terms of the agreements. On January 10, 1997, following US West's filing of objections and exceptions to the agreements and a motion for rehearing relating to the implementation schedule in the agreements, the Board approved the final interconnection agreements (the "Agreements") pursuant to section 252(e)(1) of the Act.

On February 7, 1997, US West filed its original complaint in this court pursuant to section 252(e)(6) of the Act. Over US West's objections, the court ruled that the case would be decided

on the basis of the record before the Board and the briefs of the parties. By June 27, 1997, the parties completed briefing on the merits of US West's original complaint. Upon the request of the parties, the court permitted additional briefing concerning the impact of the Eighth Circuit Court of Appeals' decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998) [hereinafter "IUB"], in which the court upheld some, but vacated other, provisions of the FCC's First Report and Order[3] implementing the Act. In addition, US West requested, and the court granted, permission to file a First Amended Complaint to conform US West's claims to the Eighth Circuit's interpretation of the Act. The parties completed supplemental briefing on September 5, 1997.

On October 16, 1997, the court held oral argument on the merits of US West's First Amended Complaint. At the beginning of the hearing, the Board orally moved for a limited remand in light of the Eighth Circuit Court of Appeals' decision in the IUB case. The court ordered the Board to submit a proposed remand order, including the provisions it believed should be remanded, and allowed the other parties to respond to the proposed order. On January 14, 1998, the court ordered a limited remand to the Board in light of the significant changes the IUB decision made to the applicable law. Over US West's objection, the court permitted the Agreements to remain in effect as approved by the Board until the Board issued its final order on remand.

In the remand proceeding, the Board established a procedure that allowed the parties to identify the specific agreement provisions they believed to be affected by the IUB decision. In accordance with this procedure, the parties filed initial, responsive, and reply testimony and exhibits. A hearing was held from March 31 through April 7, 1998. The Board issued its Final Arbitration Decision on Remand on May 15, 1998.

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[3] "FCC's First Report and Order" will be used throughout this opinion to refer to the FCC's FIRST REPORT AND ORDER: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (August 8, 1996).

On remand, the parties proposed changes to over 600 provisions in the Agreements. The Board reviewed each of those proposed changes and made significant modifications to the Agreements. Many of the proposed changes were agreed to by MCI, AT&T and US West. Other changes were agreed to by only AT&T and US West, but because of insufficient evidence of differentiation between the competitive needs of AT&T and MCI, the Board applied those agreed-to changes to MCI's interconnection agreement as well. As to the proposed modifications not agreed to by either MCI or AT&T, the Board made specific findings of fact and conclusions of law. Because of the delay caused by the remand, the Board also unilaterally extended the term of the Agreements so that they will not expire until May 15, 2001.

In accordance with its decision on remand, the Board adopted a revised interconnection agreement[4] on May 15, 1998. Under the court's remand order, modifications to the Agreements on remand became effective upon issuance of the Board's decision. Thus, the parties need not and did not execute the Agreements a second time.

On June 4, 1998, US West filed an application for reconsideration of the Board's remand decision. On July 8, 1998, the Board determined that it did not have jurisdiction under state law to engage in reconsideration and issued an order denying US West's application for reconsideration.

On July 22, 1998, US West filed a motion for leave to file a Second Amended Complaint in light of the Board's remand decision. Also on July 22, 1998, MCI filed a motion for leave to amend its

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[4] Because the Board accepted the agreed-to modifications as to both MCI and AT&T, and because the Board reached the same conclusions as to issues contested by either party, the Board adopted one agreement after remand to serve as the initial agreement between both AT&T and US West, and MCI and US West. In the future, however, AT&T and MCI may individually reach agreements with US West that, consistent with applicable law, would cause the agreements to diverge. Although the Board on remand adopted a single interconnection agreement, for purposes of consistency in this opinion, the court will continue to refer to the interconnection agreements between US West and MCI and US West and AT&T as the "Agreements."

answer to add crossclaims and counterclaims for affirmative relief. This court granted both motions on August 4, 1998. Answers to both the Second Amended Complaint and the crossclaims and counterclaims have been filed. Moreover, opening, responsive, and reply memoranda have been filed concerning all claims for affirmative relief. Oral Arguments were heard on November 16, 1998, and the matter is submitted.

OBLIGATIONS UNDER THE ACT

Obligations Placed on Carriers

To facilitate competition under the Act, Congress established specific obligations for three categories of telecommunications service providers. Section 251(a) contains minimum requirements with which all telecommunications carriers, the broadest category of telecommunications service providers, must comply. Section 251(b) provides the additional obligations applicable to all local exchange carriers ("LECs"), or companies that provide local telephone service and exchange access for long distance telephone companies. In addition to obligations under section 251(a), under section 251(b) an LEC has the duty:

> (1) * * * not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations, on the resale of its telecommunications services.
> (2) * * * to provide, to the extent feasible, number portability in accordance with requirements prescribed by the Commission.
> (3) to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and * * * to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.
> (4) * * * to afford access to poles, ducts, conduits and rights-of-ways of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.
> (5) * * * to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Section 251(c) provides the additional obligations applicable to ILECs or incumbent LECs. In addition to obligations under

sections 251(a) and 251(b), under section 251(c) ILECs have the duty to:

> (1) * * * negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.
> (2) * * * provide, for the facilities and equipment of the requesting telecommunications carrier, interconnection with the local exchange carrier's network --
>
> > (A) for the transmission and routing of telephone exchange service and exchange access;
> > (B) at any technically feasible point within the carrier's network;
> > (C) that is at least equal in quality to that provided by the local exchange carrier to itself, its subsidiaries, affiliates or any other party to which the carrier provides interconnection; and
> > (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.
>
> (3) * * * provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory * * *. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.
> (4) * * *
>
> > (A) * * * offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
> > (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except [as limited by this provision].
>
> (5) * * * provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.
> (6) * * * provide, on rates, terms, and conditions that

> are just, reasonable, and nondiscriminatory, for physical collocation of the equipment necessary for interconnection or access to unbundled elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

The Act qualifies the obligation contained in subsection (c)(3) by requiring the FCC, in determining what network elements must be made available to CLECs, to consider, at a minimum, whether (A) access to proprietary elements is necessary, and (B) whether the failure to provide access to such network elements would impair the CLECs' ability to provide the service they seek to offer. See 47 U.S.C. § 251(d)(2); see also IUB, 120 F.3d at 810-12 (explaining FCC's interpretation of these standards).

State law also imposes some obligations on local exchange carriers. Iowa's Local Exchange Competition provision codified at Iowa Code § 476.100 provides in part:

> A local exchange carrier shall not do any of the following:
> * * *
> 2. Discriminate against another provider of communications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the local exchange carrier provides to itself and its affiliates. * * *
> 3. Degrade the quality of access or service provided to another provider of communications services.
> * * *
> 5. Unreasonably refuse or delay interconnections or provide inferior interconnections to another provider.
> * * *

Section 252(d) of the Act describes in more detail appropriate cost considerations to be applied when determining the rates that ILECs may charge in return for fulfilling their obligations under the Act. Specifically, section 252(d)(1) provides that rates for interconnection and network elements must be nondiscriminatory, "based on the cost * * * of providing the interconnection or network element," not predicated upon "rate-of-return or other rate-based proceedings" of the sort that prevailed in the monopoly era, and may include a reasonable

profit.

The Board's Obligations

The Act delegates to state commissions, in this case the Board, responsibility for conducting arbitrations under section 252(b). Under section 252(b)(1), the Board will arbitrate any open issues raised in good faith negotiations between the parties. Under section 252(b)(4), the state commission must limit its consideration of any petition for arbitration to the issues set forth in the petition and any response to the petition. In resolving the open issues between the parties set forth in the petition and response, the state comission may only: (1) ensure that its resolution and any conditions imposed meet the requirements of section 251 of the Act, including any regulations prescribed by the FCC pursuant to section 251; (2) establish rates for interconnection, services, or network elements according to section 252(d); and (3) provide an implementation schedule. See 47 U.S.C. § 252(c).

Section 252(e)(1) provides that any agreement reached through negotiation or arbitration must be submitted to the Board for its approval. The Board must approve or reject the agreement, with written findings as to any deficiencies. Under section 252(e)(2)(B), the Board can reject an agreement, or a portion of an agreement, reached through arbitration only if it finds that the agreement does not meet the requirements of section 251, including any FCC regulations prescribed pursuant to that section, or the standards set forth in section 252(d).

Section 252(e)(3) also grants the Board authority to establish additional requirements that are authorized under state law, including requiring compliance with intrastate telecommunications service quality standards or requirements. Under Iowa law, the Board is charged with the duty to act, to the extent reasonable and lawful, to further the development of competition in telecommunications markets. See Iowa Code § 476.95(2). Pursuant to that duty, and pursuant to the more specific "Local Exchange Competition" provisions in sections 476.100 and 476.101, the Board has promulgated local competition rules found in Iowa Admin. Code r. 199-38 (1997).

The Court's Obligations

Section 252(e)(6) provides that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and [section 252]." Because arbitrated terms that are inconsistent with the FCC's implementing regulations constitute violations of the Act, See 47 U.S.C. §§ 252(c), 152(e)(2)(B), the federal court's mandate under Section 252(e)(6) includes review of agreements for compliance with FCC regulations. This review is exclusively vested with the Federal district court. See IUB, 120 F.3d at 803-04; see also 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). It is pursuant to this exclusive review authority that the court renders this decision.

STANDARD OF REVIEW

As the court previously recognized in this case, "[section 252(e)(6)] authorizes judicial review of [the Board's] actions based on the record before the [Board]." See Ruling and Order Vacating Scheduling Order (March 17, 1997); see also United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) ("[I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed * * * consideration is to be confined to the administrative record and * * * no de novo proceeding may be held."). As to the standard of review to be applied to the Board's actions, the court will review the Board's interpretations of federal law de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997), cert. denied, 118 S. Ct. 684 (1998) (reviewing de novo a state agency's interpretation of a federal statute); see also Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social and Rehab. Serv., 31 F.3d 1536, 1544 n.10 (10th Cir. 1994) (noting that a state agency's determination of procedural and substantive compliance with a federal law is not entitled to the same deference that would be afforded to a

federal agency's determination). The Board's findings of fact and applications of law to fact, however, warrant deference from this court because the Act gives the Board original jurisdiction to decide the disputed issues. Moreover, because the Act gives the Board original jurisdiction over the setting of prices, including discretion to choose the methodology for calculating costs, these decisions likewise warrant deference from the court. See US West Comm., Inc. v. MFS Intelenet, Inc., No. C97-222WD, 1998 WL 350588, at *2 (W.D. Wash. Jan. 7, 1998) (reviewing state commission's choice of pricing and cost methodology under arbitrary and capricious standard); GTE South, Inc. v. Morrison, 6 F. Supp. 2d 517, 527 (E.D. Va. 1998) (applying arbitrary and capricious standard to state commission's decision on cost methodology and applicable pricing models); MCIMetro Access Transmission Serv., Inc. v. GTE Northwest, Inc., No. C97-742WD, slip op. at 4 (W.D. Wash. July 7, 1998) (concluding that the state commission's choice of pricing and cost methodology must be tested by the "arbitrary and capricious" standard of review).

Accordingly, the Board's factual determinations, including decisions setting prices and establishing cost methodology, will not be disturbed unless they are arbitrary and capricious. Under this deferential standard, the court need only ensure that the Board's decision was based on consideration of the relevant factors and not the product of a clear error of judgment. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The court may not substitute its judgment for that of the agency. See Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974). This approach of deferring to the state agency's fact determinations, but not deferring to the state agency's law determinations, has been adopted by the vast majority of district courts reviewing state agency action under section 252(e)(6). See, e.g., MFS Intelenet, Inc., 1998 WL 350588, at *3; GTE South Inc., 6 F. Supp. 2d at 523-24; Southwestern Bell Telephone Co. v. AT&T Comm. Of the Southwest, Inc., No. A 97-CA-132 SS, 1998 WL 657717, at *3 (W.D. Tex. Aug. 31, 1998).

DISCUSSION

US West organizes its Second Amended Complaint into the following claims challenging substantive provisions of the Agreements: unlawful technical, construction and performance requirements in violation of §§ 251(c)(2); 251(c)(3), and 252(d) (Count I); unlawful provisions for combining elements in violation of §§ 251(c)(3) and 252(d)(1) (Count II); unlawful provisions for unbundling shared transport in violation of section 251(c)(3) (Count III); unlawful provisions regarding OSS capabilities in violation of §§ 251-252 (Count IV); unlawful provisions for unbundling dark fiber in violation of § 251(c)(3) (Count V); unlawful provisions that exceed Board authority in violation of § 252 (Count VI); unlawful provisions regarding collocation in violation of § 251(c)(6) (Count VII); miscellaneous incoherent or inconsistent provisions (Count VIII). US West also raises several claims in its Second Amended Complaint challenging the nature and effect of the arbitration proceedings, including: a claim that the Board failed to resolve all the issues raised by the parties in violation of § 252(b)(4)(C) (Count IX); a denial of due process claim (Count X); and a claim that the Agreements result in a confiscation of US West's property (Count XI).[5] In its answer, MCI responds by alleging two affirmative, substantive claims against US West and the Board, namely: a claim that the Board failed to set cost-based interconnection and unbundled network element rates in violation of §§ 251 and 252 of the Act (MCI's Count I); and a claim that the Board failed to de-average unbundled network element rates in violation of §§ 251 and 252 (MCI's Count II). Many of these claims include sub-claims and sub-issues which warrant individual discussion. Accordingly, I will address each

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[5] On November 24, 1998, the parties jointly filed a table of pre-remand issues still before the court. That table referenced an issue entitled "Bill & Keep Transport and Termination Cost Recovery." Although such an issue was included in US West's First Amended Complaint, see Count VI.E., no such claim was raised by US West in its Second Amended Complaint. Accordingly, I conclude that this issue has been withdrawn by US West.

substantive count and its related sub-issues in turn.

US West's Claims

Count I: Unlawful Technical, Construction, and Performance Standards

Applying the Law After IUB

Count I of US West's Second Amended Complaint raises an issue that has been hotly contested since the passage of the Act: What level of quality of interconnection or access to unbundled network elements must an ILEC provide to its competitors under the Act? The Eighth Circuit Court Appeals addressed this issue in its IUB decision. In IUB, the court held that under the Act a state commission may not require ILECs to provide access to unbundled network elements or interconnection at a level of quality that is superior to the level at which the ILECs provide those services to themselves. See IUB, 120 F.3d at 813-13. More specifically, the court concluded that the Act only requires unbundled access to an ILEC's existing network, not to a yet unbuilt superior one, and that the Act does not require ILECs to cater to every desire of every requesting carrier. See id. at 813. Thus, state commissions cannot require ILECs to *substantially* alter their networks in order to provide superior quality interconnection or superior quality access to network elements. See id. at 813, n.33. The court limited this holding, however, by noting that state commissions may, under the Act, require ILECs to modify their facilities "to the extent necessary to accommodate interconnection or access to network elements." See id.

On remand, the Board attempted to apply the interpretation of the Act articulated in IUB. That is, the Board attempted to require US West to make those modifications to its facilities that were *necessary* for access to network elements and interconnection, without requiring US West to provide superior interconnection or access by substantially altering its network. See Board's Final Arbitration Decision on Remand, at 16-19. In performing this balancing act, the Board concluded that a modification is "necessary" for access or interconnection if such

modification is "convenient" or "useful." See id. at 19. US West contends that this liberal definition of the word necessary is illegal under the Act and FCC regulations, and inconsistent with the Eighth Circuit's IUB decision. Indeed, US West points out that the useful or convenient standard is a more liberal definition of the word necessary than the definition given to the term by the FCC in another context and ultimately approved by the IUB court. See IUB, 120 F.3d at 810-11 (approving the FCC's construction of the word "necessary" as it is used in section 251(d)(2)(A) -- the CLEC's ability to compete would be "significantly impaired or thwarted" without access).

I find US West's argument challenging the liberal interpretation unpersuasive. The court in IUB recognized that the word "necessary" should be "'harmonized with its context.'" See IUB, 120 F.3d at 811 (quoting Armour & Co. v. Wantock, 323 U.S. 126, 129-30 (1944)). Because of the Act's purpose of promoting competition in local telephone markets, the IUB court concluded that the term "necessary," when used in the Act, should not necessarily be read narrowly to mean "indispensable" or "absolutely required." Thus, the court deferred to the more liberal definition articulated by the FCC in its First Report and Order. See id. Nothing in that decision, however, suggested that the term "necessary" could not have been given an even more liberal definition by the FCC. Indeed, in approving the FCC's definition of the word "necessary," as it is used in section 251(d)(2)(A), the court noted that courts have at times interpreted the term to mean "convenient or useful," see id., at 811 (citing M'Culloch v. Maryland, 17 U.S.(4 Wheat.) 316, 413 (1819)), a standard adopted by the FCC under other provisions of the Act. See FCC's First Report and Order, at ¶ 571 (interpreting the word "necessary" to mean "used" or "useful"). In light of the Act's purpose of promoting competition in local telephone markets, I conclude that the Board's expansive interpretation of the term "necessary" in this context is legal and appropriate.

Moreover, even if the Board's liberal interpretation of "necessary" is somehow inconsistent with the Act, US West has

failed to point to any provision of the Agreements which is rendered illegal or improper because of the Board's liberal interpretation. Accordingly, I turn my attention to the specific provisions of the Agreements challenged by US West.

Technical Standards

US West cites seven technical standard provisions in the Agreements which allegedly illustrate the unbounded nature of the Board's definition of the word necessary, and which allegedly require US West to modify its network even though such modifications are not *necessary* to interconnection or access to elements under a more appropriate definition of the word necessary. See US West's Opening Brief After Remand, at 7. Of those seven provisions, however, six are limited by the phrase "consistent with the ILEC's facilities as they evolve." The Board placed that language in certain provisions to comply with the IUB decision and ensure that US West was not required to provide network elements that satisfy a standard of quality higher than provided by the existing network. See Board's Final Arbitration Decision on Remand, at 20. Because US West must satisfy the technical standards in those six provisions only to the extent of the capabilities of the existing network, US West is not required to build or modify anything to satisfy the standards. Accordingly, these provisions do not violate the Act as interpreted by the court in IUB.

The Board did not limit some of the technical standard provisions in the Agreements with the "facilities as they evolve" language, because the Board determined that meeting those particular standards was necessary to accommodate interconnection or access to network elements. See id. This approach is consistent with footnote 33 of the IUB decision. See IUB, 120 F.3d at 813 n.33 (allowing modification of ILEC's network where necessary to accommodate interconnection or access to network elements). Only one provision challenged by US West is not limited by the "consistent with ILEC facilities as they evolve" language. Section 3.2.4 of Attachment 3 of the Agreements provides that "Loop Distribution shall support performance monitoring of the Loop, as well as provide necessary access for

performance monitoring for the Network Elements to which it is associated." This provision merely requires that certain loops purchased by CLECs as an unbundled network element be testable. The loop performance monitoring provision is not limited by the "facilities as they evolve" limitation, because the Board found that compliance with standards in this area, even if it requires slight modifications to US West's existing network, is necessary to accommodate interconnection and access to network elements even under the most stringent of definitions of the word necessary. This finding is not arbitrary and capricious. AT&T and MCI can't provide service with a loop that can't be tested. Under these circumstances, I conclude that none of the seven technical standard provisions challenged by US West unlawfully requires US West to modify its network.

Performance Standards

In order to comply with the IUB decision, the Board, on remand, inserted generic statements into the Agreements "that require US West to provide interconnection and services for resale equal to the quality it provides to itself or any other party, or if higher, the requirements of Board or FCC rules." See Board's Final Arbitration Decision on Remand, at 25. The Board also included in the Agreements generic statements requiring access to US West's network elements "to be as close as possible to the quality of access US West provides to itself and to any others." See id. at 25-26. Moreover, the Board sought to eliminate specific provisions from the original agreements which were shown by the record evidence to be inconsistent with these generic statements. See id. US West contends, however, that the Board failed to remove numerous provisions relating to performance standards which require US West to provide AT&T and MCI with service that is superior in quality to the service US West provides its retail customers and other wholesale customers. US West contends these provisions are in direct violation of the IUB decision and the aforementioned generic statements and should be eliminated from the Agreements.

One week after this court's remand, the Board issued a

"Procedural Order on Remand" that required US West to specify the provisions of the Agreements it believes require superior service, to provide evidence "clearly delineating the level of service quality US West provides to itself with regard to each challenged provision, as well as evidence showing that the level of service quality required by the agreement provision is superior." See Board's Procedural Order on Remand, at 4. The Board contends that, until the closing phases of the hearing, US West largely ignored the Board's directive to provide evidence showing the level of service quality US West provides itself. The Board refused to consider much of the evidence proffered late in the proceedings because it was untimely. See Board's Final Arbitration Decision on Remand, at 16-17. Thus, the Board concluded US West generally "failed to show that the service quality standards and performance standards in the agreements require superior service." See id. at 25. Because there is some evidence in the record concerning the specific standards challenged by US West, I find it insufficient to merely accept this general observation by the Board. Accordingly, I will address the validity of the specific provisions challenged by US West.

Provisions relating to time intervals

US West challenges 12 provisions in the Agreements which allegedly require US West to complete certain service provisioning and business processes in time intervals that are shorter than the intervals US West complies with for itself and its customers. US West contends that these provisions establishing shorter time intervals require US West to provide superior service and therefore must be eliminated from the Agreements. In essence, US West challenges four separate groups or types of time interval provisions.

First, US West challenges section 8.1 of Attachment 5 of the Agreements. Section 8.1 provides that when a CLEC makes an order for certain services or elements, the CLEC will specify its Desired Due Date ("DDD") for completion of that order. If the DDD is less than the time intervals established in section 8.1 for providing particular network elements, then the order will be

considered expedited. US West contends that the provisioning intervals established in section 8.1 are generally shorter than the intervals US West applies to itself and its customers. In other words, a DDD requested by a CLEC may fall outside the expedited order range established by section 8.1, but would constitute an expedited order, and warrant higher charges, if made by a customer. Thus, the provision requires US West to provide CLECs with more timely, or superior, service than it provides its customers.

The Board contends that the record does not establish what intervals US West currently applies, and thus, US West failed to establish on the record that section 8.1 requires superior service. I agree. In support of its challenge, US West relies exclusively on the testimony of Perry W. Hooks, Jr., US West's Director of Legal and Regulatory Affairs for Wholesale Interconnection Operations, and Exhibit A to his testimony. The nature and import of Exhibit A is less than self-explanatory and Mr. Hooks' testimony did little to clarify the relevancy of the exhibit. Indeed, in his direct testimony Mr. Hooks contended that section 8.1 required superior service because it ceded too much control over the intervals to the CLECs, control that US West's customers did not share. See Direct Testimony of Perry W. Hooks, Jr., at 514. The only mention of Exhibit A was that it was attached to Mr. Hook's testimony "[f]or the Board's information." See id. In his reply testimony, Mr. Hooks testified:

> Despite having provided a Service Interval Guide with my Direct Testimony filed on February 11, 1998, which provides the intervals US West uses for its own customers, AT&T finds itself unable to agree that these are the intervals which should apply. US West utilizes the interval guide for all fourteen states.

See Reply Testimony of Perry W. Hooks, Jr., at 643. On cross examination, however, Mr. Hooks admitted that neither the intervals contained in Exhibit A nor Mr. Hooks' own testimony disclose what US West's actual performance is with respect to each of the intervals. See Cross-examination Testimony of Perry W. Hooks, Jr., at 701. Moreover, Mr. Hooks admitted that US West

had not disclosed the intervals provided to other CLECs currently operating in Iowa. See id. at 701-702. Based upon this limited and conflicting record evidence, I cannot conclude that the Board's finding that US West failed to provide sufficient evidence of its current practice to establish its superior service claim as to section 8.1 is arbitrary and capricious. Accordingly, section 8.1 of Attachment 5 will not be vacated.

Second, US West challenges section 14.1.2.14 of Attachment 1 of the Agreements. This section provides that "During Cooperative Testing, where efficiencies can be realized, the ILEC provisioning processes shall be enhanced to deliver Network Elements and Ancillary Functions and any Additional Requirements to the CLEC in shorter intervals than during subsequent normal service periods." US West contends this provision requires US West to perform business processes in intervals shorter than US West performs the same processes for itself or its customers. US West fails, however, to support this contention with record evidence. The only statement made by US West in its brief that is supported by a record cite is that "US West does not provide these shorter intervals for itself or its customers." However, US West fails to point to any evidence in the record discussing less demanding intervals used by US West in analogous situations with its end-user customers. The Act creates a unique relationship between ILECs and their competitors, which results in demands being placed on ILECs that heretofore have been nonexistent. US West may not avoid these new demands by arguing that a new obligation under the Act necessarily requires superior service. In other words, merely because cooperative testing and its corresponding intervals may be unique to the ILEC/CLEC relationship does not warrant a finding that the intervals are improper superior service requirements. Accordingly, I will not disturb the cooperative testing interval provision merely because no such interval exists in US West's service to its customers.

Third, US West challenges sections 8.2 and 8.3 of Attachment 5 of the Agreements. Within two hours after receiving an expedited order from a CLEC, sections 8.2 and 8.3 require US West to notify the requesting CLEC of US West's confirmation to

complete, or not complete, the order within the expedited interval. US West contends, without citing any part of the record, that these requirements are unreasonable and impracticable. Without any evidence in the agency record supporting US West's contention that these requirements are unreasonable, impracticable, or otherwise require superior service, I will not disturb the Board's decision to include these requirements in the Agreements.

Fourth, US West challenges eight provisions in Attachments 3, 5, and 6, as unlawfully allowing AT&T and MCI to exercise control over when US West conducts tests and maintenance procedures, restores network elements, responds to requests for off-hour provisioning services, and answers repair calls. US West argues that AT&T and MCI should not receive this control because US West's customers do not currently have similar control over US West's operations. The challenged provisions merely require US West to keep the lines of communication open with the CLECs regarding repairs, testing, and service orders that may affect a CLEC's service to its customers. Necessarily, a competitor utilizing an ILEC's network to provide service to its own customers requires more control and notice of routine maintenance, repairs, and tests than do end-user customers. Thus, giving competitors more notice and input into these procedures than is given to end-user customers does not constitute the type of "superior" service requirements found improper in IUB. Rather, the provisions challenged by US West are reasonable and necessary to ensure that CLECs are able to effectively and efficiently compete with US West through the use of US West's network.

Specified levels of performance and intervals

Section 8.5 of Attachment 5 of the Agreements requires US West to satisfy the following service quality standards: (i) complete 85 percent of all orders within five business days of a request for service or the customer-requested date, whichever is later, (ii) complete at least 95 percent of all orders within ten business days of the request for service or the customer-requested date, whichever is later; and (iii) complete at least

99 percent of all orders as accepted by the ILEC without error. US West contends that these response times and error-free standards are more rigorous than the response times and performance standards US West achieves with its own customers.

There is no evidence in the record that the response time provisions (i & ii) require US West to provide superior service. Prior to the Board's Final Decision on Remand, current section 8.5 was contained in section 9.5 of Attachment 6 and it provided:

> The ILEC shall satisfy the following service quality standards: (i) at least 90% of all orders must be completed by DDD; (ii) at least 98% of all orders must be completed by Committed Due Date; and (iii) at least 99% of all order will be competed without error.

On remand, US West provided evidence through the testimony of Perry W. Hooks, Jr., that this provision required US West to provide AT&T and MCI with superior service because it required service to be completed by a customer's desired due date ("DDD"). See Direct Testimony of Perry W. Hooks, Jr., at 515. Mr. Hooks suggested that US West only provides services based on a customer's DDD if that DDD is not sooner than the minimum published interval. See id. If the DDD is sooner than the minimum published interval then service would be provided on the DDD only if the customer paid for expedited service. See id. Mr. Hooks testified that under former section 9.5, the CLECs and their customers would get service by their DDD regardless of whether such timing would normally constitute expedited service. On remand, however, the Board amended section 8.5 to its current version. The current version does not require service by the DDD, but rather within five days of the DDD or the request for service, whichever is later. There is no evidence in the record that this timing interval requires superior service. Indeed, Mr. Hooks admitted in his testimony that in 1996, US West completed 99 percent of its orders by the commitment due date. See id. at 516. Thus, completing 95 percent of its orders within 5 days of the request for service date or the customer-requested date, whichever is later, appears reasonable. Accordingly parts i and ii of section 8.5 will not be disturbed.

Likewise, US West has failed to show that the Board's decision to adopt the 99 percent error-free rate contained in part iii of section 8.5 is arbitrary and capricious. Mr. Hooks testified that in 1996 "US West experienced an installation error report rate of approximately 14% or, conversely, approximately 86% of US West's installations apparently were without error." See id. The Board acknowledges that the Hooks testimony attempts to establish a base-line for US West's superior service challenge to part iii; however, the Board found the 14 percent error rate to be disturbingly high. Without testimony explaining how this 14 percent figure was calculated, the Board assumed that such a high rate must include errors made by the customer in the ordering process. Because section 8.5 only requires 99 percent error-free service of all orders "as accepted by the IXEC," the Board contends that the 99 percent rate is not overly ambitious. Moreover, Mr. Hooks did not discuss whether this 1996 figure was a usual error rate for US West or consistent with industry standards, or whether US West had achieved better performance standards by 1998. Indeed, in his direct testimony, Mr. Hooks qualified his performance standard testimony by noting that "US West may or not reach these desired levels of performance at any given time." See id. at 515. Mr. Hooks also admitted that part iii of section 8.5 would constitute a superior service requirement only *if* US West is unable to reach those levels of service for its other customers. See id. The Board's finding that this equivocal testimony was insufficient to establish a base-line for a valid superior service claim was not arbitrary and capricious. Accordingly, part iii of section 8.5 will not be disturbed.

. *Providing information on right-of-ways and pole attachments*

Initially, US West challenged section 3.2.11 of Attachment 4 of the Agreements under the belief that the provision required US West to respond to a request for information on the availability and condition of right-of-ways, conduit, or pole attachments within ten days -- a significantly shorter response time than mandated by the FCC in paragraph 1224 of its First Report and Order. However, section 3.2.11 allows US West to notify the

requesting CLEC that there will be a delay in responding to its request, so long as the notification is sent "immediately" and includes an explanation for the delay and sets a later deadline for the response. In its reply brief, US West implicitly accepted this approach as reasonable and intimated that "no further controversy regarding this provision" exists. See US West's Reply Brief After Remand, at 5. Accordingly, the court will not disturb this provision.

Time and cost charges

US West also challenges section 3.5 of Attachment 5 of the Agreements which requires US West, upon work completion, to electronically provide the CLEC with an "Order Completion per order" that reflects when a particular order was completed and states any additional charges incurred, including time and cost charges. US West contends that it currently generates time and cost charges when it generates bills, not after it completes orders. To comply with section 3.5, therefore, US West would have to change its operational support systems ("OSS")[6] to provide AT&T and MCI with information it does not provide to anyone else. Thus, US West argues that this provision constitutes an improper superior service requirement that must be vacated. I disagree.

Section 3.5 merely ensures that CLECs have access to time and cost charges in a manner that is equivalent to the access enjoyed by US West. Such equal access is mandated by the Act, state law, and corresponding regulations. Time and cost billing information is subsumed within the OSS network element. See 47 C.F.R. § 51.319(f)(1) (establishing that OSS functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an ILEC's databases and information). The Act and state law require US West to provide nondiscriminatory access to network elements, including OSS functions. See 47 U.S.C. § 251(c)(3); Iowa Code § 476.100(2)

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[6] Operational Support Systems are software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers. See IUB, 120 F.3d at 808.

(requiring access to essential facilities on terms and conditions no less favorable than those the LEC provides to itself). Nondiscriminatory access to the OSS network element requires access that is equal to the access enjoyed by the ILEC. See Iowa Code § 476.100(2); MCI Telecomm. Corp. v. US West Comm., Inc., No. C97-1508R, slip op. at 30 (W.D. Wash. July 21, 1998)(quoting FCC's First Report and Order, at ¶ 316)(establishing that nondiscriminatory access to OSS services means "'the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves * * *.'"). Because US West has access to the "time and cost charges" information when the work is completed — long before US West actually issues a bill — CLECs also have the right to the information when the work is completed. Thus, any change that must be made to the OSS system to provide AT&T and MCI with the time and cost information upon completion of the work is necessary to accommodate nondiscriminatory access to a network element. Such modifications are proper under the IUB decision. See IUB, 120 F.3d at 813 n.33. Accordingly, I will not vacate section 3.5.

DMOQs

US West challenges several provisions in the Agreements which it contends improperly retain direct measures of quality ("DMOQs") requirements that the Board specifically deleted from Attachment 11 of AT&T's proposed interconnection agreement. US West argues that the Board previously rejected all of the "minutely specified quality standards" contained in the DMOQs, and that the court should delete the remaining references to the DMOQs that were inexplicably retained in the body of the Agreements. See Board's Preliminary Arbitration Decision Before Remand, at 8 (October 18, 1996) ("The Board has also eliminated the minutely specified service quality standards set forth by AT&T * * *.") I disagree.

The court's obligation under the Act is to ensure that the Agreements comply with relevant state and federal law, not to ensure that the Agreements comply with the Board's own decisions. Because US West fails to explain how the DMOQ standards are

illegal under federal or state law, I will not vacate them.

Even if the court has some implicit obligation to ensure that the Agreements do not conflict with Board decisions, I am not convinced that the DMOQ standards remain in the Agreements contrary to the intent of the Board. In its preliminary arbitration decision before remand, the Board noted that it was rejecting AT&T's DMOQ credit methodology primarily because the level of credit given to the CLECs based on US West's service quality amounted to improper penalties. See id. In doing so, the Board did not reject the entire concept of quality standards. See Board's Final Arbitration Decision Before Remand, at 5 (November 27, 1996). I do not read any of the Board's language in its arbitration decisions as concluding that all of the DMOQ standards, without exception, were improper or unlawful. Indeed, as US West pointed out, MCI made the Board aware that some of the DMOQ standards remained in the body of the Agreements before the Board issued its final arbitration decision and the Board declined to remove those provisions. Moreover, US West challenged the DMOQs that remained in the Agreements before the Board approved the final version, and the Board again declined to remove the provisions. The Board now assures the court that every DMOQ standard that remains in the Agreements was individually reviewed and consciously retained in the Agreements. For the foregoing reasons, the court will not disturb the DMOQ standards that remain in the Agreements.

Alleged Conflict with Section H.1.1

In an argument unrelated to the IUB decision, US West contends that the provisions in the Agreements that purport to require US West to conform its Iowa network to specified technical standards and to generic industry-wide standards are internally inconsistent with section H.1.1 of the Agreements. US West contends that under section H.1.1 whenever US West's network deviates from the technical and performance standards in the Agreements, those deviations should supercede the standards as long as they are documented, and permitted by FCC and Board rules and regulations. Because the parties allegedly agreed that US West is permitted to deviate from the technical and industry

standards contained in the Agreements, US West contends that the provisions purporting to require US West to comply with those standards must be deleted from the Agreements. I disagree.

Section H.1.1 provides that "[t]he parties recognize that equipment vendors may manufacture telecommunications equipment that does not fully incorporate and may deviate from the industry standards referenced in this Agreement." The parties agreed that if a deviation from the referenced standards was required by virtue of the particular characteristics of the individual facility components deployed within US West's network, (1) US West will notify AT&T and MCI of the individual components that require deviation from particular standards referenced in the Agreements, and (2) the technical and performance limitations of those components will supersede the otherwise applicable standards referenced in the Agreements for the affected components (so long as the revised standards are consistent with FCC and Board rules and regulations). This provision does not give US West free reign to deviate from the Agreements' technical and performance requirements. Rather, this provision is intended only to allow for minor deviations based on factors outside US West's control, and to permit new entrants to learn of deviations from the Agreements' standards prior to ordering the non-complying components or elements. In other words, section H.1.1 merely allows the parties to agree to a deviation from the technical standards for existing network hardware. Both this provision and the provisions requiring compliance with particular technical and industry-wide standards may co-exist in the Agreements. Because the provisions requiring compliance with particular technical and industry-wide standards do not inherently conflict with section H.1.1, they need not be deleted from the Agreements.

Challenge to 90-day Notice of Deviation Provision

Although not specifically raised in Count I of the Second Amended Complaint, US West challenges the provision in the Agreements which requires US West to give CLECs 90 days notice prior to implementing any deviation from the Agreements' standards. See Agreements, § H.1.2 ("Written notice (the 'Change

Notice') of any planned changes in standards for any Network Component which could impact that Network Component will be provided at least ninety (90) days (or at the make/buy point) prior to the planned implementation.*). US West claims this provision should be vacated because it is arbitrary, not supported by the evidence, discourages network innovation, and places US West at a competitive disadvantage. I disagree. This notice provision merely allows AT&T and MCI the time to deal effectively and competitively with decreases in the level of service provided by US West and to take full advantage of any increases in the level of service provided by US West. Such notice is appropriate and necessary to ensure that CLECs may effectively and efficiently utilize its access to the ILECs network. This notice provision in no way gives competitors the ability to prevent US West from enhancing its network or offering new services. Accordingly, this provision is consistent with the language and the spirit of the Act and state law. Cf. Iowa Code § 476.100(3) (prohibiting a local exchange carrier from degrading the quality of access or service provided to another provider of communications services).

Construction Cost Provision

In Count I, US West raises the claim that the Board imposed an unlawful construction cost recovery provision which failed to permit US West to recover its construction costs up front. Nothing in the Act or regulations gives US West the right to receive its construction costs up front. Rather, the Act merely establishes that US West has a right to be justly and reasonably compensated for the "cost" of providing interconnection and access to unbundled network elements. See 47 U.S.C. §§ 251(c)(2), 251(c)(3), 252(d)(1). Such costs include expenses US West encounters in modifying or constructing new facilities at the request of a new entrant. Section 1 of Attachment 3 of the Agreements ensures that US West will be reasonably and justly compensated for these costs. See Agreements, Attachment 3, § 1 ("The CLEC must compensate the ILEC for the CLEC's proportionate share of the additional economic costs whenever the CLEC requests the use of facilities not currently in place."). The Board

considered US West's proposal for up-front payment of construction costs and found the proposal to be unreasonable. See Board's Final Arbitration Decision on Remand, at 14-15. This finding is not arbitrary and capricious. Accordingly, I conclude that the Agreements' construction cost provisions are consistent with the Act.

Count II: Combining Elements
Choosing an Appropriate Approach

In this Count, US West challenges the approach adopted by the Board regarding the combination or re-combination of network elements. US West contends that the approach adopted by the Board, which includes several different options, is unlawful or infeasible, and that the Board should have adopted US West's proposal that the combination of elements be achieved through the use of a Single Point of Termination ("SPOT") frame. US West also complains that the Agreements unlawfully require US West to provide access to elements that is equal to the access available to US West, whereas the Act only requires that US West provide access that does not discriminate among the CLECs. Finally, US West alleges that the Agreements contain miscellaneous provisions that unlawfully require US West to provide elements in combination.

Section 251(c)(3) of the Act requires ILECs to provide nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point*. The last sentence of that section provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." (Emphasis added). In IUB, the Eighth Circuit Court of Appeals interpreted this statutory language to mean that LECs could not be required to recombine network elements that are purchased by the requesting carriers on an unbundled basis. See IUB, 120 F.3d at 813. Rather, "the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves." Id. Indeed, the court interpreted the LECs' objection to the particular FCC

rule at issue to mean that the LECs "would rather allow entrants access to [the LECs'] network than have to rebundle the unbundled elements for them." Id.

Attempting to be consistent with this decision, while recognizing competing network security interests, the Board established five options that US West could choose from for combining network elements. In section 17 of the Agreements, the Board ordered US West to choose among the following options for permitting AT&T and MCI to combine network elements:

> (1) The ILEC can elect to not separate the Network Element from other Network Elements with which it is combined;
> (2) The ILEC can provide its own personnel to the CLEC to recombine the Network Element with other Network Elements as requested by the CLEC;
> (3) The ILEC can elect "recent change" technology, which is switching software somewhat like an on/off switch that allows the CLEC to recombine some Network Elements;
> (4) The ILEC can elect to have a third-party technician acceptable to both the ILEC and the CLEC recombine the Network Elements; and
> (5) The ILEC can elect to allow the CLEC's technician recombine the Network Elements.
>
> Where options 4 or 5 are selected, ILEC may require that ILEC personnel accompany the third-party or CLEC personnel as they do the recombining of Network Elements. Where ILEC personnel accompany the third-party or CLEC personnel, ILEC shall bear the expense of its personnel, and CLEC shall bear the recombining expense of the third-party or its own personnel.

US West contends that all of these options are either unlawful, infeasible, or both. Specifically, US West argues that the first three options require US West to combine network elements for MCI and AT&T, in direct violation of the Eighth Circuit's decision in IUB. Moreover, US West challenges the feasibility of the recent change software option. The remaining two options require US West to permit AT&T and MCI technicians or third-party technicians to combine elements. US West contends that granting such access to US West's network seriously compromises network security and integrity and is therefore not technically feasible. I find these arguments unpersuasive.

In determining how to provide for the combination or recombination of network elements, the Board had the difficult task of trying to satisfy several competing interests while remaining within the confines of the Act. The Board's resolution of the issue is reasonable, lawful, and certainly not arbitrary and capricious. The CLECs urged the Board to require the ILECs to combine the elements pursuant to state law authority notwithstanding the Eighth Circuit's interpretation of federal law in IUB. The Board, conscious of the Eighth Circuit's strong statement against forcing ILECs to combine elements, was unwilling to apply state law in a manner inconsistent with the Act. Meanwhile, the other avenue recognized by the court of appeals -- giving CLECs access to the ILEC's network to combine elements -- contained inherent risks to the security of the ILEC's network. In its decision, the Board gave US West options which each emphasized different degrees of concern for doing no more than the Act requires and for protecting network security. Although the Board admittedly did not have the authority to force US West to retain the elements in a combined state or to recombine them, it would be legal for US West to choose to do so. Moreover, the Board decided that allowing CLECs or a third party to recombine elements on the ILEC's main distribution ("MDF") or COSMIC frame was technically feasible. This decision was not arbitrary and capricious, especially in light of the Board's provision for an ILEC escort to protect network security. The Board's conclusion that "recent change" software was sufficiently developed to be a technically feasible alternative was likewise a reasonable decision that was not arbitrary and capricious. For the aforementioned reasons, I conclude that the provision of the Agreements giving US West several options for the combination or recombination of network elements is not arbitrary and capricious; it is reasonable and lawful.

During the remand proceedings, US West urged the Board to adopt a SPOT frame approach to the separation and recombination of network elements. The Board rejected this approach because it found "ample evidence in the record that the SPOT frame approach is inefficient, expensive, inconsistent with network security,

and provides discriminatory access to [unbundled network elements, or] UNEs." See Remand Decision, at 22. Although these findings are not supported by witnesses and testimony offered by US West, they are supported by other substantial evidence in the record and are not arbitrary and capricious. Moreover, I agree with the Board's argument that US West's SPOT frame approach virtually reads out of the Act the availability of access to UNEs "at any technically feasible point." See 47 U.S.C. § 251(c)(3). The SPOT frame approach, contrary to the intentions of Congress about the flexibility granted to competitors in the locus of access to UNEs, provides competitors with access to UNEs at one place, and only one place, the US West-provided SPOT frame. A more reasonable construction of "any technically feasible point" is that the competitor has its choice of any such point in the network. On this record, the permissible points include US West's MDF and COSMIC frames.

US West also makes a general allegation that the Board improperly interpreted the requirement that access to network elements be "nondiscriminatory." The Board interpreted the nondiscriminatory access requirement to mean that US West must offer the UNEs "on terms and conditions that are, as near as possible given the fact they are uncombined, no less favorable than the ILEC provides to itself or any other party." See Final Arbitration Decision on Remand, at 14. US West contends that this definition ignores the distinction drawn by Congress in drafting sections 251(c)(2) and 251(c)(3) and that nondiscriminatory access only prevents ILECs from discriminating among competitors. In section 251(c)(2), the Act requires ILECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself * * *." Section 251(c)(3) requires ILECs to provide only "nondiscriminatory" access to network elements. Because Congress used different language to describe the required levels of interconnection and access, US West asserts Congress must have intended the language to mean different things. Moreover, US West points to the Eighth Circuit's description of these standards in IUB, where the court noted that the

nondiscrimination standard "merely prevents an incumbent LEC from arbitrarily treating some of its competitors differently than others * * *." IUB, 120 F.3d at 813.

US West's arguments are reasonable. I am not, however, convinced that the Board's standard is inconsistent with the Act. Both federal and state law support the Board's interpretation. In 47 C.F.R. § 51.311(b), the FCC explained that nondiscriminatory access to unbundled network elements requires ILECs to provide quality of access to unbundled elements that is at least equal in quality to that which the ILEC provides to itself. Likewise, Iowa Code § 476.100(2) prohibits local exchange carriers from discriminating against another provider "by refusing or delaying access to essential facilities[7] on terms and conditions no less favorable than those the local exchange carrier provides to itself and its affiliates." (Footnote added). Accordingly, I conclude that the Board did not violate the Act by suggesting that US West must provide access to unbundled network elements, to the extent possible, equal to the access US West provides itself. See also MCI Telecomm. Corp. v. US West Comm., Inc., No. C97-1508R, slip op. at 30.

US West also alleges that the Agreements contain several miscellaneous provisions which unlawfully require US West to provide MCI and AT&T with network elements on a combined basis. See Second Amended Complaint, at p. 27, ¶ 84. None of the parties expand on this allegation. I conclude, without more guidance from the parties, that the cited provisions do not unlawfully require the provision of network elements on a combined basis, but rather, merely offer the provision of combinations as an option, or set standards or enforcement procedures in case such combinations are provided by US West. Accordingly, the provisions cited by US West in paragraph 84 of its Second Amended Complaint are not inconsistent with sections 251 and 252. To the extent the provisions are internally

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[7] The state statute's definition of an "essential facility" is broad enough to contain most, if not all, facilities and functions defined as network elements under the Act. Compare Iowa Code § 476.100(2)(a-d) with 47 U.S.C. § 153(29).

inconsistent with other provisions of the Agreements, these inconsistencies are more appropriately addressed in an enforcement proceeding when, and if, they cause problems in the performance of the Agreements.

Paying for Escorts

Section 37 of the Agreements provides:

> Where options 4 or 5 are selected, ILEC may require that ILEC personnel accompany the third-party or CLEC personnel as they do the recombining of Network Elements. Where ILEC personnel accompany the third-party or CLEC personnel, ILEC shall bear the expense of its personnel, and CLEC shall bear the recombining expense of the third-party or its own personnel.

US West contends that this provision is inconsistent with section 252(d)(1) of the Act which entitles US West to recover all of its costs of providing interconnection and access to unbundled network elements. I agree.

Section 251(c)(3) of the Act provides that an ILEC has the duty to provide nondiscriminatory access to network elements on an unbundled basis in a manner that allows requesting carriers to combine such elements. The ILEC is to be compensated for this access to unbundled elements with rates that are just, reasonable, and nondiscriminatory. See 47 U.S.C. § 251(c)(3). Section 252(d)(1) defines a just and reasonable rate for purposes of section 251(c)(3) as a rate based on the cost of providing the network element. If US West chooses options four or five, allowing CLEC or third party technicians to recombine elements, the Agreements give US West the right to require an escort accompany the other technicians while they recombine the elements. The cost of providing that escort is appropriately described as a cost of providing unbundled access to the network element. The Board's contention that "it would be patently unreasonable to make a competitor pay US West to separate UNEs that the competitor wants to purchase combined" is, in my opinion, wrong. Sections 251 and 252 make it clear that US West is entitled to charge competitors the cost of separating the elements and making them available on an unbundled, as opposed to a bundled, basis. Forcing US West to pay for the cost of the

escort to assist in unbundling the elements is therefore unlawful. The Board's argument that US West should pay for the escort because it chose the option which threatened security is likewise faulty. The Board supports its combination provision by suggesting that it gives the ILEC options. It is unreasonable then to tip the scales in favor of options one and two by granting the ILEC full recovery of its costs if those options are chosen, but refusing to grant the ILEC full recovery for its costs if it chooses options four or five. Accordingly, the portion of the Agreements forcing US West to pay for the cost of the escort is remanded, and the Board is directed to modify the Agreements to make them consistent with this decision.

Count XII: Unbundling Shared Transport

In its Second Amended Complaint, US West alleges that the Agreements unlawfully require US West to provide "shared transport" on an unbundled basis. Shared transport is the facilities and associated functions which allow calls to be transmitted between switches in a telephone network; it is "shared" in the sense that telecommunications of many different carriers are carried on the same facilities at the same time. US West suggests in its complaint that because shared transport is virtually useless unless it is combined with local switching, which is itself an independent network element, the Agreements require US West to provide network elements on a combined basis in violation of the Act as interpreted by the Eighth Circuit Court of Appeals in IUB. In briefing this Count, however, US West correctly abandoned this claim after the Eighth Circuit Court of Appeals, in Southwestern Bell Telephone Co. v. FCC, 153 F.3d 597 (8th Cir. 1998) ("SWBT"), upheld the FCC Order finding "shared transport" to be a network element that must be provided on an unbundled basis.

Keying on some dicta in the SWBT opinion, however, US West attempts to salvage this Count by arguing that the Board established an erroneous price for shared transport which blurs the distinction between service through resale and through the purchase of network elements. In SWBT, the Eighth Circuit

acknowledged the possibility that the unbundled sale of shared transport could erode the careful distinction between resale and unbundled access, but declined to address that possibility "[u]ntil the state commissions exercise their authority to determine how shared transport will be priced * * * and appeal has been taken to a federal district court." Id. at 604-05. US West argues that the Board has adopted a "usage-sensitive" pricing methodology for the shared transport element which erodes the distinction between resale and unbundled access, and that this court should therefore strike that pricing decision. There is no evidence, however, that US West raised this issue with the Board in the first instance. "This Court may not consider arguments not raised before the administrative agency involved." Morrison, 6 F. Supp. 2d at 529. Accordingly, US West has waived this argument. Even assuming US West did not waive this argument, there is insufficient evidence that the pricing methodology adopted by the Board as to this one element will have the effect of eroding the distinction between resale and access to network elements. Thus, I conclude that the Board did not act unlawfully, or arbitrarily and capriciously, in requiring US West to provide access to shared transport on an unbundled basis pursuant to the compensation plan adopted by the Board.

In a related claim, US West alleges that the Agreements unlawfully fail to require AT&T and MCI to provide US West with forecasts of their shared transport needs. US West suggests this omission will adversely effect US West's ability to ensure customer service. US West contends that the Board recognized the need for forecasts in its decision after remand, but failed to include a provision requiring such forecasts in the Agreements. Thus, US West urges this court to amend the Agreements to conform with the Board's decision.

> The Board, in its decision after remand, states:
>
> The Board believes when US West must do the transport network planning, it is in all carriers' and customers' best interests to require the CLECs to provide any information to US West they may have about significant future variations in usage. * * * The information can be provided on a proprietary basis for network engineering purposes only.

Section 43.3 of the Agreements provides:

> If CLEC purchases shared transport as an unbundled network element, CLEC will provide the ILEC in a timely manner information it has about significant future variations in network usage that may affect the ILEC's trunk forecasting. This information may be provided on a proprietary basis for network engineering purposes only.

It is unclear how much more closely the Agreements should or could reflect the Board's decision. Moreover, even if the Agreements did not contain a provision requiring forecasts, which it clearly does, US West has not shown what section of the Act would be violated by such an omission. Accordingly, US West's claim regarding shared transport forecasts is both factually and legally without merit.

Count IV: Unlawful Operational Support Systems Requirements

Compliance with Future National Standards:

Next, US West challenges section 37.12 of the Agreements which requires US West to provide the CLECs with access to its operational support systems ("OSS")[8] through an electronic interface that satisfies any subsequently adopted national standards. US West contends that neither the Act, the IUB decision, nor state law authorizes the Board to require compliance with any subsequently adopted national standards.

In IUB, the Eighth Circuit Court of Appeals confirmed that OSS is a network element, and that ILECs must provide nondiscriminatory access to it. See IUB, 120 F.3d at 808-16. Nondiscriminatory access to OSS means "'the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers.'" See MCI Telecomm. Corp. v. US West Comm., Inc., No. C97-1508R, slip op. at 30 (quoting FCC's First Report and Order, at ¶ 316). Moreover, the FCC has concluded that nondiscriminatory access to these OSS functions "is vital to

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[8] See supra note 6 (defining Operational Support Systems).

creating opportunities for meaningful competition." See FCC's First Report and Order, at ¶ 518.

On remand, the Board concluded that the parties had reached substantial agreement that US West would provide access to its OSS through an "EDI real time mediated access electronic interface" ("EI"), and the Board adopted that approach. See The Board's Final Arbitration Decision on Remand, at 28-29. US West does not challenge that decision. Rather, US West contends that the Board improperly required US West to subsequently modify this method of access or EI to comply with any subsequently adopted national standards. US West argues that the contested language requires US West to change its OSS interfaces to comply with all national standards solely to appease the CLECs, and that such a requirement violates the IUB decision. See IUB, 120 F.3d at 813 (concluding that the ILEC need not provide access to a yet unbuilt superior network, nor cater to every desire of every requesting carrier). I agree. Although the Act contemplates requiring ILECs to modify their facilities to the extent necessary to accommodate access to network elements, see IUB, 120 F.3d at 813 n.33, once that access is established the ILECs do not surrender control of their networks to their competitors. In this case, US West has agreed to provide reasonable access to its support systems. Whether US West updates the nature of that access to comply with subsequent national standards should be left to the discretion of US West and may be the subject of future negotiations between US West and the CLECs. See Agreements § 37.12 ("The parties may mutually agree to a different type of EI, in whole or in part."). Of course, US West's discretion is not unlimited. US West remains under an obligation to provide access to its support systems in a *nondiscriminatory* manner and on terms and conditions that are just, reasonable, and nondiscriminatory. See 47 U.S.C. § 251(c)(3). Accordingly, if US West were to comply with subsequently adopted national standards as to the electronic interfaces utilized by itself or other competitors to access US West's support systems, then US West would be obliged to make such modifications available to MCI and AT&T.

The court is not incognizant of the common sense reasons for imposing the challenged obligations on US West. The Board adopted this provision to ensure that the Agreements did not become impediments to the timely implementation of the latest technologies. See Board's Final Arbitration Decision on Remand, at 26-27. Moreover, the FCC has recognized that "[i]deally, each incumbent LEC would provide access to support systems through a nationally standardized gateway," so that new entrants would not need to develop multiple interface systems, one for each incumbent. See FCC's First Report and Order, at ¶ 517. To date, however, the court is unaware of any universally accepted national standard gateway, or of any action taken by the FCC under the Act *requiring* compliance with any such national standard. See id. at ¶ 528 (promising to make a determination in the near future as to whether to take action to guide industry efforts at arriving at appropriate national standards for access to operational support systems). Until such action is taken, or until some law or regulation requires US West to provide access consistent with a national standard, the Board does not have the authority to require US West to modify its electronic interface or gateway to comply with subsequently adopted national standards.[9] US West has agreed to provide nondiscriminatory access to its operational support systems, and nothing more can be required of it. See US West Comm., Inc. v. AT&T Comm. Of the Pacific Northwest, Inc., No. 97-1575-JE, 1998 WL 907015, at *16-18 (D. Or. Dec. 10, 1998) (refusing to require ILEC to change billing software merely to further the goal of developing standardized, national interfaces for OSS functions, because the court was unaware of any provision in the Act establishing such a goal or mandating the establishment of a unitary national standard). Accordingly, section 37.12 of the Agreements is remanded to the Board to delete the requirements that the electronic interface and the gateway must satisfy any

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[9] Neither party cites, and the court is unaware, of any state law requiring compliance with national electronic interface standards for access to OSS functions.

subsequently adopted national standards.

Time and Cost Charges

In Count IV, US West also challenges the provision of the Agreements which requires US West to provide time and cost charges after it completes orders instead of when it issues bills. This argument was thoroughly addressed in Count I, supra.

Count V: Unbundling Dark Fiber

US West next challenges the provisions of the Agreements which require US West to provide AT&T and MCI with dark fiber on an unbundled basis. US West contends both that dark fiber is not a network element and that AT&T and MCI have failed to establish that their ability to provide service will be impaired if they do not have access to the dark fiber. The first contention challenges the Board's interpretation of the Act and warrants de novo review, whereas the second contention challenges the Board's findings of fact and will not be disturbed unless the findings are arbitrary and capricious.

Section 153(29) of the Act defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." (Emphasis added). Dark fiber is simply fiber optic cable, or a component thereof, deployed between switches in US West's network. It is "dark" in the sense that US West at the moment has chosen not to provide the electronic equipment needed to power, or "light" the fiber. When it is lit by combining it with electronic equipment at both ends, dark fiber can transmit telecommunications. US West contends that because dark fiber does not have the electronic devices necessary for voice transmission, and, therefore, is not used to transmit signals, it cannot be considered a network element. I disagree.

US West's narrow interpretation of the definition of network element, and its willingness to add a temporal limitation to that definition, is inconsistent with the language and the spirit of the Act. US West argues that "equipment used in the provision of a telecommunications service" must mean equipment "currently in use." The statute itself does not contain such a temporal

limitation, and one should not be implied. Rather, it is sufficient that the fiber has the capability to be used at a time when demand justifies its activation, so long as it is part of the existing network. A limiting definition of network element, such as the one offered by US West, would allow an ILEC to avoid making equipment available to CLECs merely because the equipment is not currently in use. For example, a local loop servicing a particular residence, which is in all other respects a network element, would not be available to a CLEC if the house was temporarily vacant and not subscribing to telephone service. This result is inconsistent with the scope of the language of the Act as interpreted by the FCC. See 47 C.F.R. § 51.319(a) (providing that an ILEC must provide nondiscriminatory access to local loops on an unbundled basis). Moreover, such a result would be inconsistent with the Act's underlying purpose of facilitating the development of competition in the local exchange market. See IUB, 120 F.3d at 808-10 (emphasizing the need for an expansive definition of "network element" to promote the purposes of the Act). Accordingly, I do not find the Board's decision that dark fiber within the existing network is a network element to be contrary to the Act or otherwise unlawful. See MCI Telecomm. v. BellSouth Telecomm., 7 F. Supp. 2d 674, 680 (E.D.N.C. 1998); MCI Telecomm. Corp. v US West Comm., Inc., No. C97-1508R, slip op. at 13-16; MCIMetro Access Transmission Serv., Inc. v. GTE Northwest, Inc., No. C97-742WD, slip op. at 8; AWMI v. AT&T Comm. of the Southwest, Inc., 1998 WL 657717, at *5.

Even though the Board legally designated dark fiber a "network element," the Board could require it to be unbundled only if, at a minimum, "the failure to provide access to such [a] network element[] would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B) (emphasis added). US West contends that AT&T and MCI have failed to show such impairment will result if they don't have access to the dark fiber. Again, I disagree.

The Eighth Circuit Court of Appeals has explicitly approved of the FCC's interpretation of the impairment requirement. See

IUB, 120 F.3d at 812. Accordingly, AT&T and MCI need only show that the quality of service they can offer would decline or the cost of providing the service would rise as a result of their inability to gain access to the dark fiber. See id. The Board found that the evidence in the record satisfied this standard. See Board's Final Arbitration Decision on Remand, at 11-12. I do not find this conclusion to be arbitrary and capricious.

Finally, US West's argument that providing access to dark fiber will detrimentally effect its ability to provide service, or that it is competitively unfair, is irrelevant to the court's review under the Act. In passing the Act, Congress contemplated the effect of requiring ILECs to share network elements and decided that the benefits to competition such a requirement provides outweighs any potential harm to ILECs. Indeed, the Act does not provide an "out-clause" for ILECs to avoid the unbundling requirements if such unbundling will detrimentally affect their business. Dark fiber should be treated no differently than any other element in this regard. See US West Comm., Inc. v. AT&T Comm. of the Pacific Northwest, Inc., 1998 WL 897025, at *13-14 (noting that US West's argument is a recurrent theme that is inherent in the Act's underlying scheme which forces an ILEC to let competitors use the ILEC's own infrastructure to compete against it).

For the aforementioned reasons, the Board's decision to require US West to make dark fiber available on an unbundled basis will not be disturbed.

Count VI: Contract Provisions that Exceed Board Authority

Section 252(b)(4)(A) states that the Board "shall limit its consideration [in any arbitration under the Act] to the issues set forth in the petition [for arbitration] and the response, if any." Section 252(b)(4)(C) provides that the Board must resolve each such open issue "by imposing appropriate conditions as required to implement subsection (c) of [section 252] upon the parties to the agreement." Section 252(c) establishes that in resolving by arbitration any of the open issues and in imposing conditions upon the parties to an agreement, the Board must: (1)

ensure compliance with section 251 of the Act and its corresponding FCC regulations; (2) establish rates pursuant to section 252(d); and (3) provide a schedule for the implementation of the terms and conditions of the agreement. US West interprets these provisions as placing significant restrictions on the Board's authority to impose conditions on the parties to the Agreements. First, US West contends section 252(b)(4)(A) limits the Board's authority to resolving open or disputed issues raised by the parties in the petition or response. Second, US West argues that the Board is only authorized to impose obligations which further one of the three objectives specified in section 252(c).[10] In other words, US West argues that the Act does not directly authorize the Board to impose any requirement that is not expressly provided for in the Act or state law. Thus, US West contends that the Board exceeded its authority under the Act by including several provisions in the Agreements which are not specifically authorized or required by the Act or state law. I will discuss, in turn, the Board's authority to adopt each challenged provision.

Calling Card Number Portability

US West challenges the Board's authority to require US West to provide calling card number portability. Section 8.4.3 of Attachment 2 to the Agreements provides that a customer changing local service providers must be allowed to choose whether his or her calling card will remain with the former provider or will be transferred to the new provider. In any event, under this provision, "the customer may request the calling card number remain unchanged." US West contends the later requirement is unauthorized under the Act.

Section 251(b)(2) of the Act requires all local exchange carriers to provide "number portability" in accordance with requirements prescribed by the FCC. As defined by the Act,

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[10] Both parties also recognize that the Act authorizes the Board, in its review of any agreement, to establish or enforce state law.

number portability refers to the ability of customers to retain, "at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." See 47 U.S.C. § 153(30). US West contends that number portability, as defined by section 153(30), does not include calling card number portability. The Board appears to acknowledge that section 251 does not require calling card number portability when it argues that section 251 doesn't prohibit such portability either. See Board's Final Brief Before Remand, at 17. AT&T and MCI contend calling card numbers constitute "telecommunications numbers" and are therefore covered by section 251(b)(2). I agree with US West and disagree with AT&T and MCI. Neither 47 U.S.C. § 215(b)(2) nor 47 C.F.R. § 52, subpart C, dealing with number portability, apply to calling card numbers. The plain language of both sections requires the portability of each user's particular telephone number. Neither section, however, mentions, much less requires, the portability of calling card numbers. Moreover, no party cites any state law requiring calling card portability.

The issue is, therefore, whether the absence of such an explicit requirement in the Act precludes the Board from requiring US West to provide calling card portability. I conclude that it does. The Board argues that if US West can prohibit calling card number portability, it has a tool which provides an unfair disincentive for certain customers to change local carriers. The Board fails to cite, however, any evidence in the record supporting the existence or the magnitude of such a disincentive. MCI contends it introduced evidence in the arbitration proceedings that telephone calling card number portability can be as important to certain customers as local number portability. Like the Board, however, MCI fails to cite any evidence in the record supporting this contention. Rather, MCI merely cites argument by counsel made in its Exception to Preliminary Arbitration Decision. Such argument by counsel, which did not cite to any supporting evidence in the record, see Defendants' Appendix at 2453, does not constitute evidence either

before the Board or before this court. Thus, I conclude that the Board erred in requiring US West to provide calling card number portability when such a requirement was neither mandated by the Act, nor supported by any evidence in the record. Accordingly, the Board is directed to modify section 8.4.2 of Attachment 2 in accordance with this decision.[11]

Requiring US West to Resell Enhanced and Deregulated Services

Section 251(c)(4) of the Act provides that ILECs have the duty to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." US West contends that the Agreements unlawfully require US West to provide an enhanced and deregulated service, i.e., voice mail, for resale, see Agreements, Attachment 2, § 6.7, even though such services are not controlled by section 251(c)(4). This claim is comprised of two distinct arguments: (1) voice mail is a deregulated service and deregulated services are not controlled by section 251(c)(4), and (2) voice mail is an enhanced service and enhanced services are not covered by section 251(c)(4). I will address each argument in turn.

US West's argument that deregulated telecommunication services are not controlled by section 251(c)(4) is without merit. See US West Comm., Inc. v. MFS Intelenet, Inc., 1998 WL 350588, at *4 (deferring to state commission's finding that unregulated and deregulated services are "telecommunications services" that must be made available for resale). The FCC has determined that under section 251(c)(4) ILECs must establish a wholesale rate for each retail service that: (1) meets the definition of a telecommunications service, and (2) is provided at retail to subscribers who are not telecommunications carriers.

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[11] AT&T and MCI argue in the alternative that calling card number portability is a just, reasonable, and nondiscriminatory condition of interconnection under section 251(C)(2)(D). I find this argument to be without merit.

See First Report and Order, at ¶ 871. Nothing in this explanation limits the coverage of the resale provision to regulated telecommunications services. Ignoring this explanation by the FCC and the plain language of the Act, US West cites paragraph 872 of the FCC's First Report and Order for the proposition that ILECs need only provide services for resale if those services are tariffed. Paragraph 872 does not, however, establish a limit on which services must be made available for resale, but rather, establishes a means for determining which services will generally satisfy the two elements discussed in paragraph 871, without prescribing a list of those services. In other words, services which satisfy the two prong test articulated in paragraph 871 must still be made available for resale even though they may not appear on the ILEC's list of retail tariffs. Even if paragraph 872 establishes a limit on which services must be made available for resale, US West has failed to cite any deregulated telecommunications service which the Agreements require it to resell. Although US West refers to voice mail as being deregulated and thus unlawfully made available for resale, the Board contends, and US West did not disagree in its reply, that voice mail has not officially been deregulated and in fact remains a retail service offered through US West's Iowa tariffs. Accordingly, I do not find section 6.7 of Attachment 2 to be unlawful or arbitrary and capricious based upon US West's deregulation argument.

US West finds success, however, in its enhanced services argument. US West argues that the Act requires US West to provide only "telecommunications services" for resale, not "information services." See 47 U.S.C. § 251(c)(4); see also 47 U.S.C. § 153(20) (defining information services); 47 U.S.C. § 153(46) (defining telecommunication services). US West also contends that enhanced services are information services, and not telecommunication services. Finally, US West contends that voice mail is an enhanced service. Thus, US West argues that the Board lacked authority under section 251(c)(4) to require US West to make its voice mail service, an enhanced service, available to the CLECs for resale. The FCC has recently accepted a similar

argument *en toto*. In the FCC's Opinion and Order, In re Application of BellSouth Corp. et al. for Provision of In-Region, Interlata Services in Louisiana, CC No. 98-121 (Oct. 13, 1998), the FCC was asked to determine whether the Bell companies had satisfied the requirements of 47 U.S.C. § 271(c)(2)(B)(xiv). That provision required the Bell companies to make telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3). The FCC found this requirement satisfied even though BellSouth refused to offer voice mail and other voice messaging services for resale at wholesale rates. In so holding, the FCC reasoned:

> [Section 271(c)(2)(B)(xiv)] requires "telecommunications services," as defined by the 1996 Act, to be made available at wholesale rates. * * * [V]oice mail and voice messaging services are information services, not telecommunications services, and, thus, are not subject to this * * * provision. Prior to the enactment of the 1996 Act, the Commission classified voice messaging services as "enhanced" services. More recently, the Commission has determined that the definition of "information services" under the 1996 Act includes those services previously classified as "enhanced services" and that "information services" are not also "telecommunications services" because the two definitions under the 1996 Act are mutually exclusive. Accordingly, voice messaging services are not subject to the resale provision of [section 271(c)(2)(B)(xiv)] because they are not telecommunications services.

See FCC's Memorandum Opinion and Order, at ¶ 314 (footnotes omitted). This analysis by the FCC suggests that the Board does not have authority under section 251(c)(4) to force US West to sell its voice mail services to the CLECs at wholesale rates. The CLECs cite no law to contrary. Accordingly, I find the FCC's analysis persuasive and section 6.7 of Attachment 2 of the Agreements is remanded to the Board to be modified according to this decision.

Imposing Obligations on US West Dex

US West also challenges the Board's authority to impose contractual obligations and requirements on US West DEX, a separate corporate entity from US West, and an entity which is neither a telecommunications carrier under the Act nor a party to

the arbitration proceedings. See MCI Telecomm. Corp. v. US West Comm., Inc., No. C97-1508R, slip op. at 24-26 (concluding that state commission had no authority to force US West to regulate DEX). I do not reach the merits of this challenge for two reasons. First, if, as US West alleges, it is a separate entity from US West DEX, US West does not have standing to assert the rights of US West DEX. Because US West has failed to allege any injury to itself caused by these provisions, it lacks standing to challenge them. See US West Comm. Inc. v. AT&T Corp. of the Pacific Northwest, Inc., 1998 WL 897025, at *15 (concluding US West pleaded itself out of court on this issue because it lacked standing to assert the rights of a third party). Second, at oral argument, the parties indicated that this claim is probably moot because US West DEX and AT&T and MCI have entered, or are in the process of entering, contractual arrangements which will make the Agreements' provisions affecting US West DEX either unnecessary or obsolete. Cf. id. For these reasons, I will dismiss this claim without prejudice.

Imposing Unlawful "Branding" Requirements

The identification of a service or a network element when provided to a customer through the use of trademarks, such as "Thank you for using AT&T," is called branding a service or network element. See MCI Telecomm. v. BellSouth Telecomm., 7 F. Supp. 2d at 683. Section 15.1 of the Agreements provides:

> Services offered by the CLEC that incorporate Network Elements made available to the CLEC pursuant to this Agreement, and Local Services that the CLEC offers for resale, shall, at the CLEC's sole discretion and expense, be branded exclusively as CLEC's services, or otherwise as the CLEC shall determine. In no event shall the ILEC's personnel acting on behalf of the CLEC pursuant to this Agreement provide information to the CLEC's local service customers about the ILEC's products or services. The ILEC shall provide, for the CLEC's review and approval, the methods and procedures, training and approaches to the extent they relate to the CLEC's branding requirements.

US West contends that these branding requirements violate the First Amendment of the United States Constitution by forcing US West to say some things and not say other things all to help MCI

and AT&T competitively.

As an initial matter, it is important to point out that the FCC found branding or unbranding of services and elements to be essential to fair competition under the Act. Both 47 C.F.R. § 51.217(d) and 47 C.F.R. § 51.613(c) establish that the refusal of an ILEC to comply with a CLEC request that the ILEC rebrand or unbrand certain services creates a presumption that the ILEC is unlawfully restricting the CLEC's access to those services. Thus, the Board was acting within the lawful confines of the Act in adopting this provision. See MCI Telecomm. v. BellSouth Telecomm., 7 F. Supp. 2d at 684 (striking agreement provision adopted by state commission which failed to require ILEC to leave behind materials branded with CLEC's trademark when servicing a CLEC customer).

US West's constitutional challenges to this branding provision are unpersuasive. First, US West contends it is unconstitutional to require it to "speak" a CLEC's brand-name against its will. A commercial entity, however, may be required to disclose certain information when to require such disclosure is "reasonably related to the State's interest in preventing deception of consumers." See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). The Board's requirement that ILECs inform consumers which local carrier is actually providing the consumer with service easily passes this standard. Moreover, this situation falls far short of the requirements found unconstitutional in Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 13 (1986), where an organization was forced to convey political or social messages with which it disagreed. Second, US West argues that the requirement that US West servicepeople not discuss US West products or services when providing service to a customer of AT&T or MCI is an unconstitutional restriction of speech. This restriction, however, easily passes muster under the four prong test articulated in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980). Assuming the affected speech is protected expression, it was still properly restricted because the restriction directly advances the substantial government

interest in promoting fair competition in the local exchange market, and the restriction is no more extensive than is necessary to serve that interest. US West remains free to sing the praises of its network and services through the full panoply of advertising mediums which do not carry the risk of misrepresentation or unfair competition inherent in the restricted speech. Accordingly, US West's challenges to this provision are unsuccessful.

Imposing Unlawful Indemnification Provisions

Many of the network elements that US West must unbundle under the Agreements consist of intellectual property that US West does not own, but is allowed to use through licensing arrangements with the third-party owners. These licenses do not necessarily grant US West the right to sub-license the technology, and US West often must agree to keep proprietary technical data accompanying the technology confidential. US West contends, however, that section 5 of the Agreements requires US West to indemnify AT&T and MCI for any additional license fees that must be paid to third-party software vendors so that AT&T and MCI may utilize the third-party software currently used by US West in its network. US West argues that these costs are actually a cost of providing interconnection under § 252(d)(1)(A), and that AT&T and MCI should assume that. In other words, US West contends that AT&T and MCI should negotiate their own license agreements with the third party vendors and pay any fees associated with those agreements themselves.

I do not read section 5 of the Agreements as requiring US West to solicit and purchase license agreements or modifications to current license agreements from third parties for the benefit of CLECs. Rather, section 5 (labeled "Indemnification") is a standard, although somewhat verbose, indemnification provision requiring each party to indemnify the other against all types of claims. In addition, the section establishes certain procedures to control the indemnitee/indemnitor relationship. Nothing in this provision discusses who should pay for what intellectual property licensing arrangements. At most, the provision would

require each party to indemnify the other when, and if, a third party seeks to enforce a particular license agreement already in existence. As of this time, however, no third-party intellectual property owner has raised such a claim. Accordingly, US West's argument is premature and the claim will be dismissed without prejudice.

Requiring Unlawful Split of Long Distance Access Charges

Long-distance carriers pay access charges to compensate local exchange carriers for transporting long-distance telephone calls over the local exchange carriers' networks. Section 6.2 of Attachment 7 of the Agreements provides that when a local carrier (i.e., US West) routes or forwards a terminating intrastate long-distance call to a customer's telephone number and that customer subscribes to another local carrier's service (i.e., AT&T or MCI), the local utility routing or forwarding the call shall bill the long-distance carrier the access charge the local utility would bill if it provided local exchange service to the terminating number. The access charge revenue collected from the long-distance carrier is then divided as follows: "(1) The carrier common line charge shall flow through the local utility that serves the customer; and (2) The switching and transport charges shall be divided equally between the local utility that serves the customer and the local utility that routed or forwarded the call." US West argues that this division of the access charges is unfair, because whenever US West routes or forwards a long-distance call to an AT&T or MCI customer, US West will perform virtually all of the work in routing the long-distance traffic to that number. Accordingly, US West contends that AT&T and MCI should receive only the common carrier line charge, and US West should receive the remainder of the access charges to cover its higher costs in routing the call.

US West fails to specify any part of the Act or FCC regulation which is violated by the Board's division of long-distance access charge revenue. Moreover, US West has failed to cite sufficient record evidence indicating that the Board's decision was arbitrary and capricious. Indeed, US West recognizes that the FCC "specifically declined to dictate how the

specific charges must be split." See US West's Opening Brief Before Remand, at 20. Rather, the FCC, in its First Report and Order and Further Notice of Proposed Rulemaking, In re Telephone Number Portability, CC Docket No. 95-116, at ¶ 140 (July 2, 1996), merely concluded that the "overarching principle is that the carriers are to share the access revenues received for a ported call." In the void created by the absence of controlling federal law, the Board properly relied on state law by adopting, verbatim, the language of Iowa Admin. Code r. 199-38.2(1)(e) (1997). Thus, when US West routes or forwards a terminating intrastate call to a competitor's customer, the access charge will be split, under the Agreements, according to applicable State law.[12] Under these circumstances, I cannot conclude that section 6.2 of Attachment 7 is illegal or that the Board acted arbitrarily and capriciously in adopting the provision. See US West Comm, Inc. v. MFS Intelenet, Inc., 1998 WL 350188, at *4 (noting that the methodology employed for sharing access charges is left to the discretion of the state commission).

Unilaterally Extending Terms of Agreements

On remand, the Board modified the term or duration of the Agreements. Prior to remand, the term provision contained in section 1.1 of the Agreements provided:

> When executed by authorized representatives of the ILEC and the CLEC, this Agreement shall become effective as of the Effective Date established by the Utilities Board during the approval process under 47 U.S.C. 252(e)(1), and shall expire three (3) years from the Effective Date, unless renewed by agreement of the parties or terminated earlier in accordance with the provisions of this Agreement.

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[12] US West argues that the Iowa Administrative Code section relied upon by the Board is somehow deficient because it only relates to *intrastate* long-distance access charges, not *interstate* access charges. The challenged provision of the Agreements, however, also relates only to "terminating intrastate long distance call[s]." (Emphasis added). Thus, the Administrative Code section cited by the Board appears exactly on point. Moreover, US West fails to explain why a particular split of access charges for interstate calls should be different than the split of access charges for intrastate calls.

It is undisputed that the Agreements became effective on January 14, 1997, and have remained effective to this day. Accordingly, prior to remand, the Agreements were due to expire on January 14, 2000. Concerned about the effect of the delay caused by the remand on the usefulness of the Agreements, the Board modified section 1.1 to read:

> This Agreement has been effective from January 14, 1997, and the modifications determined by the Utilities Board on remand shall become effective on May 15, 1998. The agreement, as modified, shall expire on May 15, 2001, unless renewed by agreement of the parties or terminated earlier in accordance with the provisions of this Agreement. Provisions in the Agreement requiring an action within a stated period after an "Effective Date," which in the context of the Agreement are affected by the modifications, shall be preformed in accordance with the May 15, 1998, effective date.

US West contends that the extension of the term of the Agreements by over one year is an abuse of the authority granted to the Board under the Act and under this court's remand order. In support of this claim, US West argues that the IUB decision did not affect the term provision, nor did any party request that the Board change the term provision on remand. Thus, US West argues, the Board had no authority to unilaterally change the term of the Agreements.

The Board contends that it extended the term of the Agreements pursuant to this court's direction to "make any appropriate modifications." Moreover, the Board argues, the extension is appropriate, indeed necessary, to prevent the uncounted resources expended on this arbitration and review by the Board, this court, and the parties, from being an academic exercise.

In its remand order, instead of remanding specific provisions for reconsideration in light of the IUB decision, this court simply remanded "the agreements to the Board for review for compliance with Iowa Utilities Board." This court ordered the

Board to "review the agreements, conduct any appropriate proceedings, and make appropriate modifications." On remand, the Board made significant changes to the substantive provisions of the Agreements. I find and conclude that, under all of the circumstances, the extension of the term of the Agreements was a permissible and appropriate modification within the authority of the Board under this court's remand order. Accordingly, the term provision contained in the Agreements will not be disturbed.

Requiring Switched Fractionalized DS1 Service

US West challenges the Board's authority to require US West to provide switched fractionalized DS1 service and local call measuring. Because this issue did not appear on the parties' mutual table outlining pre-remand issues yet to be resolved, it is unclear whether US West intended to abandon the claim. In any event, the briefing on this issue is so minimal and unhelpful that the court is unable to fully understand the exact nature of these "services"[13] and the basis for US West's challenge. To the extent US West suggests the Board had no authority to impose these requirements because US West did not utilize them with its own customers in Iowa or because the Board did not discuss its rationale for adopting these requirements, I find those arguments unpersuasive. Because I cannot conclude that these provisions are unlawful or arbitrary and capricious, these provisions will not be disturbed.

Other Claims

In its Second Amended Complaint, US West alleges that the Board had no authority to require US West to connect the signaling transfer points ("STPs") of AT&T and MCI with the STPs of other carriers. Additionally, US West raises concerns about a provision requiring local measuring capabilities in all of its central offices. Because the merits of these allegations were not addressed in the briefs provided by US West or any other party, I conclude that these claims have been withdrawn.

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[13] I use this term loosely as I am not entirely clear whether these items are services, elements, or none of the above.

Count VII: Violation of Collocation Provision

Physical collocation "enables a requesting telecommunications carrier to * * * [p]lace its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." See 47 C.F.R. § 51.5. Section 251(c)(6) requires US West to provide such collocation of equipment "necessary for interconnection or access to unbundled elements." The FCC has defined the word "necessary" in this content to mean "used or useful," not "indispensable." See FCC's First Report and Order, at ¶ 579. Thus, US West must provide for the collocation of equipment used for the purpose of interconnection or access to unbundled network elements. See id.; see also 47 C.F.R. § 51.323(b) ("An incumbent LEC shall permit the collocation of *any* type of equipment used for interconnection or access to unbundled network elements." (emphasis added)). In Attachment 4 of the Agreements, section 2.2.5(a) provides that "[t]he CLEC may collocate the amount and type of equipment it deems necessary in its collocated space for purposes of interconnection with the ILEC's network or access to the ILEC's unbundled network elements, including but not limited to * * * remote switch modules." US West contends remote switching modules ("RSMs") are not transmission equipment and not necessary for interconnection or access to unbundled elements. Thus, US West argues, this provision requires US West to provide access to its physical property in excess of the requirements of the Act.

RSMs generally take calls from the incumbent's system and, when necessary, route them to the new entrant's switch, which in turn routes them for delivery. See MCI Telecomm. Corp. v. Bell Atlantic Virginia, Inc., No. 3:97CV629, slip op. at 18 (E.D. Va. July 1, 1998). The RSM can also switch calls directly to its destination if the terminating caller is served by the same end office in which the RSM is located. Id. The FCC has not included RSMs in its non-exhaustive list of "equipment used for interconnection and access to unbundled network elements." See 42 C.F.R. § 323(b)(1-2). Indeed, the FCC specifically noted that "[n]othing in this section requires an incumbent LEC to permit

collocation of switching equipment or equipment used to provide enhanced services." See 47 C.F.R. § 333(c). On its face, therefore, it would appear that the Board contravened the Act by requiring US West to permit collocation of the RSMs.

The issue is blurred somewhat, however, by the fact that RSMs may serve both switching and interconnection functions. As the FCC recognized in its First Report and Order:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect * * * that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

See FCC's First Report and Order, at ¶ 591. Thus, the FCC left it to the Board to decide whether the RSMs are actually used for interconnection, in which case collocation may be required, or whether the RSMs will only be used for switching, in which case US West cannot be forced to permit collocation of the equipment. In making this determination, the burden is on the ILEC to prove that the equipment in question will not be used for interconnection or access to unbundled elements. See 47 C.F.R. § 51.323(b) ("Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements.").

The Board failed to make an explicit finding in either its arbitration decisions before remand or in its arbitration decisions after remand as to the actual use of the RSMs. In its briefing before this court, however, the Board contends that US West did not provide sufficient record evidence to show that RSMs will not be used for interconnection or access to unbundled

elements as required by 47 C.F.R. § 51.323(b). To the contrary, the Board argues, the record evidence suggests that RSMs can be used in connecting local calls and that precluding collocation of RSMs would impair the efficiency of the CLECs' networks. This *post hoc* rationalization is insufficient in light of the law as explained by the FCC and interpreted by the courts.

First, the court is troubled by the Board's failure to make an explicit finding as to the actual use of the RSMs at issue. Those courts which have affirmed similar collocation provisions have done so under an arbitrary and capricious standard of review because the state commissions had made explicit findings that the RSMs would be used for interconnection or access to unbundled network elements. See MCI Telecommunications Corp. v. US West Comm., Inc., No. C97-1508R, slip op. at 11-13 (deferring to state commission's determination "that RSUs [Remote Switching Units] are equipment necessary for interconnection or access to unbundled network elements and that without RSUs CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service."); US West Comm., Inc. v. AT&T Comm. of the Pacific Northwest, Inc., No. C97-1120R, slip op. at 12-14 (W.D. Wash. July 21, 1998) (same). It is unclear whether this court should defer to the Board's *post hoc* justification, contained in its briefs, for the collocation provision, to the same degree that the court defers to findings of fact contained in the Board's arbitration decisions. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (rejecting appellate counsel's *post hoc* rationalizations for agency action; "an agency's action must be upheld, if at all, on the basis articulated by the agency itself"); Deloria v. Department of Housing & Urban Dev., 714 F. Supp. 1532, 1533 (S.D. Iowa 1988) (giving little or no weight to HUD's *post hoc* efforts to justify its decision pursuant to "well-settled rule that agency action must be upheld, if at all, on the basis articulated by the agency itself at time of its determination, and that *post hoc* explanations should not be considered") (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962)). Even if deference to the Board's *post hoc* justifications is

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

MFS INTELENET, INC., et al.,

Defendants.

NO. C97-2[illegible]WD

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action is brought by U S West Communications, Inc. ("US West") pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission (the "WUTC") concerning interconnection between US West and MFS Intelenet, Inc. ("MFS"), an entrant into a local telecommunications market. The defendants are MFS and the WUTC and its commissioners. The Federal Communications Commission ("FCC") has filed a brief amicus curiae.

Pursuant to the Act, entrants into a local telecommunications market may demand the following from an incumbent local exchange

carrier ("LEC"): (1) interconnection with its local network; (2) access to its individual "network elements", such as routers and switches, "at cost"; and (3) at wholesale rights to the servic the incumbent LEC offers its customers at retail. 47 U.S.C. § 251(c)(2)-(4).

On February 8, 1996, MFS requested access negotiations with US West. The Act requires both parties to negotiate in good faith. 47 U.S.C. §§ 251(c)(1), 252(a)(1). When negotiations failed to produce an agreement, MFS requested, and was afforded, arbitration as authorized by the Act. 47 U.S.C. § 252(b). An arbitrator was appointed, held hearings, and issued a decision. On December 9, 1996, the parties submitted an interconnection agreement reflecting the arbitration decision. The WUTC approved the agreement on January 8, 1997. Following that approval, US West brought this action pursuant to 47 U.S.C. § 252(e)(6), which provides:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

All parties have moved for summary judgement. The materials filed, and the arguments of counsel heard on December 4, 1997, have been fully considered. Because there is no genuine issue of material fact for trial, the case may be decided on summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

II. SCOPE AND STANDARD OF REVIEW

While the Act, at section 252(e)(6), authorizes judicial review of "the agreement," review necessarily extends to "the various decisions made by the [state commission] throughout the arbitration period which later became part of the agreement . . . ." GTE South, Inc. v. Morrison, 957 F. Supp. 830, 834 (E.D. Va. 1997).

As to the record to be reviewed, the Supreme Court has held that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963). Moreover, the Act was intended to facilitate the rapid entry of new competitors into local telecommunications markets. See Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (8th Cir. 1997). That intent would be frustrated by the reception of new evidence in the reviewing court. Review is thus limited to the administrative record.

As to the standard of review to be applied, a state agency's interpretations of federal law are reviewed de novo. Mountain Pacific Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997). Chevron deference (see Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984)), is not appropriate where as many as fifty state commissions will be applying the Telecommunications Act. Questions of federal law will be reviewed de novo.

The WUTC's findings of fact are a different matter. Substantial deference should be afforded to a state commission's findings because the Act gives it original jurisdiction in the area of rate-setting. See 47 U.S.C. §252(c)(2). Principles of judicial discretion are strongest where the administrative body has primary jurisdiction over the precise matters the court is asked to decide. See West Coast Truck Lines, Inc. v. Weyerhaeuser Co., 893 F.2d 1016 (9th Cir. 1990).

Iowa Utilities Board v. FCC makes clear that the state commissions have original jurisdiction over the setting of prices, including discretion to choose the methodology for calculating cost, as long as the terms of the Act are not violated. 120 F.3d at 794. The Eighth Circuit rejected an FCC order requiring state commissions to apply so-called TELRIC methodology to determine prices; the FCC may not "preempt any state pricing regulation that would employ a different methodology." Id. at 798, n. 19.

The choice of pricing and cost methodology thus rests with the commission. Its determinations in those respects must be treated as fact findings and reviewed to test whether they are arbitrary and capricious. With that deferential standard, a reviewing court under the Administrative Procedures Act (analogous here) is to consider whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. See City of Carmel-by-the-Sea v. United States Dep't of Transp., 95 F.3d 893, 899 (9th Cir. 1996). The court may not substitute its judgment for that of the agency. Id.

XII. SPECIFIC CLAIMS

The prices set in the agreement approved by the WUTC are interim prices; that is, they are subject to change during the agency's generic price and cost proceeding. It has not been shown that the WUTC used any erroneous interpretation of the Act. As to US West's specific claims:

1. The WUTC's approval of the interim unbundled loop price of $13.37 was not arbitrary or capricious. This price was chosen based on substantial information, including the WUTC's "Fifteenth Supplemental Order", Docket No. UT-950200 (recommended price: $13.38), US West's proposed tariff in another proceeding, Docket No. UT-941464 (maximum proposed price: $19.24), and the FCC's proposed proxy price for Washington ($13.37). See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, Appendix B, CC Docket No. 96-98 (Aug. 8, 1996), 11 FCC Rcd 15499, at ¶¶ 788-794 (hereinafter "FCC Order").

US West argues that the WUTC violated section 252(d)(1) of the Act by referring to a "rate-of-return or other rate based proceeding", i.e. the Fifteenth Supplemental Order. But the Fifteenth Supplemental Order was based not on rates of return but on an incremental cost methodology called TSLRIC. See Arbitrator's Report at 5. This is the type of methodology recommended in the FCC Order at paragraphs 630 and 635.

The company also argues that use of the FCC proxy price was improper in light of Iowa Utilities Board v. FCC, 120 F.3d 753

(8th Cir. 1997). The Eighth Circuit held, however, that the FCC did not have jurisdiction to make rules regarding interconnection prices. The decision did not affect the validity of the underlying methodology used by the FCC, which can still be informative. The WUTC made clear it was "free . . . to disregard those specific requirements" if it chose to, and that it was considering the proxy prices for their underlying methodology.

3. The WUTC did not act arbitrarily or capriciously in rejecting US West's request to impose special charges for construction costs and conditioning. It found that US West had offered no evidence of actual construction costs, or of a proper formula to use, or of how costs should be allocated among customers and competitors. WUTC's Order at 16-17.

3. US West has not shown that the agreement violates the Act by permitting "sham unbundling." The Act contemplates that an entrant may provide service to its customers by combining an LEC's network elements. See § 251(c)(3); Iowa Utility Board, 120 F.3d at 814. MFS is not required to provide any of its own elements in order to engage in rebundling. FCC Order at ¶ 328.

US West argues, nevertheless, that the agreement violates the Act by requiring US West to do the rebundling for MFS. The Iowa Utilities case rejected an FCC rule compelling incumbents to recombine network elements for an entrant (see 120 F.3d at 813; accord to the second Iowa Utilities decision, 1997 WL 658718 (October 14, 1997)), but the reasoning that led to that holding does not apply here. The Eighth Circuit emphasized that compelled

recombination would undermine the difference between wholesale prices for finished service and the "at-cost" price paid for network elements. 120 F.3d at 813. Here, any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between the cost and the wholesale rate for finished service.

4. The WUTC's approval of a wholesale discount of 21% off retail price was not arbitrary or capricious. The agency relied on the FCC's recommended range of 17-25%. See FCC Order at ¶¶ 932-933. US West's proposal was properly rejected as not complying with section 252(d)(3) of the Act, which requires the parties to start with the retail price and deduct costs avoided ("top down" pricing). The WUTC reasonably characterized US West's method as improper "bottom up" pricing, in which expenses are added together to determine a "wholesale" price.

5. The WUTC's finding that the unregulated and deregulated services are "telecommunications services" was not arbitrary or capricious. The agency correctly applied the Act in denying US West's claim that it is not required to sell unregulated or deregulated services. The Act requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail." 47 U.S.C. § 251(c)(4). The definition of telecommunications services is broad. 47 U.S.C. § 153(46).

6. The WUTC's finding that MFS's switches function as tandem switches more than as end office switches was not arbitrary or capricious. The commission determined the cost of call termination accordingly. In doing so, it did not violate the Act when it relied on approximations of costs submitted by MFS; rates need only be based on "reasonable approximations." 47 U.S.C. § 252(d)(2)(A)(ii).

7. The WUTC did not act arbitrarily or capriciously in deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees. The decision was properly based on FCC regulations which exempt ESP providers from paying access charges. See 47 C.F.R. pt. 69.

8. The WUTC did not act arbitrarily or capriciously in choosing MFS's proposed division of "switched access charges" for long distance calls which are delivered to the ported numbers of each company. FCC regulations require carriers to share the switched access revenues received for a ported call. First Report and Order and Further Notice of Proposed Rulemaking, Telephone Number Portability, CC Docket No. 95-116 (July 2, 1996), 11 FCC Rcd 8354, at ¶ 140. The methodology employed for sharing access charges is left to the discretion of the commission.

9. The WUTC did not act arbitrarily or capriciously in approving a cost recovery mechanism for number portability based on the number of active local numbers each company has. The FCC has indicated that it approves portability surcharges computed on

that basis. Id. at ¶¶ 130, 136. It is within a commission's discretion to approve a method based on the FCC's recommendation.

10. The WUTC did not act arbitrarily or capriciously in approving MFS's request for a single interconnection point per LATA. The agency correctly applied the Act when it limited its review to the technical feasibility of the LATA connection approved in the agreement. See 47 U.S.C. § 251(c)(2)(B) and FCC Order at ¶ 209. US West's argument that the WUTC had not considered the cost of minimal LATA connections by MFS was correctly rejected. "A determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5. US West presented no evidence on the issue of technical feasibility of MFS's chosen points of connection.

11. US West's due process claims are without basis. The company has failed to show that any finding of fact was arbitrary and capricious, or that any error of law was committed. Yang v. Shalala, 22 F.3d 213, 217 (9th Cir. 1994), cited by US West, is not controlling because here the arbitrator and the WUTC based their decisions on the evidence submitted by the parties.

In sum, it has not been shown that the WUTC or the arbitrator acted arbitrarily or capriciously, or contrary to law, in making any relevant determination, or that the agreement violates the Act. Accordingly, US West's motion for summary judgment is denied. Defendants' motions for summary judgment are granted except as to the taking claim, discussed below.

IV. US WEST'S TAKING CLAIM

US West claims that the WUTC's approval of the agreement amounts to an unconstitutional taking. A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985). These requirements are not met here, and the taking claim, because it is not ripe, must be dismissed without prejudice.

V. CONCLUSION

For the reasons stated, defendants are awarded summary judgment as to all claims except US West's taking claim, which will be dismissed without prejudice. Judgment will be entered accordingly.

The clerk is directed to send copies of this order to all counsel of record.

Dated: January 6, 1998.

William L. Dwyer
William L. Dwyer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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SOUTHWESTERN BELL TELEPHONE COMPANY	§	
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VS.	§	NO. A-97-CA-108-SS ✓
	§	
PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; ROBERT W. GEE; JUDY WALSH; AT&T COMMUNICATIONS OF THE SOUTHWEST; MCI TELECOMMUNICATIONS CORPORATION; MCIMETRO ACCESS TRANSMISSION SERVICES, INC.; TELEPORT COMMUNICATIONS GROUP, INC.; MFS COMMUNICATIONS COMPANY, INC.; and AMERICAN COMMUNICATIONS SERVICES, INC.	§	
**********	§	
SOUTHWESTER BELL TELEPHONE COMPANY	§	
	§	
VS.	§	NO. A-97-CA-171-SS
	§	
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.; MCI TELECOMMUNICATIONS CORPORATION; PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; ROBERT W. GEE, and JUDY WALSH	§	

ORDER

This suit concerns judicial review of several interconnection agreements entered into between the plaintiff Southwestern Bell Telephone Company ("SWBT") and the corporate defendants AT&T Communications of the Southwest, Inc ("AT&T"); MCIMetro Access Transmission Services, Inc.

and MCI Telecommunications Corporation (collectively, "MCI"); Teleport Communications Group, Inc. ("Teleport"); MFS Communications Company, Inc. ("MFS"); and American Communications Services, Inc. ("American"). These interconnection agreements were arbitrated and approved by the Public Utility Commission ("PUC") pursuant to §§ 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252, Pub. L. No. 104, 110 Stat. 56 (1996) (the "FTA"). Numerous challenges to the interconnection agreements are currently pending before the Court in Consolidated Cause No. A-97-CA-132-SS.

In the two above-styled and numbered causes, SWBT asserts the PUC committed various errors of state law in arbitrating and approving the interconnection agreements. Before the Court are SWBT's Conditional Motions to Remand, as well as the Motions to Dismiss filed by the PUC and the individual Commissioners Wood, Gee, and Walsh; AT&T; MCI; Teleport; and MFS. In the motions to remand, the Court must determine whether the Eleventh Amendment bars the exercise of subject matter jurisdiction in these cases. If subject matter jurisdiction is proper, the Court must then consider whether SWBT's state-law claims are preempted by the FTA, the issue presented in the motions to dismiss.[1]

I.

In its Conditional Motions to Remand, SWBT states that it has no objection to this Court hearing its state-law claims, so long as the Court determines that these claims are not barred by Eleventh Amendment immunity. When Congress clearly conditions state participation in a program

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[1] SWBT's motions to remand are identical in both cases, as are the motions to dismiss filed by the PUC, the Commissioners, and MCI. All of the motions to dismiss, including those filed by AT&T, Teleport, and MFS, seek dismissal on the grounds of federal preemption. MFS merely joins in the PUC's motion to dismiss, while Teleport concurrently asserts that SWBT's state-law claims are preempted by federal law.

or activity upon the State's consent to federal court jurisdiction, a State is deemed to have waived its sovereign immunity when it voluntarily participates in that program or activity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-241, 105 S. Ct. 3142, 3145-47 (1985). It appears every federal court that has considered the issue presented in SWBT's motions to amend has concluded that a State's voluntary participation in the interconnection agreement negotiation, arbitration, and approval process outlined in § 252 of the FTA constitutes a constructive waiver of Eleventh Amendment immunity:

> The overwhelming implication of th[e] statutory structure [of the FTA] is that Congress conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted—but not required—to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court. There is no room for any other reasonable construction of the statute. By participating in the arbitration and approval process, [the state] consented to review of its actions.

US West Comm'n, Inc. v. TCG Seattle, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997) (citations and quotations omitted); *US West Communications, Inc. v. Public Service Comm'n of Utah*, 991 F. Supp. 1299, 1301-1302 (concluding that §§ 252(e)(4)-(6) of the Federal Telecommunications Act, when read together, "evince a clear Congressional intention to condition regulation by a state commission upon review of that commission's actions in federal court");[1] *MCI Telecommunications Corp. v. Bellsouth Telecommunications, Inc.*, No. Civ. A 97-76, 1998 WL 351953, at *1 (E.D. Ken. June 19, 1998); *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, No. 97 C 2225, 97 C 4096, 1998 WL 156678, at *8 (N.D. Ill. March 31, 1998) (unpublished) (citing other unpublished

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[1] Section 252(e)(5) provides that state commissions may participate in the arbitration of interconnection agreements, or they may leave such matters to the Federal Communications Commission ("FCC"). Section 252(e)(6) provides for federal judicial review of interconnection agreements to ensure that such agreements meet the substantive requirements of the FTA, while § 252(e)(4) specifically precludes state court review of interconnection agreements.

cases supporting waiver of Eleventh Amendment immunity). These courts have also found subject matter jurisdiction proper on the basis of *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *See, e.g., US West*, 991 F. Supp. at 1301. The Court agrees that the State of Texas, by participating in the arbitration and approval process, has effectively waived its Eleventh Amendment immunity. Accordingly, jurisdiction is proper in federal court, and SWBT's jurisdictional motions to remand are overruled.

II.

The corporate defendants, the PUC, and the Commissioners move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss SWBT's complaint for failure to state a claim and on the basis of federal preemption. With regard to its argument that the complaint fails to state a claim, the PUC contends it did not apply Texas law in resolving any of the disputed issues in the interconnection agreements; the PUC and remaining defendants therefore argue that there are no valid allegations of state-law error to assert. With regard to preemption, the defendants methodically discuss each state-law claim asserted by SWBT and explain in detail how each claim is preempted by a specific provision of the FTA. As the defendants accurately note, SWBT fails to respond to the majority of these arguments. Instead, SWBT simply observes that other provisions of the FTA preserve issues of state law and argues that the PUC should not have relied exclusively on federal law in arbitrating and approving the interconnection agreements.

A.

Before delving into federal preemption, it is useful to discuss the historical background and procedural posture of these cases. Congress enacted the FTA in 1996 to foster rapid competition in the local telephone service market and to end the monopoly market of incumbent local service carriers ("LECs"). In order to allow new entrants to gain competitive access to the market, FTA §

251(c) mandates that new entrants be permitted (i) to interconnect their facilities with the incumbent LEC's facilities "at any technically feasible point," *see* 47 U.S.C. § 251(c)(2); (ii) to purchase access to functionalities of the incumbent LEC's network on an "unbundled" basis, *see* 47 U.S.C. § 251(c)(3); (iii) to purchase services at wholesale prices, which new entrants can then resell to their own customers at retail value, *see* 47 U.S.C. § 251(c)(4); and (iv) to construct facilities necessary for interconnection on the incumbent LEC's premises ("collocation"), *see* 47 U.S.C. § 251(c)(6).

Section 252(a) implements these provisions by requiring the incumbent LEC—in this case, SWBT—to negotiate interconnection agreements with requesting telecommunications carriers, such as the corporate defendants, who wish to enter the market. If voluntary, private negotiations between the incumbent LEC and new entrants prove unsuccessful, either party may petition the appropriate state commission under § 252(b) to resolve any disputed issues. In these cases, each corporate defendant filed a petition for arbitration; the PUC consolidated the arbitration proceedings and held a three-week hearing in which the Commissioners served as the arbitration panel. The PUC issued an Arbitration Award on November 7, 1996, which resolved various disputes relating to the terms and conditions of interconnection, including the methodology for determining the compensation to which SWBT would be entitled. The PUC based its decisions in the Arbitration Award exclusively on a construction of federal law:

> The Arbitrators find that the following decisions, and the conditions imposed on the parties by these decisions, meet the requirements of FTA96 § 251, and any applicable regulations prescribed by the Federal Communications Commission pursuant to FTA96 § 251. The following decisions establish rates for interconnection, services, and network elements according to the standards set forth in FTA96 § 252(d).
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> * * *
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> At the end of each decision, the Arbitrators have included a reference to (1) the section of FTA96 on which the decision is based . . .

FUC's Motion to Dismiss, Exh. A, Arbitration Award at 6 ("Award"). On December 19, 1996, the PUC issued a separate Order Approving Interconnection Agreement with respect to each respective defendant in which the PUC reiterated that the proposed interconnection agreements, if revised as directed, "complies with the standards of FTA96 § 252." *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest*, Cause No. A-97-CA-014-SS (consolidated with A-97-CA-113-SS), Complaint, Exh. 4A (¶17), Exh. 4B-D (¶ 10).

The FTA permits, but does not require, state commissions to impose state-law requirements when reviewing interconnection agreements. *See* 47 U.S.C. § 253(b),(c) ("Nothing in [§ 253] shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."). In light of this discretionary authority, the PUC elected to implement the FTA and the Public Utility Regulatory Act of 1995, TEX. UTIL. CODE ANN. § 11.001 *et seq.* (Vernon 1998) ("PURA 95") on separate "parallel tracks" to avoid federal preemption issues.[1] *See* PUC's Motion to Dismiss, Exh. B, Order Addressing Certified Issues at 1. Because the PUC resolved disputed issues in the interconnection agreements without reference to PURA 95 or other state law, the defendants argue that SWBT's state-law claims are "fundamentally misconceived."

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[1] Significantly, SWBT has failed to identify any provision of Texas law mandating that state law requirements must apply to interconnection agreements arbitrated pursuant to the FTA. In other words, it is far from clear that the PUC acted unlawfully by limiting the scope of the arbitration proceeding to a determination of whether the interconnection agreements complied with federal law only. Given that state courts are expressly precluded from reviewing interconnection agreements entirely, it appears the PUC acted correctly in reserving state law issues for one bite at the apple and another forum. In any event, it appears that federal judicial review is limited to a determination of whether the interconnection agreement complies with §§ 251 and 252 of the FTA. *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.").

The argument has some intuitive appeal but is ultimately unavailing. Where the FTA and PURA 95 conflict, such that application of PURA 95 to the interconnection agreements would yield a different result, the Constitution dictates that the FTA controls. *See* Part II(D), *infra*. Conversely, where state law is consistent with federal law, there can be no error of state law. However, assuming *arguendo* that it was error for the PUC to restrict the scope of the arbitration proceeding solely to a determination of federal law, it is conceivable that there may be instances in which PURA 95 imposes some requirement, above and beyond that required by the FTA yet which is consistent with the FTA, which would render the interconnection agreements invalid under state law.[6] Fortunately, the Court need not decide these issues today because, as explained below, this Court finds that all of SWBT's state-law claims are, in fact, preempted by federal law.

B.

Federal preemption is rooted in the Supremacy Clause, U.S. Const. art. VI, cl. 2, and requires an examination of congressional intent. *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 3022 (1982); *In re Cajun Electric Power Cooperative, Inc.*, 109 F.3d 248, 253 (5th Cir. 1997). "Congress may either expressly define the extent to which state law is to be preempted by a federal statute or implicitly preempt state law by regulating enough throughout so as to preclude state law from occupying any part of the regulated field." *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996), cert. denied, 117 S. Ct. 1696 (1997); *Cajun Electric*, 109 F.3d at 253 ("Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly

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[6] At this point, these concerns are more hypothetical than real. It is apparent that SWBT asks this Court to apply PURA 95 to the interconnection agreements primarily because the Texas statutory scheme imposes fewer requirements on incumbent LECs and provides significant LECs with far more protection than does the FTA.

achievement of congressional objectives." *Texas Manufactured Housing*, 101 F.3d at 1093. As the Fifth Circuit has explained, state law directly conflicts with federal law when "compliance with both federal and state regulations is a physical impossibility" or when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Cajun Electric*, 109 F.3d at 254.

In this case, there is no question that Congress did not intend to preempt state regulation of telecommunications services entirely. *See* 47 U.S.C. § 601(c) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."). The issue then, is whether specific provisions of the FTA and the FCC's implementing regulations supersede the state-law claims. *See* 47 U.S.C. § 251(d)(3)(B) & (C) ("In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . is consistent with the requirements of this section, and . . . does not substantially prevent implementation of the requirements of this section and the purposes of this part."); *see also Cajun Electric*, 109 F.3d at 254 ("Federal regulations have no less preemptive effect than federal statutes."). In its most recent petition, SWBT asserts seventeen "categories" of claims relating to various aspects of the interconnection agreements. The Court will consider each series of claims seriatim.

In its first series of claims (Petition ¶¶ 45-51), SWBT asserts the Interconnection Agreements violate certain pricing requirements of PURA 95 because they do not allow recovery of actual costs for interconnection, collocation, and unbundled elements. As the defendants point out, the FTA

prescribes specific, mandatory pricing standards for interconnection, see 47 U.S.C. §§ 251(c)(2), 252(d)(1), access to unbundled elements, see 47 U.S.C. §§ 251(c)(3), 252(d)(1), and resale, see 47 U.S.C. §§ 251(c)(4), 252(d)(3). For instance, the FTA mandates that the rate for interconnection and network elements must be based on the cost of providing interconnection or network elements. See 47 U.S.C. § 252(d)(1)(A) ("Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section . . . shall be . . . based on the cost . . . of providing the interconnection or network element . . ."). The PUC applied these federal pricing standards in arbitrating the interconnection agreements. Award ¶¶ 82-83. Whether the PUC's determinations ultimately conform to federal standards remains to be seen; however, in light of Congress's comprehensive pricing scheme, the only way the Court can review the legality of rates imposed in the interconnection agreements is to review their compliance with the FTA. If, as SWBT appears to contend, the application of PURA 95 or any other state law would have resulted in the imposition of rates different than those obtained by applying federal law, those rates would be in direct conflict with—and therefore superseded by—the FTA.

In its second series of claims (Petition ¶¶ 52-54), SWBT contends the PUC's aggregate resale discount of 21.6% is erroneous and excessive in light of a maximum wholesale discount rate of 17% under PURA 95. Section 252(d)(3) of the FTA mandates that wholesale rates be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested," less an amount attributable to certain "marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Applying this federal pricing standard and taking the foregoing factors

into account, the PUC determined that a resale discount of 21.5% was appropriate. Award ¶¶ 43-46. There can be no clearer example of federal preemption than in this instance.

In its third series of claims (Petition ¶¶ 55-56), SWBT challenges the PUC's decision to allow new carriers to combine network elements in order to provide telecommunications service. Award ¶ 1. SWBT fails to cite any support for its claim that this alleged "them-combining" violates Texas law, and, in fact, the combining of unbundled elements is specifically required by the FTA. *See* 47 U.S.C. § 251(c)(3) ("An incumbent local exchange carrier shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."); 47 C.F.R. § 51.315 (same). Therefore, any state law prohibiting the combination of unbundled elements would be preempted.

In its fourth series of claims (Petition ¶¶ 57-59), SWBT contends that its interconnection agreements substantially reduce its revenues from access charges contrary to PURA 95. SWBT alleges PURA 95 "prohibits reductions in [SWBT's] switched access rates during the four-year period of incentive regulation, during which [SWBT's] rates for basic local exchange services cannot be increased." Petition ¶ 58. However, it is clear the PUC was following federal pricing mandates when it determined that interconnection rates be based on costs. *See* 47 U.S.C. § 252(d)(1)(A); Award ¶ 57 ("Interconnection rates, including transport and termination, must be based on costs. . . . The Arbitrators therefore conclude that SWBT shall not impose access charges on LSPs [local service providers] that purchase unbundled network elements, over and above the rates that LSPs have already paid for the unbundled network elements . . ."). Any state law provision which would require that rates be based on something other than, or in addition to, costs would directly conflict with the FTA and would therefore be rendered a nullity.

In its fifth series of claims (Petition ¶¶ 60-66), SWBT asserts that interconnection agreements impose unbundling, interconnection, collocation, and other operational requirements "beyond any standards stated in PURA 95." Petition ¶ 60. For instance, SWBT contests the PUC's determination that it must provide "dark fiber" and "subloop elements" to new entrants on an unbundled basis. Petition ¶¶ 61-63; Award ¶¶ 4, 6. Under the FTA, LECs are required to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . ." 47 U.S.C. § 251(c)(3). As the defendants correctly argue, the PUC's determination that it was technically feasible to require SWBT to provide dark fiber and subloop elements on an unbundled basis was a straightforward application of § 251(c)(3). The PURA 95 provision relied upon by SWBT in support of its position, however, requires consideration of "the public interest and competitive merits of further unbundling." *See* TEX. UTIL. CODE ANN. § 60.022. If application of this state law standard would require a different conclusion than that reached under the FTA, then this provision of state law would clearly be preempted by § 253(c)(3).

SWBT further challenges various rulings the PUC made regarding collocation, *see* Petition ¶¶ 65-66, and claims that the PUC unlawfully ordered SWBT to develop and implement electronic interfaces to facilitate communication between SWBT's network and the networks of new entrants, *see* Petition ¶ 64. In imposing these implementation requirements, the PUC expressly relied upon §§ 253(c)(3) and (6) of the FTA, which requires incumbent LECs to provide (i) nondiscriminatory access to unbundled network elements and (ii) physical collocation of equipment necessary for interconnection or access to unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *See* Award ¶ 10, 13, 25. With respect to SWBT's claims regarding electronic interfaces, FCC regulations require that incumbent LECs "provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning,

violation of § 60.022(b) of PURA 95, which, as indicated above, requires consideration of the public interest and competitive merits of further unbundling. Once again, while the merits of the PUC's determinations may be challenged under federal law standards, any contrary conclusions derived by applying conflicting state law standards would be preempted. Finally, SWBT complains that it must include competitors' entries in its white pages in violation of state law. *See* Petition ¶ 66. This claim is entirely foreclosed by the FTA, which specifically mandates that incumbent LECs permit all competing providers to have, among other things, nondiscriminatory access to directory listings. *See* 47 U.S.C. § 251(b)(3).

In its sixth series of claims (Petition ¶¶ 69-75), SWBT contends the PUC made numerous procedural errors in conducting the arbitration proceeding. For instance, SWBT claims it was denied proper notice and an opportunity to be heard because the PUC declined to re-open the arbitration proceeding following the Eighth Circuit's stay of certain FCC regulations, which regulations the PUC had previously declared were controlling. SWBT's claims of procedural errors under Texas law are made only in the most conclusory and vague fashion:

> To the extent the PUC Orders are based on principles of Texas law, the arbitration proceedings that led to the PUC Orders can only apply Texas law principles reflected in existing laws, rules and decisions, which have previously been validly adopted and determined through required procedures. To the contrary, the PUC Orders contain and apply principles, policies and decisions which either violate Texas law, or have not been validly adopted though proceedings required by Texas law.

Petition ¶ 71. As explained earlier, the PUC expressly stated that it did not apply Texas law to the arbitration proceedings in reviewing and approving the interconnection agreement. Moreover, SWBT wholly fails to identify which state laws were violated by the arbitration procedures adopted

by the PUC. Finally, the FTA generally sets forth the procedure by which arbitrations shall be conducted: both parties may file petitions with the appropriate state commission, *see* 47 U.S.C. §§ 252(b)(2) & (3), and the state commission must resolve disputed issues in a manner consistent with the FTA and relevant FCC regulations, *see* 47 U.S.C. § 252(c)(2), and within certain time limitations established under the federal act, *see* 47 U.S.C. § 252(b). SWBT's vague and conclusory assertions either fail to state a claim or are preempted by the FTA.

In its seventh and final series of claims (Petition ¶¶ 76-79), SWBT asserts the PUC's orders approving the interconnection agreements constitute unlawful "takings" in violation of the Texas Constitution. Specifically, SWBT challenges the PUC's rulings concerning unbundled elements, dark fiber, and electronic interfaces and claims that the compensation provided to SWBT under the interconnection agreements is inadequate. Again, the PUC made these determinations by applying the relevant FTA provisions on unbundling, *see* 47 U.S.C. § 251(c)(3), and pricing standards, *see* 47 U.S.C. § 252(d). Therefore, the Texas Constitution's prohibition against takings is nullified by federal law which expressly authorized the PUC's actions in this regard.

In conclusion, the Court finds that the PUC did not conduct the arbitration proceedings or resolve any disputed issues in the interconnection agreements with reference to Texas law. Further, the Court finds that each purported state-law claim in Cause No. A-97-CA-108-SS and Cause No. A-97-CA-171-SS is preempted by the FTA. For all of the foregoing reasons, the Court enters the following orders:

IT IS ORDERED that SWBT's Conditional Motion to Remand [#24] in Cause No. A-97-CA-108-SS is OVERRULED AND DENIED;

IT IS FURTHER ORDERED that the Motion to Consolidate filed by the PUC and the PUC Commissioners [#27] in Cause No. A-97-CA-108-SS is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that the Motions to Dismiss filed by AT&T [#43], the PUC and the PUC Commissioners [#45], MCI [#46], Teleport [#48], and MCI [#50] in Cause No. A-97-CA-108-SS are GRANTED;

IT IS FURTHER ORDERED that SWBT's Motion for Status Conference [#64] in Cause No. A-97-CA-108-SS is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that SWBT's Conditional Motion to Remand [#8] in Cause No. A-97-CA-171-SS is OVERRULED AND DENIED;

IT IS FURTHER ORDERED that the Motions to Dismiss filed by the PUC and the PUC Commissioners [#15] and MCI [#19] in Cause No. A-97-CA-171-SS are GRANTED;

IT IS FURTHER ORDERED that SWBT's Motion to Exceed Page Limitation [#21] in Cause No. A-97-CA-171-SS is GRANTED; and

IT IS FINALLY ORDERED that SWBT's Motion for Status Conference [#29] in Cause No. A-97-CA-171-SS is DISMISSED AS MOOT.

SIGNED on this 7th day of August 1998.

UNITED STATES DISTRICT JUDGE

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED
NOV 20 1996
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE	)	
INTERCONNECTION CONTRACT	)	DOCKET NO. _____
NEGOTIATIONS BETWEEN AT&T	)	
COMMUNICATIONS OF THE MIDWEST,	)	
INC., AND U S WEST COMMUNICATIONS,	)	
INC., PURSUANT TO 47 U.S.C. SECTION 252	)	

DIRECT TESTIMONY

OF

ROGER RIGGERT

ON BEHALF OF

AT&T COMMUNICATIONS OF THE

MIDWEST, INC.

November 20, 1996

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are "used" or "useful" for interconnection or access to unbundled network elements, it makes it clear that U S WEST has the burden of proof on such issues. FCC Order, ¶¶ 580-581.

Q. **WHAT DOES THE ACT AND FCC ORDER REQUIRE REGARDING THE PREMISES AT WHICH U S WEST MUST PERMIT COLLOCATION?**

A. Pursuant to Section 251(c)(6) of the Act, collocation must be provided "at the premises of the local exchange carrier." According to the FCC, the term "premises" includes the LEC's "central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities . . . [and] any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures." FCC Order, ¶ 573.

Q. **YOU MENTIONED THAT U S WEST DESIRES TO RESTRICT THE TYPE OF EQUIPMENT AT&T COLLOCATES ON U S WEST PREMISES. IS THERE A SPECIFIC TYPE OF EQUIPMENT AT&T WISHES TO COLLOCATE WHICH U S WEST WILL NOT ALLOW?**

A. Yes. Recognizing that U S WEST must permit collocation of any equipment "used" or "useful" for interconnection or access to unbundled elements, AT&T seeks collocation of remote switching modules ("RSMs"). RSMs are necessary for interconnection or access to unbundled elements. In fact, AT&T intends to

use RSMs to interconnect with unbundled loops purchased from U S WEST. In addition, AT&T will "use" the full capabilities of RSMs installed in collocated space, including their limited switching capabilities.

Finally, the collocation of RSMs will enable AT&T to (1) avoid the serious quality problems, including echo, delay and noise, associated with back-to-back placement of subscriber loop carriers ("SLCs"); (2) ensure that maintenance and testing capabilities and associated restoration and dispatch times, are at parity with U S WEST; (3) complete 911/E911 calls and intra-community calls even if the facility is accidentally severed; and (4) efficiently complete calls between two AT&T customers who are both served by unbundled local loops provided through the same U S WEST central office, thereby alleviating U S WEST concerns regarding increases in traffic that must be handled by U S WEST switches as a result of the introduction of competition.

Q. **HAS U S WEST PRESENTED EVIDENCE THAT THE COLLOCATION OF RSMS IS NOT TECHNICALLY FEASIBLE?**

A. No. U S WEST's primary objection is that the collocation of RSMs will require a significant amount of U S WEST space. However, the space required to support, for example, 512 customers, with an RSM is only thirty inches wide and six feet high. By way of comparison, the SLC 2000 requires two to three times that amount of space to support the same number of customers.

BEFORE THE

PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

IN THE MATTER OF AT&T'S PETITION FOR ARBITRATION WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.	)	DOCKET NO. TC96-184

DIRECT TESTIMONY OF

JON LEHNER

JANUARY 17, 1997

D. OTHER RESALE ISSUES

1. Construction Charges

Q. WHEN USWEST CONSTRUCTS FACILITIES TO SERVE A RESELLER, SHOULD CONSTRUCTION CHARGES APPLY?

A. Yes. If USWEST must construct new facilities to service a reseller, USWEST must be permitted to charge the reseller for construction. The cost should be paid in full by the reseller before the facilities are constructed. The Commission should reject AT&T's self-serving position that it should not be responsible for such charges.[90]

Q. WHY IS IT CRITICAL THAT USWEST BE PERMITTED TO ASSESS CONSTRUCTION CHARGES?

A. In most cases, it is likely that resale requests will be received in areas where facilities are available. However, in some cases a reseller may request new facilities to an area not currently served or an area with limited existing facilities. If USWEST is to build facilities to such an area, it must be assured that it will be able to recover the costs of construction. The only way to assure the recovery of these costs is through the assessment of construction charges to the reseller. This

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[90] Direct testimony of Arleen Starr on behalf of AT&T, page 8.

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[90] Direct testimony of Arleen Starr on behalf of AT&T, page 8.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INTERCONNECTION CONTRACT NEGOTIATIONS BETWEEN AT&T COMMUNICATIONS OF THE MIDWEST, INC., AND US WEST COMMUNICATIONS, INC., PURSUANT TO 47 U.S.C. SECTION 252	))))))	DOCKET NO. _____

DIRECT TESTIMONY OF

ARLENE M. STARR

ON BEHALF OF

AT&T COMMUNICATIONS

OF THE MIDWEST, INC.

NOVEMBER 20, 1996

B. CUSTOMER CHANGE CHARGE.

Q. WHAT CUSTOMER CHANGE CHARGE IS AT&T RECOMMENDING BE ESTABLISHED?

A. AT&T is recommending that the retail charge of $5.00 currently applicable to a customer's change of primary interexchange carrier ("PIC") be utilized for customers desiring to change local service providers, until a cost-based charge is developed for this state.

X. CONCLUSION

Q. DO YOU HAVE ANY CONCLUSIONS WITH RESPECT TO THE PRICING ISSUES IN THIS PROCEEDING?

A. Yes. In order for viable entry by AT&T into the local service market within U S WEST's South Dakota service area, several pricing requirements must be met. These requirements have appeared as common themes throughout this testimony. Included are prices that:

- are consistent with the requirements of the Act and the FCC Order,
- impose the same economic impact on AT&T that U S WEST incurs when it uses the same facilities,
- do not discriminate against AT&T vis-à-vis U S WEST,

State Commissions Setting Aggregate Avoided Cost Discount

Joint Complaint of AT&T Communications of New York, et al., against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service, Opinion and Order Determining Wholesale Discount at 75-76 (N.Y. PSC Nov. 27, 1996).

Petition for Arbitration of an Interconnection Agreement Between MCIMetro Access Transmission Services, Inc. and U S WEST Northwest Inc., Docket No. UT-960338, Arbitrator's Report and Decision at 20 (Wash. Utils. & Transp. Comm'n Jan. 3, 1997).

Petition of MCI Telecomm. Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio, Case No. 96-888-TP-ARB, Arbitration Award at 23 (Ohio P.U.C. Jan. 9, 1997), aff'g, Arbitration Panel Report at 32 (Ohio P.U.C. Dec. 2, 1997).

Interconnection Contract Negotiations Between AT&T Communications of the Midwest, Inc. and US West Communications Inc. Pursuant to 47 U.S.C. Section 252, TC96-184, Findings of Fact and Conclusions of Law; Order and Notice of Entry of Order at 24 (S.D. Pub. Util. Comm'n Mar. 20, 1997).

Arbitration by the Public Service Commission of an Interconnection Agreement between U S WEST Communications Inc., and AT&T Communications of the Mountain States, Inc., under 47 USC § 252, Arbitration Order at 19 (Wyo. PSC April 23, 1996).

Interconnection Agreement Negotiations between AT&T Communications of the South Central States, Inc. and BellSouth Telecomm., Inc., Case No. 96-482, Order at 6 (Ky. Pub. Serv. Comm'n Feb. 6, 1997).

AT&T Petition for Interconnection with Michigan Bell Telephone, Notice of Decision of Arbitration Panel at 23, Case Nos. U-11151, U-11152 (Mich. PSC Oct. 28, 1996); see Petition of AT&T Communications of Michigan for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan, Order Approving Agreement Adopted by Arbitration at 11 (Mich. PSC Nov. 26, 1996).

warranted, the Board's findings articulated for the first time in its briefs are insufficient to support the provision requiring the collocation of RSMs. The Board merely states that RSMs "can be used in connecting local calls" and that the preclusion of collocation of RSMs "apparently would interfere with" CLECs achieving efficient networks. These *post hoc* findings fall short of the requirement that the Board determine whether or not the RSMs would actually be used for interconnection or access to unbundled network elements. See MCI Telecomm. Corp. v. Pacific Bell, C97-0670 SI, slip op. at 24-27 (N.D. Cal. Sep. 29, 1998) (remanding collocation issue to state commission where arbitrator and reviewing commission failed to determine, as required by ¶ 581 of the FCC's First Report and Order, whether the RSMs were actually going to be used for interconnection or access to unbundled elements). Accordingly, the court remands this narrow issue to the Board for a determination whether the RSMs will actually be used for interconnection or access to unbundled network elements.[14]

Count VIII: Miscellaneous Revisions for Coherence and Consistency

In Count VIII, US West alleges that numerous provisions remain in the Agreements which require modification to bring greater coherence and consistency to the Agreements and, ultimately, to make the Agreements comport with the Act. The requested modifications will be discussed in turn.

First, US West contends the Board failed on remand to eliminate all provisions that referenced combined network elements. All such provisions should be eliminated, US West

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[14] In addition to violating the Act, US West contends that placing RSMs in US West's central offices enables AT&T and MCI to avoid paying US West access charges for interstate and intrastate switched access. Although it is doubtful that such use of the RSMs will make collocation illegal under the Act, the Board may be well advised to consider this risk in making its collocation determinations on remand. Cf. US West Comm., Inc. v. AT&T Comm. of the Pacific Northwest, Inc., No. 97-1575-JE, 1998 WL 897025, at *14 (deferring to state commission's decision that danger that CLECs would misuse collocated RSUs to avoid payment of switched access charges was minimal in that instance).

argues, to comport with the Board's ruling in its Final Arbitration Decision on Remand, and the Eighth Circuit Court of Appeals' ruling in IUB, that US West cannot be required to provide AT&T and MCI with network elements on a combined basis. I find this argument to be without merit. The Agreements allow US West to chose to provide CLECs network elements on a combined basis. The provisions that US West challenge in this Count merely give US West the option of providing elements on a combined basis or articulate standards, procedures, or enforcement mechanisms to be utilized if US West voluntarily chooses to provide network elements on a combined basis. In other words, nothing in these provisions requires US West to provide elements on a combined basis in contravention of the Act or the Board's decision. Moreover, the provisions do not create inconsistencies or incoherence so severe as to make the Agreements incomprehensible or illegal. Accordingly, these provisions need not be modified by this court; rather, any future confusion caused by these provisions can properly be handled at an enforcement proceeding.

Second, US West contends that the Board failed to delete references to design, engineering, tracking, and management functions in section 9.3 of the Agreements. In its decision after remand, the Board modified the Agreements to comport with the FCC's description of the Operations Support Systems (OSS) network element, See 47 C.F.R. § 51.319(f), and provided that US West must provide access to the five OSS functions contained in that description — preordering, ordering, provisioning, repair and maintenance, and billing. See Board's Final Arbitration Decision on Remand, at 29. The Board also ordered that if functionality from other support systems, such as design and tracking, is necessary to provide the five functions, US West must provide that functionality. See id. Despite these rulings, section 9.3 of the Agreements after remand requires US West to provide access to "all operations support systems used to support and used in the preordering, ordering, provisioning, design, engineering, maintenance, repair, tracking, management, billing associated directly or indirectly with unbundled Network Elements

and ancillary services." US West argues that this provision should be modified to reflect the Board's decision to limit the CLECs' access to the five OSS functions identified by the FCC as being part of the OSS network element. Accordingly US West requests that this court delete references to design, engineering, tracking, and management in section 9.3. The Board admits that it inadvertently failed to modify the list of OSS functions in section 9.3 and does not contest US West's proposed modification. Although ordering the proposed modification does not appear to be required by the Act or the court's decision in IUB, it would defy logic to refuse to modify the provision to comport with the Board's express intent. Accordingly, the Board is ordered to modify section 9.3 to comport with its Final Arbitration Decision on Remand.

Third, US West contends that an inconsistency in the Bona Fide Request ("BFR") process provisions should be corrected by this court. US West argues that the Board appropriately deleted from Attachment 3, § 12.1.1, the provision that made the BFR process available "for reaching agreement on the unbundling of the SCPs and the AIN triggers," but inadvertently left similar provisions intact in section 37.10 of the Agreements and section 12.8.1 of Attachment 3. The Board responds that its actual mistake was in deleting the BFR process from Attachment 3, § 12.1.1. The Board does not seek modification of that provision, however, because the other provisions cited by US West satisfactorily make the BFR process available for unbundling SCPs and the AIN triggers. Nothing in the Board's Final Arbitration Decision on Remand suggests an intent one way or the other concerning the use of the BFR process in unbundling the SCPs and the AIN triggers. Moreover, neither party cites to any law or regulation controlling this issue. I refuse to modify the Agreements simply for the sake of consistency, especially where the inconsistency is not contrary to the Board's express intent or the Act. US West's motion for a modification of the BFR provisions to provide for greater consistency within the Agreements is denied. Such a claim can be more appropriately dealt with at an enforcement proceeding, if and when the

inconsistency causes enforcement difficulties.

Fourth, US West contends that section 2.1.1 of Attachment 4 is incorrect in that it provides that if US West constructs facilities to meet a CLEC's request for collocated space, "the CLEC shall pay reasonable construction costs in accordance with the BFR process contained herein." US West argues that construction costs should be determined in accordance with the Special Construction Process, not pursuant to the BFR process. The Board contends that it is unaware of any reference in the Agreements to a "Special Construction Process" for collocation space construction and that no change to the Agreements is warranted. Not only does the court not find a provision in the Agreements discussing a "Special Construction Process," but the court cannot locate a section 2.1.1 in Attachment 4. Section 2.2.1 of Attachment 4 does, however, contain the disputed language referring to the BFR process. US West has failed to cite any law, or even a principled rationale based on consistency within the Agreements, supporting its proposed modification. Suffice it to say, I find this argument to be without merit.

Fifth, US West challenges section 37.14.4 of the Agreements which requires US West to inform AT&T and MCI, within 48 hours of receiving a request for a network element, whether the requested element is proprietary or non-proprietary in nature. US West contends that this time frame should be modified to reflect the 30-day period set forth in section 37.14.5 for providing the CLECs a preliminary analysis of a request. In essence, US West seeks to have this provision modified because it is dissatisfied with the burden the short time frame places on US West's operations. US West does not cite any record evidence supporting the severity of the burden placed on US West by this provision, nor does it cite any law supporting its proposed modification. It is not this court's responsibility to reconsider every dispute over a particular provision merely because one party is dissatisfied with the final result adopted by the Board. The provision adopted by the Board is neither illegal nor arbitrary and capricious. Accordingly, this claim is without merit.

Finally, US West contends that the language of section 9.7.1

of Attachment 2 should be modified to conform with the "more accurate" language contained in section 5.2.11 of Attachment 5. Section 9.7.3 provides that "[t]he ILEC shall provide the CLEC with real time notification from any data available in the ILEC OSS regarding whether a customer has a previous pending or held order." Section 5.2.11 provides that "[t]he ILEC shall provide the CLEC with real time notification regarding the order status if the service request should go held." US West fails to explain why the later language is "more accurate" or to provide a legal basis for the proposed modification. The court refuses to modify language in the Agreements merely because two provisions (one dealing with service functions supporting resale of services and the other dealing with ordering interfaces) in two separate Attachments are not identical.

Count IX: Failure to Resolve Issues

In Count IX of its Second Amended Complaint US West alleges that by failing to consider individually each contract provision it imposed, rather than accepting a "last best offer," the Board did not resolve the issues within the meaning of the Act. No party expanded on this allegation, and I find it to be without merit.

Count X: Denial of Due Process

US West alleges that the Board deprived US West of its property without due process of law[15] in violation of the Fourteenth Amendment by: (1) denying US West the right to present evidence and challenge opposing parties; (2) denying US West the right to create an adequate record; (3) approving contract

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[15] As an initial matter, I seriously doubt that this review proceeding is the proper venue to hear US West's constitutional challenges raised in Counts X and XI. Such challenges are more appropriately raised in a separate original action subject to the usual rules of civil procedure. This court is merely sitting in an appellate capacity reviewing agency action for compliance with federal law. These constitutional challenges which have not been heard by a tribunal before, are not appropriate subject matter for this type of review. Because no other court has seen fit to refuse to hear these types of claims during a section 252(e)(6) proceeding, however, and for the sake of judicial economy, I will address the merits of the claims.

provisions without support in the arbitration hearing; and (4) approving contract provisions without any reasoning, explanation or findings of fact.[16] I find these allegations to be without merit.

First, I find the procedures followed by the Board in the initial arbitration provided US West with due process and allowed the parties to create an adequate record. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). The procedures followed by the Board satisfied this minimal standard. US West filed extensive pre-hearing direct testimony and was allowed to conduct direct and cross examination of witnesses during a two-day hearing. The Constitution requires nothing more in this case. See MCIMetro Access Transmission Servs., Inc. v. GTE Northwest, Inc., No. C97-742WD, slip op. at 11 (finding due process satisfied where GTE submitted 1200 pages of testimony and exhibits, filed a lengthy post-arbitration brief, and participated in two days of hearings before the arbitrator).

US West contends that the Board's decisions were not based on evidence in the record. The record created during the arbitration proceedings in this case is extensive. US West's blanket allegation that the Board's decisions were not supported by that record is without merit. If the Board made errors in this case, they were factual or legal errors and do not rise to the level of a due process violation. See US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., No. C97-1320R, slip op. at 24 (rejecting similar due process claim raised by US West); MCI Telecommunications Corp. v. US West Communications, Inc., No. C97-1508R, slip op. at

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[16] US West challenges predominantly, if not exclusively, the procedures followed during the initial arbitration. US West does not challenge the procedures followed by the Board during subsequent pricing hearings and hearings after the remand. Accordingly, this court's opinion is limited to those procedures followed during the initial arbitration proceedings.

26-27 (same).

Finally, US West contends that the Board denied it due process by failing to provide sufficient written fact findings and conclusions of law. In support of this contention, US West argues that the Board violated its own procedural rules by failing to give an independent reason for adopting each clause in the Agreements. This argument is unpersuasive. It would be unreasonable to conclude that the Administrative Procedure Act ("APA"), if it applies at all, requires the Board to comment on every clause in the adopted Agreements. Cf. 47 C.F.R. § 51.807(d)(1) (authorizing "entire package final offer arbitration" for arbitrations performed by the FCC pursuant to § 252(e)(5) of the Act). Even if that APA can be so interpreted, I am not convinced that every violation of it amounts to a constitutional violation. Finally, US West has failed to point to any specific provision which it has been unable to challenge in this review proceeding because the Board did not provide a written rationale explaining its decision to adopt that provision. For these reasons, I reject US West's due process challenge.

Count XI: Takings

In this Count, US West claims that certain provisions of the Agreements effectuate a taking of US West's private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This claim is inappropriate at this time for several reasons.

First, it is unclear whether the takings claim is even ripe for review. As the Eighth Circuit pointed out in IUB, "[w]hen a state or the federal government provides an adequate procedure for obtaining compensation, a takings claim is not ripe for review until the litigant has used the procedure and has been denied just compensation." See IUB, 120 F.3d at 818 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985)). The Act provides such an adequate procedure in the form of arbitration proceedings before the Board. See id. at 818. The record is unclear as to whether the Board has issued final pricing decisions or in what specific

respects US West has been denied fair compensation as a result of any such decision. See US West's Response to MCI's Motion for Leave to Amend Answer (July 29, 1998) (contending MCI's proposed claims challenging pricing decisions are not ripe for review because the Board has not yet approved US West's tariffs). Accordingly, it is unclear whether US West's takings claim is ripe for review by this court. Cf. US West Comm., Inc. v. MFS Intelenet, Inc., 1998 WL 350588, at *5 (citing Williamson Planning Comm'n, 473 U.S. at 186-97) (dismissing similar claim by US West as not ripe because plaintiff failed to show that final decision had been rendered by the state regarding the property, and plaintiff had failed to attempt to obtain just compensation for property in state court); GTE South Inc. v. Morrison, 6 F. Supp.2d at 530 (dismissing similar takings claim where agency had only set interim rates and plaintiff had not sought just compensation through existing statutory mechanisms).

Moreover, this claim is untimely because no action allegedly giving rise to a taking has yet occurred. No evidence has been presented to show that MCI or AT&T has purchased any elements or services pursuant to the Agreements, nor are there any assurances that they ever will. Until a CLEC actually exercises any of its rights under its agreement with US West, US West cannot show that its property is being taken without just compensation. See US West Comm., Inc. v. TCG Oregon, No. 97-858-JE, 1998 WL 897023, at *10 (D. Or. Dec. 10, 1998) (granting summary judgment for defendants where US West failed to present evidence that a taking had yet occurred); US West Comm., Inc. v. AT&T Comm. of the Pacific Northwest, Inc., 1998 WL 897025, at *18-19 (same). As to any costs US West incurs as a result of requirements in the Agreements directing US West to construct new facilities or modify current facilities, US West has failed to show that it has taken such action and not been reasonably compensated either through the Board's approval of rate increases or through recovery mechanisms in the Agreements. Accordingly, there is no evidence that a taking without just compensation has actually occurred.

Because US West's takings claim is not timely, the claim

will be dismissed without prejudice.

MCI's Claims

MCI challenges two policy decisions of the Board regarding costing methodology contained in the "Final Decision and Order" issued on April 23, 1998, which culminated from a separate pricing proceeding identified as Docket No. RPU-96-3.[17] While issues concerning specific rates may not be ripe because the Board has not yet approved all compliance tariffs, the two policy issues raised by MCI were addressed in a conclusive manner in the Board's Final Decision and Order and are appropriate for consideration by the court at this time.

MCI's Count I: Failure to Set Cost-Based Interconnection and Access to Unbundled Network Element Rates

Sections 251(c)(3) and 251(c)(2) of the Act mandate that rates for access to unbundled network elements and interconnection, respectively, be "just, reasonable, and nondiscriminatory." See 47 U.S.C. §§ 251(c)(2-3). Section 252(d)(1) provides that the just and reasonable rate for interconnection and access to network elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." See 47 U.S.C. § 252(d)(1). Originally, the FCC mandated that state commissions employ the "total element long-run incremental cost" ("TELRIC") method to calculate "the costs that an incumbent LEC incurs in making its facilities available to competitors." See IUB, 120 F.3d at 791 (citing 47 C.F.R. §§ 51.503, 51.505 (1996)). Under the FCC's method, the state commission would then determine the price that an incumbent LEC may charge its competitors based on the TELRIC-driven cost figure. See id. If the state commission failed to use the

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[17] On June 12, 1998, the Board granted rehearing in part and made some clarifying corrections to its Final Decision and Order. Unless otherwise indicated, any reference to the Board's Final Decision and Order will be made in light of any corrections made to that Order pursuant to its June 12 ruling.

TELRIC method to calculate costs, then the FCC provided proxy rates which the state commission was obliged to apply. See id.

In IUB, however, the Eighth Circuit vacated the FCC's pricing rules because the court concluded that the FCC exceeded its jurisdiction in promulgating them. See id. at 793-800 (vacating 47 C.F.R. §§ 51.501-51.515, inclusive, except for 51.515(b)). In so doing, the court reaffirmed that the Act "grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." Id. at 796.

In accordance with the authority explicitly conferred under the Act, the Board established a separate pricing docket, received extensive evidence and argument on the pricing issues, and delivered its findings and conclusions in a Final Decision and Order dated April 23, 1998. In that decision, the Board considered what pricing principle should control for unbundled network elements and which pricing model or tool should be utilized to calculate the appropriate costs for individual UNEs. See Board's Final Decision and Order, at 1. The Board also determined the inputs, in light of the pricing principle adopted, to be plugged into the model to compute unbundled network element prices. See id.

During the procedures leading to the Board's decision, US West did not urge the Board to adopt a particular pricing principle, but rather focused on the end-result of prices to be established and urged the Board to adopt pricing methodology producing rates that reflect the actual costs it will incur to provide interconnection and access to UNEs. See Board's Final Decision and Order, at 12-13. AT&T and MCI requested that the Board follow the FCC in adopting the TELRIC methodology or pricing principle. See id. at 13. Under the TELRIC approach, "costs" are the costs a carrier would incur to replace its whole network, except for wire centers, based on use of the most efficient technology deployed in current wire center locations, plus a reasonable profit. See id. The Board rejected the TELRIC methodology because it incorporated two assumptions that are difficult to reconcile with the cost based pricing

requirements of the Act — an assumption that US West's existing technology will be instantaneously replaced, and an assumption that the existing technology will be replaced by an optimal network that will never exist and which will produce services the current network cannot provide. See id. Since the Board concluded that neither of these things will ever happen, it decided that costs based on the TELRIC methodology or pricing principle are unlikely to be actual costs US West will incur to provide interconnection and access to UNEs. See id. The Board then turned to an incremental cost approach which was not based on the aforementioned assumptions and which the Board concluded would most closely represent the actual costs US West will incur in providing access to UNEs in the near future. See id. at 14-15.

Incremental costs are the "additional per-unit costs a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of that good or service." Id. at 14 "Incremental costs are forward-looking in the sense that these costs are incurred as the output level changes by a given increment." Id. Because the Board found the record void of a true incremental cost study, it applied four principles to the cost evidence in the docket to implement an incremental cost pricing methodology. See id. at 15. Among those principles were the ideas that "the most realistic assumptions and inputs reflecting US West's costs will be used to the extent these inputs can be verified in the record," and that "prices for unbundled network elements will reflect the actual costs caused by providing the element." Id. at 15.

To estimate or calculate the cost of UNEs, the parties proposed competing models or pricing tools. US West relied principally on the Regional Loop Cost Analysis Program (RLCAP) to estimate loop costs for Iowa, while AT&T and MCI relied principally on the Hatfield Model version 3.1, which estimates the costs of UNEs using TELRIC principles developed by the FCC. See id. at 15-16. Although the Board concluded that the models or programs produced costing results that were reasonably close to one another when similar inputs were used, the Board adopted

the Hatfield Model.[18] See id. at 16-17 (citing the model's openness and availability for public scrutiny; its constant review, revisions and improvements; and its ability to produce specific subloop element prices). Although the Board recognized that the Hatfield Model was designed to operate using TELRIC principles, which the Board had rejected, it concluded that the Hatfield Model could effectively be used to estimate incremental costs "by the use of assumptions and inputs which realistically reflect US West's costs and existing local exchange network." Id. at 17-18.

Because the RLCAP and Hatfield Models produced similar cost estimates given identical inputs, and because the Hatfield Model was designed to operate using inputs based on the hypothetical assumptions underlying the TELRIC approach, the parties agreed that the fighting issue before the Board was the input values that should be used in running the Hatfield model or program. See id. at 16-17. As the Board explained before, and as the Board brought to fruition through its input decisions, the Board adopted and submitted inputs which realistically reflected US West's costs and existing local exchange network. It is in this respect that MCI contends the Board erred.[19]

MCI argues that in order to mimic the rates existing in a competitive market, prices must be forward looking and based upon the efficient reproduction cost of the network elements in question — based on what it would cost an efficient competitor to reproduce them in today's market. While purporting to follow a forward-looking methodology by adopting the Hatfield Model, MCI

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[18] The Board did make some "mechanical corrections" to the Hatfield Model that are not relevant to the issue at hand. See id. at 18-19.

[19] Although the more theoretical aspect of MCI's claim is a challenge to the Board's adoption of the incremental cost methodology instead of the TELRIC methodology, I believe the practical corollary to that argument, and the real fighting issue in this claim, is a challenge to the nature of the inputs entered into the Hatfield Model. By affirming the inputs adopted by the Board, I implicitly accept the Board's adoption of the incremental cost methodology.

contends the Board made critical changes to the model which converted it into an embedded cost methodology which will compensate US West for the inefficiencies and poor design of its current network. Specifically, MCI argues that the Board violated the principles of a forward-looking methodology by requiring that rates be calculated based on "inputs which realistically reflect US West's costs and existing local exchange network." These inputs, MCI alleges, allow US West to be compensated for every inefficient choice of technology or design in its present network even if no rational competitor entering the market today would make such choices. By accepting these "historic, embedded inputs," MCI argues, the Board defeated the purpose of choosing a forward-looking method to begin with and violated the requirements of the Act that the prices approximate those of a competitive market and not be based on a rate of return on US West's investment.

I find MCI's arguments unpersuasive. The Board calculated network element rates pursuant to the Hatfield model, the cost model that MCI itself presented and advocated as forward-looking. The Board merely replaced some of the inputs to the model that clearly were based on unrealistic technological and cost assumptions with inputs that reflected US West's current network and network expenses in order to determine what it would actually cost to build new elements or provide new access in the future. See AT&T Comm. of the South Central States, Inc. v. BellSouth Telecomm., Inc., 20 F. Supp. 2d 1097, 1101 (E.D. Ky. 1998) (finding commission within its discretion when it rejected costs studies that were based on a perfectly efficient hypothetical model; relying instead on studies that were based on BellSouth's preexisting network); cf. Southwestern Bell Telephone Co. v. AT&T Comm. of the Southwest, Inc., 1998 WL 657717, at *10-13 (accepting state commission's TELRIC approach which took into account ILEC's existing network routes, wire center location, and "Texas-specific" data, because such a TELRIC methodology better "reflects the costs that the ILEC expects to incur in making network elements available to new entrants"). Thus, the Board was able to approximate what incremental costs US West will

actually incur in expanding its current network to provide network elements to the CLECs in the foreseeable future. The Board made adjustments to the Hatfield model inputs because it decided that to do so would provide a more accurate approximation of US West's costs associated with "providing the interconnection or network element"; which is what the Act expressly requires. See AT&T Comm. of the South Central States, Inc. v. BellSouth Telecomm., Inc., 20 F. Supp. 2d at 1101 (rejecting reliance on any particular methodology or model so long as cost study is based on touchstone of Act -- "the actual costs an ILEC will incur in providing network elements"); see also MCI Telecomm. Corp. v. US West Comm., Inc., No. C97-1503R, slip op. at 16-18 (concluding that while conflicting interpretations of evidence concerning inputs existed, none of arbitrator's choices were arbitrary and capricious); US West Comm, Inc. v. AT&T Comm. of the Pacific Northwest, Inc., No. C97-1320R, slip op. at 17-19 (same).

Moreover, even assuming that section 252(d)(1)(A) is best read as not allowing recovery of historical costs, see GTE South Inc. v. Morrison, 6 F. Supp. 2d at 529-30, MCI has failed to show that the decisions made by the Board will result in US West recovering such costs. The court in Morrison accepted AT&T's definition of historical costs as the incumbent's level of expenditures for each element, as exemplified in the incumbent's accounting books, less depreciation. See GTE South Inc. v. Morrison, 6 F. Supp. 2d at 528, n.8. The approach adopted by the Board does not allow US West to recover any such historic costs sunk into a particular network element. Rather, the Board's approach looks at US West's current network and determines what it will actually cost to incrementally expand that network, or provide competitors access to that network. As the Board correctly points out, the difference between incremental costs and historical costs is the difference between the cost of adding a new loop to an existing system and what it previously cost to provide an old loop. The Board's determinations that its incremental approach is forward-looking, and that its inputs are most likely to establish rates based on the ILECs actual costs of

providing access without allowing recovery for historical costs, are not arbitrary and capricious.[20] See Southwestern Bell Telephone Co. v. AT&T Comm. of the Southwest, Inc., 1998 WL 657717, at *10-13 (concluding that because the TELRIC methodology adopted by the commission took into account the ILEC's existing infrastructure, as opposed to an idealized one, the rates most closely and fairly represent the incremental costs the ILEC actually expects to incur in making network elements available to competing carriers); MCI Telecommunications Corp. v. Pacific Bell, No. C 97-0670 SI, slip op. at 12-13 (rejecting MCI's argument that "simply because the pricing methodology was based upon an analysis of Pacific Bell's actual network as opposed to a hypothetical network using the most current and efficient technology, that the methodology is not necessarily 'forward looking.'"). Accordingly, I find that the Board considered the relevant factors and made reasonable decisions applying the pricing standards in 47 U.S.C. § 252(d)(1) to the competitive situation in the Iowa local exchange market.

MCI's Count II: De-averaging Unbundled Network Element Rates

The Act requires that rates for unbundled network elements be "just, reasonable, and nondiscriminatory" and "based on the cost * * * of providing the * * * network element." See 47 U.S.C. §§ 251(c)(3); 252(d)(1). In its Final Decision and Order, the Board adopted rates for unbundled elements that are based on the statewide average cost of providing each particular element. MCI argues that these averaged rates fail to reflect the geographic cost differences of providing network elements and

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[20] At least one court has suggested that it should review *de novo* whether the Act requires the state commissions to use a particular type of cost model when pricing unbundled network elements. See MCI Telecommun. Corp. v. Pacific Bell, No. C 97-0670 SI, slip op. at 6. The Pacific Bell court went on to conclude that the Act requires state commissions to use forward-looking pricing methodologies and precludes the recovery of historical costs. See id. at 7. Even under a more searching review, I find the Board's pricing approach consistent with the Act because the Board adopted a forward-looking incremental cost methodology and did not allow for recovery of historical costs.

violate sections 251 and 252 because they are neither cost-based nor just, reasonable, and nondiscriminatory. In order to properly reflect the cost of providing the elements, MCI contends, the prices charged by incumbent local exchange carriers for unbundled network elements must be "geographically de-averaged."

It is undisputed that the cost of providing network elements varies widely depending on population density and related factors. The Board's willingness to charge CLECs statewide average rates ensures that in most instances the CLECs will be paying prices for unbundled network elements that do not precisely correspond to the cost of providing those elements to particular customers. MCI contends that this result violates section 252(d)(1) because the price the CLEC must pay to lease network elements in different areas of the state will not reflect the cost of providing service in those areas. I disagree.

Nothing in the Act requires the Board to adopt de-averaged rates. The only limitations on setting rates in section 252(d)(1) are that rates must be "just and reasonable," based upon costs as opposed to a "rate-of-return" or other "rate-based" proceedings, and "nondiscriminatory." Although the FCC had required zonal averaging with each state being separated into at lest three zones, see 47 C.F.R. § 51.507(f), this command was vacated by the Eighth Circuit in IUB. See IUB, 120 F.3d at 800 & n.21. In IUB, the court held that the state commissions have the exclusive authority to set rates under the Act. See id. I conclude that the rates adopted by the Board in this case satisfy the requirements of the Act; in particular, they are properly based on costs, albeit a statewide average cost. See MCI Telecomm. Corp. v. US West Comm., Inc., No. C97-1508R, slip op. at 32-34 (upholding state commission's decision to base cost of network elements on statewide average); MCI Metro Access Transmission Services, Inc. v. GTE Northwest, No. C97-742WD, slip op. at 5 (same); MCI Telecommunications Corp. v. US West Comm., Inc., 1998 WL 897026, at *1-2 (same).

MCI contends that the Board adopted the statewide average rates for improper reasons, not as a proxy for "actual costs."

Specifically, MCI contends that the Board adopted the averaged rates to provide a source of implicit subsidies perpetuating universal service. MCI challenges this purpose for two reasons. First, MCI contends that the Act does not grant the Board discretion to depart from the core requirement of cost-based rates in pursuit of other policy objectives. Accordingly, the Board cannot average rates in order to provide hidden subsidies to high-cost area consumers or to avoid an arbitrage if whole rates for unbundled elements were de-averaged before retail rates were. Second, MCI contends that perpetuation of implicit subsidies through averaged network element costs is in direct contradiction of 47 U.S.C. § 254 where Congress provided for an alternative system of explicit subsidies to replace the system of implicit subsidies currently funding universal service. See 47 U.S.C. § 254(e).

I conclude that it is unnecessary to wade into the debate over whether competitive pricing should precede universal service reform or vice versa. See Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 536-28 (8th Cir. 1998) (recognizing the implicit tension between the goals "of moving toward cost-based rates and protecting universal service," and upholding as reasonable both a FCC regulation moving access charges towards cost before the explicit universal service support mechanism is fully operational, and a FCC regulation allowing implicit subsidies to temporarily continue in SLC rates pending universal service reform). My duty under section 252(e)(6) is to ensure that the Agreements and the Board's other decisions meet the requirements of sections 251 and 252. This provision does not suggest that I am obliged or authorized to check the Board's decisions or the Agreements for compliance with section 254. See Southwestern Bell Tel. Co. v. AT&T Comm. of the Southwest, Inc., 1998 WL 657717, at *12 (noting that issues of universal service have no place in proceedings under § 252(e)(6) because the court's review of the interconnection agreements is confined to a determination of their compliance with §§ 251 and 252 of the Act, not § 254). Because I have found the statewide averaged cost approach adopted by the Board to satisfy the requirements of sections 251 and 252,

this provision will not be disturbed.[21]

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[21] Even assuming section 252(e)(6) authorizes the district court to consider the interconnection agreement's compliance with section 254, I do not find the Board's approach unlawful. As counsel for MCI admitted during oral arguments, even under the five-zone approach MCI advocates, the cost of providing elements for particular customers will be both above and below the average cost adopted for each zone. Until a per-customer cost approach is feasible and adopted, some lower-cost customers will be implicitly subsidizing higher-cost customers. Although the Board's approach leans markedly more towards preserving universal service at the expense of more precise cost-based rates than does the approach advocated by MCI, I do not believe that the Board's approach is unreasonable or unlawful. Rather, I conclude the Board made a carefully reasoned decision that is consistent with the pro-competitive purposes of sections 251 and 252, while respecting the need for universal service as recognized in section 254. See MCI Telecomm. Corp. v. US West Comm., Inc., 1998 WL 897026, at *1-2 (accepting use of averaged loop prices as reasonable considering: we do not yet have a true free market; tracking costs to each separate house is not yet feasible, thereby requiring some level of averaging; and the new funding sources for Universal Service are not yet established). In so concluding, I do not suggest that the Board's approach is the most reasonable, especially in light of the changes to the universal service structure section 254 will usher in only months after the Board's adoption of the statewide average approach.

ORDERS

IT IS ORDERED that the following provisions be remanded to the Board for action consistent with this opinion: Section 37 (regarding who pays for escorts); Section 37.12 (regarding future compliance with national standards); Section 8.4.3 of Attachment 2 (regarding calling card portability); Section 6.7 of Attachment 2 (regarding voice mail as an enhanced service); Section 2.2.5(a) of Attachment 4 (regarding the collocation of RSMs); and Section 9.3 (regarding OSS functions).

IT IS ORDERED that the US West DEX claim in Count VI, the indemnification claim in Count VI, and the takings claim in Count XI be dismissed without prejudice.

IT IS ORDERED that all other provisions of the Agreements and decisions of the Board that were challenged by the parties are affirmed.

Dated this 25th day of January, 1999.

HAROLD D. VIETOR
Senior U.S. District Judge

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January 5, 2000

VIA UPS OVERNIGHT

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and two copies of the U S WEST Communications, Inc.'s Motion for Extension of Time to File Reply Brief together with a proposed Order Granting U S WEST Communications, Inc.'s Motion for Extension of Time to File Reply Brief. As I indicated in the motion, I have contacted opposing counsel and they have no objection to the motion. Please forward the proposed Order to Judge Battey for his review and signature. Please file stamp the second copy and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Wilka

TAW/vjj
Enclosure
cc: Rolayne Ailts Wiest
John Lovald
Maria Arias Chapleau
Michael D. Warden
David Zaring
Alex Duarte
Michael Thompson
Bonnie Ulrich
Larry Toll
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DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Civ. No. 99-5024

Plaintiff,

v.

U S WEST COMMUNICATIONS, INC.'S MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Plaintiff U S WEST Communications, Inc. ("U S WEST") moves this Court for a one-week extension to file its reply brief (extending the deadline from January 12, 2000 until January 19, 2000). U S WEST has contacted opposing counsel regarding its request for an extension and is authorized to report that there are no objections.

Dated this 5th day of January, 2000

Respectfully submitted,

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Tamara A. Wilka
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Attorneys for U S WEST Communications, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

ORDER GRANTING U S WEST COMMUNICATIONS, INC.'S MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF

Plaintiff having moved for a one-week extension of the deadline to file its reply brief and no parties opposing the request,

Now, therefore,

IT IS ORDERED that the deadline for Plaintiff's reply brief is extended until January 19, 1999.

Dated this _____ day of January, 2000.

BY THE COURT:

_____
The Honorable Richard H. Battey
United States Senior District Judge

ATTEST:
Joseph Haas, Clerk

By: _____
Deputy

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UTILITIES COMMISSION

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January 10, 2000

Clerk of United States District Court
515 9th Street, #302
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VIA UPS OVERNIGHT

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed the original and two copies of the Motion for Admission Pro Hac Vice and Order to be forwarded to Judge Battey for his signature and filing. I am also enclosing a check for $100 for the filing fee.

Please file stamp the second copy and return to me in the enclosed stamped, self-addressed envelope.

Thank you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL &
GREENFIELD, L.L.P.

COPY

Tamara A. Wilka

TAW/vjj
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cc: Rolayne Ailts Wiest
John Lovald
Maria Arias Chapleau
Michael D. Warden
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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSIO

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

Civ. No. 99-5024

MOTION FOR ADMISSION PRO HAC VICE AND ORDER

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendant

STATEMENT OF MOVANT

I, Tamara A. Wilka, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice KARA M. SACILOTTO, an attorney admitted to practice in the District of the District of Columbia, but not admitted to the Bar of the Court, who will be counsel for Plaintiff U S WEST Communications, Inc. in the case listed above.

I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: January 10, 2000 By: Tamara A. Wilka

STATEMENT OF PROPOSED ADMITTEE

I, KARA M. SACILOTTO, am currently a member in good standing of the U.S. District Court for the District of Columbia, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: January 6, 2000

Kara M. Sacilotto
Type/Print Name

Signature

PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600

ORDER

It is hereby

ORDERED that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Court, Room 220, Federal Building, 400 South Phillips Avenue, Sioux Falls, SD 57104-6851.

Dated this _____ day of _____, 2000.

BY THE COURT:

_____
United States District Judge

ATTEST:

Joseph Haas, Clerk
U.S. District Court

By: _____
Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

JAN 13 2000

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

vs.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota; AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

CIV99-5024

ORDER TO ADMIT NONRESIDENT ATTORNEY

RECEIVED

JAN 19 2000

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Tamara A. Wilka has filed a motion to allow nonresident attorney, Kara M. Sacilotto, to participate in all proceedings in the above case. The Court has reviewed the file and good cause appearing, it is hereby

ORDERED that Kara M. Sacilotto is hereby admitted to participate in all proceedings of this case pursuant to the Rules of Practice of the United States District Court of the District of South Dakota.

IT IS FURTHER ORDERED that Kara M. Sacilotto shall pay to the Clerk of this Court the sum of $100 as his admission fee.

Dated January 13, 2000.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY

The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 1/13/00

CLERK

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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (United States Dist. Ct. - Western Div. Civ. No. 99-5024)
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST's Reply Brief on the Merits of its Affirmative Claims, Motion for Stay and Certificate of Service. This is intended as service upon you by mail.

Sincerely yours,
BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Tamara A. Wilka

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January 19, 2000

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UTILITIES COMMISSION

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of the U S WEST's Reply Brief on the Merits of its Affirmative Claims, Motion for Stay and Certificate of Service. I am also enclosing copies of unpublished decisions which are cited in the brief for the Court's convenience. Please note that this is a Western Division case so copies of the pleadings as well as the unpublished decisions should be forwarded to Judge Battey.

I have also enclosed a second copy of the cover page and the motion. Please file stamp and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL &
GREENFIELD, L.L.P.

Tamara A. Wilka

TAW/vjj
Enclosure
cc: Rolayne Ailts Wiest
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

JAMES A. BURG, et al.,

Defendants.

CIV NO. 99-5024

U S WEST'S REPLY BRIEF ON THE MERITS OF ITS AFFIRMATIVE CLAIMS

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I. INTRODUCTION

U S WEST Communications, Inc. ("U S WEST"), submits this Reply Brief on its claims arising out of the Findings of Fact and Conclusions of Law and Order in Docket No. TC96-184 dated March 20, 1997 (the "Decision"), Order Approving Interconnection Agreement dated March 4, 1999 (the "Order"), Order on Reconsideration; Notice of Entry of Order dated August 13, 1997 (the "Reconsideration Order"), Second Arbitration Order; Notice of Entry of Order dated December 30, 1998 (the "Second Arbitration Order"), and the Interconnection Agreement approved by the Public Utilities Commission of South Dakota ("Commission") on March 4, 1999 (the "Agreement") between U S WEST and AT&T Communications of the Midwest, Inc. ("AT&T"). These orders and the Agreement were attached as Exhibits A through E, respectively, to U S WEST's Complaint.[1]

In its Complaint, U S WEST appealed a variety of decisions arising from the Commission's arbitration decisions. In its Responsive Brief, the Commission contends that where the Agreement does not contain language implementing a particular issue decided in the Commission's arbitration orders, this Court should not review the issue because the Agreement, not the Commission's decisions, is the controlling document between the parties. Commission Brief at 9; see also Order at 3-4, Exh. B to U S WEST Complaint ("The Commission makes no findings on whether the Interconnection Agreement accurately reflects the Commission's arbitrated decisions since the parties were free to further negotiate and decide upon mutually agreeable terms and conditions that differed from the Commission's arbitrated decisions"). Accordingly, the Commission agrees that U S WEST need not comply with the Commission's orders to the extent the Agreement does not incorporate them.

---

[1] In this brief, citations to materials in the record will include the number assigned to the document by the Commission in the Chronological Index filed with the Court. Citations to pages of pre-filed testimony are to the internal page citations, not the Bate stamped page number. The Commission's March 20, 1997 Decision is No. 123 in the record, the August 13, 1997 Reconsideration Order is No. 134, the December 30, 1998 Second Arbitration Order is No. 174, the March 4, 1999 Order is No. 179, and the Agreement is included in No. 176.

In light of the Commission's clarification of its position, U S WEST will narrow its challenge to the Agreement. As set forth more fully below, because the Commission and AT&T agree that U S WEST has no obligation to combine elements for AT&T under the Agreement, and that the Agreement does not require U S WEST to provide interconnection at the "highest level" of quality, but only an "equal" level of quality, U S WEST will withdraw its Second Claim for Relief and its Third Claim for Relief as it relates to interconnection. In addition, the Commission asserts that the Agreement contains neither a lost profits nor punitive damages provision. Accordingly, U S WEST will withdraw its Ninth Claim for Relief relating to lost profits and punitive damages.

In addition, since U S WEST filed its Opening Brief on September 13, the Federal Communications Commission ("FCC") has released its Third Report and Order,[2] determining which network elements incumbent local exchange carriers ("incumbent LECs") must unbundle under the Act. As of the filing of this reply, the Third Report and Order is not yet in effect, and challenges to that order have not yet been filed. U S WEST respectfully requests that the Court stay any consideration of U S WEST's Fifth Claim for Relief regarding unbundling of dark fiber and vertical features of the switching element pending the effective date of the Third Report and Order and any motion by challengers to a stay of that order. Consistent with AT&T's suggestion, U S WEST also suggests that the Court stay any consideration of its claim regarding the requirement that U S WEST procure third-party intellectual property licenses for AT&T until the FCC decides this issue, which is pending before it. Finally, U S WEST has determined that it will

---

[2] Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("Third Report and Order").

withdraw its Fourth Claim for Relief regarding collocation of remote switching units[3] and its Seventh Claim for Relief relating to reservation of capacity on its rights-of-way.[4]

This reply addresses the merits of the remaining issues in dispute: performance standards as they relate to access to unbundled network elements (Third Claim for Relief), recovery of construction charges (Sixth Claim for Relief), exercise of eminent domain rights for AT&T (Seventh Claim for Relief), single point of interconnection per LATA (Eighth Claim for Relief), the unlawful contract provisions that U S WEST has not withdrawn (Ninth Claim for Relief relating to aggregate discount and customer transfer charge), and U S WEST's takings claim (Tenth Claim for Relief). For the reasons set forth in U S WEST's Opening Brief and below, the Court should grant U S WEST the relief requested in its briefs and its Complaint on U S WEST's remaining claims.

II. ARGUMENT

A. This Court Should Ignore the Commission's "Jurisdictional Statement."

In its responsive brief, the Commission includes a "jurisdictional statement" stating that since this Court denied the Commission's motion to dismiss on Eleventh Amendment grounds, the law has changed. Commission Brief at 8. Even if the Commission had asked it to do so, the Court should not revisit its denial of the Commission's motion for two important reasons. First, the new authority the Commission cites is irrelevant. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., *119 S. Ct. 2219 (1999), held only that Congress could not* extract constructive waivers from States that would "sanction" States for engaging in "otherwise permissible activities," such as the ordinary commercial conduct at issue in that case. Id. at 2231. The Court reaffirmed that as a condition of granting States a benefit, such as the opportunity to

---

[3] U S WEST previously withdrew its claim regarding collocation premises. As a result of withdrawal of its claim regarding remote switching units, U S WEST has now withdrawn its Fourth Claim for Relief entirely.

[4] Although U S WEST has withdrawn some claims from this proceeding, this withdrawal should not be construed as a waiver of these issues in any other regulatory or judicial proceeding.

implement the local competition provisions of the Act. Congress could require the State to consent to the conditions Congress attaches to the benefit, such as consenting to federal court jurisdiction. Id. Accordingly, since College Savings Bank, the majority of courts have held that State commissions consent to suit by participating in arbitrations and the interconnection agreement approval process under the Act and thereby waive their Eleventh Amendment immunity as a condition of their participation in this federal program. See Bell Atlantic Delaware, Inc. v. Global NAPs South, Inc., Civil Action No. 99-466-RRM, 1999 U.S. Dist. LEXIS 19165 at *17-23 (Dec. 14, 1999); U S WEST Communications, Inc. v. Ellenbecker, No. 99-CV-136-D, slip op. at 10-11 (D. Wyo. Nov. 3, 1999); AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., Case No. 97-1573-CV-W-5, slip op. at 17-21 (W.D. Mo. Aug. 31, 1999); U S WEST Communications, Inc. v. Mecham, Case No. 2:98CV-490K, slip op. at 5-9 (D. Utah Aug. 13, 1999).

Second, the Commission's jurisdictional statement does not implicate this Court's alternative reliance on Ex parte Young, 209 U.S. 123 (1908). Accordingly, this Court's June 17, 1999, decision denying the Commission's motion to dismiss was undoubtedly correct.

B. The Commission Agrees That The Agreement Does Not Require U S WEST To Combine Network Elements.

In its Second Claim for Relief, U S WEST challenged the Commission's Decision purporting to require U S WEST to combine network elements for AT&T. See Decision at 12 ¶ 83. As U S WEST pointed out in its Opening Brief, in the Agreement, U S WEST and AT&T "parked" this issue, Agreement, Part A, Recitals; Agreement, Attachment 3 §§ 1.5.2, 2.1, 19, which means that the Agreement currently imposes no obligation on U S WEST to combine network elements. U S WEST Opening Brief at 5.

The Commission states unambiguously that U S WEST has no obligation to provide combined elements under the Agreement. Commission Brief at 9-10. AT&T also agrees that this issue is "parked" and therefore, the Court should not address it. AT&T Brief at 10-11. Because the Commission agrees that U S WEST has no obligation to provide AT&T with combined

elements under the parties' Agreement. U S WEST hereby withdraws its Second Claim for Relief. U S WEST reserves the right to reinstate this claim in the event the Commission imposes a combination requirement that is inconsistent with or exceeds the requirements of federal law.

C. The Agreement Imposes Unlawful Performance Standards for Access to Unbundled Network Elements in Violation of Section 251(c) of the Act.

1. Interconnection

Although the Commission ordered U S WEST to "perform its obligations under the Agreement at no less than the highest level which U S WEST uses for its own operations or those of its affiliates," Decision at 4, ¶ 17, both the Commission and AT&T[5] take the position that the Agreement does not incorporate this requirement. Instead, both assert that the Agreement requires U S WEST to provide interconnection quality consistent with the requirements of Section 251(c)(2). Commission Brief at 10 ("The language that U S WEST objects to is found in the Commission's arbitration decision. The parties apparently negotiated their own standard and did not use the Commission's language contained in paragraph 17"); AT&T Brief at 14-15 (describing Agreement, Attachment A ¶ 52.2, AT&T states that U S WEST must only provide interconnection that is "equal in quality" to that which it provides itself). Because neither the Commission nor AT&T contends that the Agreement requires U S WEST to "perform its obligations under the Agreement at no less than the highest level which U S WEST uses for its own operations or those of its affiliates," Decision at 4, ¶ 17, U S WEST will withdraw its Third Claim for Relief as to interconnection only.

---

[5] AT&T mischaracterizes U S WEST's argument on the quality of interconnection it must provide. U S WEST does not dispute that it must provide interconnection "equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection" pursuant to 47 U.S.C. § 251(c)(2). See AT&T Brief at 14. Rather, U S WEST opposes the Commission's additional requirement in its Decision that U S WEST "perform its obligations under the Agreement at no less than the highest level which U S WEST uses for its own operations or those of its affiliates," Decision at 4, ¶ 17 (emphasis added). As explained in U S WEST's Opening Brief at 12-14, this additional requirement violates the Act.

2. Nondiscriminatory Access to Network Elements

In its Second Arbitration Order, the Commission adopted AT&T's proposed language regarding access to unbundled network elements that effectively applied the "equal in quality" standard that applies to interconnection to access to unbundled elements, which must be provided according to the different "nondiscriminatory" access standard. See U S WEST Opening Brief at 14-17. In doing so, the Commission also rejected U S WEST's proposed definition of "itself" which included the qualifier "for the purposes of interconnection." Second Arbitration Order at 4 ¶ 4.

The Commission, but, tellingly, not AT&T, contends that U S WEST "agreed" to provide AT&T access to unbundled network elements "equal in quality" to that which it provides "itself." Since AT&T, the party with whom U S WEST negotiated these provisions, does not contend that U S WEST agreed to this provision, the Commission's argument fails at the outset. In any event, the Commission's argument is wrong. The Agreement shows the definition of "Itself" as bolded, meaning that the parties included it pursuant to the Commission's arbitration orders. See Agreement, cover page; Part A Definitions, page 6. The parties also footnoted the definition to show that it arose from the Commission's Second Arbitration Order. Agreement, Part A Definitions, page 6. In § 52.3.1, the word "Itself" is again bolded and footnoted to indicate that the Commission ordered the definition in its Second Arbitration Order. Agreement, Part A § 52.3.1. Although the Commission appears to argue that the parties agreed to the language in § 52.3.1, the fact that the definition of "Itself" is bolded shows that they did not.

Section 52.3.3, defining "equal in quality" is also bolded and footnoted, again indicating that the language was ordered in the Second Arbitration Order.[6] In all of these provisions, the

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[6] As the Commission notes, U S WEST proposed language for § 52.3.3 would have limited any obligation to provide access to unbundled elements that is at all times "equal in quality" to what U S WEST provides "itself." Commission Brief at 12 (citing U S WEST's proposed agreement language that provides that *if* U S WEST cannot provide access "equal in quality," it will provide access in a manner that allows an efficient carrier a meaningful opportunity to compete).

term "Itself" is capitalized, indicating that the definition adopted was AT&T's proposed definition, and not U S WEST's limited definition. Second Arbitration Order at 4 ¶ 4.

Given this, it is surprising the Commission contends U S WEST agreed to this language. It appears that the Commission ignores that it rejected U S WEST's proposed definition of "itself," which would have limited any obligation to provide access "equal in quality" to interconnection only. See Second Arbitration Order at 4 ¶ 4. Since U S WEST's limited definition of "itself" also would have limited the obligations in §§ 52.3.1 and 52.3.3, it is simply wrong to suggest U S WEST "agreed" to provide access to unbundled elements in a manner "equal in quality" to that which it provides itself. See U S WEST Communications Inc.'s Brief in Support of Remaining Interconnection Agreement Issues (No. 166) at 4-6 (discussing reason for proposed definition of "Itself"). When the Commission rejected U S WEST's limited definition of itself, it dramatically changed the remaining contractual provisions.

Beyond claiming that U S WEST agreed to this contract language, the Commission does not seek to defend the lawfulness of these contract provisions under the Act. AT&T only offers a defense of these provisions by ignoring the plain language of the FCC orders that state that U S WEST must only provide network elements in a manner that permits an efficient carrier a meaningful opportunity to compete. See U S WEST Opening Brief at 15-16. Indeed, AT&T does not even address the numerous FCC decisions that recognize that because incumbent LECs do not provide unbundled elements to themselves, their duty to competitors is to provide access to unbundled elements that affords them a "meaningful opportunity to compete." Id. Memorandum Opinion and Order, In the Matter of the Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404 ¶¶ 369, 379 (rel. Dec. 27, 1999) (confirming that Bell operating companies must provide unbundled network elements in a manner that permits an efficient carrier a meaningful opportunity to compete to meet its nondiscrimination obligations).

Furthermore, AT&T selectively quotes from provisions of the FCC's First Report and Order implementing provisions of the Act.[7] Although AT&T relies on paragraph 312 to challenge U S WEST's claim that the "equal in quality" standard does not apply to access to unbundled network elements, AT&T Brief at 16, paragraph 315 of the same order (which AT&T does not address) directly supports U S WEST's proposed contract language. First Report and Order ¶ 315 (stating that Section 251(c)(3) requires incumbent LECs to treat all requesting carriers equally and to provide "unbundled elements under terms and conditions that would provide an efficient carrier a meaningful opportunity to compete"). AT&T also cites paragraphs 100-105 of the FCC's Second Report and Order and Memorandum Opinion and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 et al., 11 FCC Rcd 19392, FCC 96-333, ¶¶ 100-105 (rel. Aug. 8, 1996). However, in these paragraphs of that Order that AT&T cites, the FCC was not addressing access to unbundled elements under 47 U.S.C. § 251(c)(3) at all. Rather, the paragraphs AT&T cites relate to nondiscriminatory access under 47 U.S.C. § 251(b)(3), which addresses the obligation of all local exchange carriers, not just incumbents, to provide dialing parity[8] and access to telephone numbers, operator services, and directory services and listings. Id., 47 U.S.C. § 251(b)(3). Thus, the FCC's discussion of "nondiscrimination" in this entirely different context is irrelevant.[9]

In the arbitration, the Commission failed to adequately consider U S WEST's claim that the FCC does not require incumbent LECs to provide access to unbundled network elements that

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[7] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 15499 (rel. Aug. 8, 1996) ("First Report and Order").

[8] "Dialing parity" generally refers to the ability of customers of competing providers to route their telephone traffic to the carrier of their choice without having to dial extra numbers. The term is defined in 47 U.S.C. § 153(15).

[9] Likewise, the discussion AT&T cites in its brief at p. 16 n.8 regarding the FCC's Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, Implementation of the Telecommunications Act of 1996, FCC 99-227 (rel. Sept. 9, 1999), addresses the same inapplicable statutory provision.

In the arbitration, the Commission failed to adequately consider U S WEST's claim that the FCC does not require incumbent LECs to provide access to unbundled network elements that is at all times equal in quality to U S WEST's provision of service to itself. The Court should strike the definition of "Itself" in Part A as well as § 52.3 of the Agreement.

D. U S WEST Must Be Permitted Full Up Front Recovery of Construction Charges.

The Commission and AT&T do not dispute that U S WEST will incur non-recurring charges if it constructs facilities for AT&T to resell U S WEST services. They claim, however, that U S WEST should not be permitted to recover its construction charges up front because in a resale environment, U S WEST owns and controls the facilities and will eventually get cost recovery from someone. Commission Brief at 20; AT&T Brief at 25. Furthermore, AT&T claims it would be unfair to require it to pay for construction it requests up front because the customer may switch to a different carrier. These arguments actually support U S WEST's claim for cost recovery.

First, it is AT&T that is requesting that U S WEST build facilities for resale out to an unserved area, and therefore, AT&T should bear the normal market risks that any competitive provider bears that its investment may not pan out. See Lehner Direct (No. 34) at 117-18, attached hereto as Appendix 1. Instead, AT&T and the Commission seek to shift the burden of tracking down cost recovery to U S WEST. They cite no authority for the proposition that U S WEST should bear AT&T's investment risks.

Second, the Commission and AT&T ignore other possible scenarios. If AT&T requests construction of facilities for resale, and later abandons those facilities to serve the customer over its own network facilities, U S WEST will not get cost recovery from anyone. This same dilemma occurs if the customer switches to another facilities-based CLEC, or the customer abandons service altogether. Thus, AT&T is wrong when it states that U S WEST is "always" compensated for its costs of building facilities for AT&T. AT&T Brief at 25.

AT&T's claim that U S WEST's construction charge proposal violates 47 U.S.C. §§ 251(c)(4) and 252(d)(3), AT&T Brief at 24, is also wrong. Those provisions discuss the

wholesale discount rate for "telecommunications services," not the facilities over which those services are provided. 47 U.S.C. § 251(c)(4) (incumbent LECs have the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers") (emphasis added); 47 U.S.C. § 252(d)(3) ("a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier").[10] Construction charges are a non-recurring charge related to putting facilities in place to provide service, not the service itself. As the party requesting the construction and causing U S WEST to incur the construction costs, AT&T should be required to pay for that construction up front, as those costs are incurred. Cf. First Report and Order ¶¶ 745 (reflecting a general rule that non-recurring costs should be recovered in the manner incurred), 201 (requesting party should bear costs of expansion).[11]

The Court should remand this issue to the Commission to revise the construction charge provisions to ensure that if U S WEST constructs facilities for AT&T,[12] U S WEST receives full up front recovery of its construction charges.

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[10] The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Thus, a telecommunications service subject to a wholesale discount is entirely different that the facilities over which that service is carried.

[11] For the same reason AT&T's claim that U S WEST's pricing proposal violates the resale rate provisions of the Act must fail, AT&T's claim that U S WEST's proposal is an unreasonable restriction on resale of telecommunications services also fails. U S WEST is not restricting the availability of AT&T's resale of any particular "telecommunications service." See 47 U.S.C. § 251(c)(4)(B).

[12] AT&T, but not the Commission, claims that U S WEST has an obligation under South Dakota law to build facilities in unserved areas for AT&T. AT&T Brief at 26 n.14. The SDCL provision AT&T appears to cite (SDCL § 49-31-3.1) provides only that a carrier cannot discontinue a noncompetitive service without Commission approval. That provision is irrelevant to this case.

E. The Court Should Stay Consideration on U S WEST's Fifth Claim for Relief.

As set forth in the introduction, since U S WEST filed its Complaint and Opening Brief, the FCC has issued its Third Report and Order addressing the network elements incumbents must unbundle in light of the Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). That order is not yet final, and challenges to it also have not yet been filed. U S WEST requests that the Court stay consideration of its Fifth Claim for Relief relating to dark fiber and vertical switching features until the Third Report and Order becomes final and any request for a stay of that order is addressed.

F. Federal Law Does Not Require U S WEST To Exercise Eminent Domain Powers on Behalf of AT&T.

As the Commission points out in its Brief at 21 & n.8, on October 26, 1999, after U S WEST filed its Opening Brief, the FCC issued an Order on Reconsideration in which it determined that federal law does not require incumbent LECs to exercise their eminent domain authority on behalf of requesting carriers. See Order on Reconsideration, Implementation of the Local Competition Provisions of the Telecommunications Act, CC Docket No. 96-98, FCC 99-266 ¶ 38 (rel. Oct. 26, 1999). In its Order on Reconsideration, the FCC held:

> [W]e are persuaded that neither the statute [i.e., 47 U.S.C. § 224] nor its legislative history offers convincing evidence that Congress intended for section 224 to compel a utility to exercise eminent domain. Accordingly, on reconsideration, we find that section 224 does not create a federal requirement that a utility be forced to exercise eminent domain on behalf of third party attachers.

Id.

The Commission cites no authority under South Dakota law that permits or requires U S WEST to serve as an agent for AT&T in exercising any eminent domain powers or otherwise negotiating access to a right-of-way for AT&T. Furthermore, neither the Commission nor AT&T disputes U S WEST's claim that under South Dakota law, AT&T has its own authority to exercise eminent domain. U S WEST's Opening Brief at 28 (citing SDCL § 49-36-12). In fact, AT&T does not address this issue at all in its brief. Because AT&T can exercise eminent domain rights

on its own, and the Commission has cited no state law grounds for requiring U S WEST to do so on its behalf, the Court must strike this obligation from § 47.4.4 of Part A of the Agreement.

G. The Agreement Unlawfully Permits AT&T to Establish A Single Point of Interconnection Per LATA Without Compensating U S WEST for That Interconnection.

The Commission and AT&T rely on the Ninth Circuit's decision in U S WEST Communications, Inc. v. MFS Intelenet, Inc., 193 F.3d 1112, 1124 (9th Cir. 1999), for the proposition that the Agreement properly permits AT&T to establish only one point of interconnection in each LATA. The MFS court, however, did not address the issue of compensation for the increased costs U S WEST alleges it incurs as a result of ordering this type of interconnection.

In the First Report and Order, the FCC stated that the Act prohibits consideration of costs in determining the "technically feasible" points of interconnection. First Report and Order ¶ 199. Thus, an incumbent LEC cannot prohibit as "technically infeasible" a point of interconnection simply because it is more expensive. However, this does not mean that the incumbent will not be compensated for its costs of providing the more expensive method of interconnection. Section 252(d)(1) mandates that the incumbent recover these costs. 47 U.S.C. § 252(d)(1). Accordingly, the FCC explicitly stated that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." First Report and Order ¶ 199. The FCC further noted in paragraph 209 that "because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect". Id. ¶ 209. Permitting AT&T to establish a single point of interconnection per LATA, without paying U S WEST's increased costs, would relieve AT&T of its incentive "to make economically efficient" interconnection choices, thereby destroying the paradigm the FCC envisioned. It also thereby forces U S WEST to subsidize AT&T's business plans and denies U S WEST recovery of its costs.

U S WEST argued that a single point of interconnection per LATA imposed significant additional costs on U S WEST. See U S WEST Opening Brief at 31 n. 20; Transcript (No. 79) at 466-67, 492-97, 508 (discussing how a single point of interconnection converts intraoffice calls to interoffice calls, thereby requiring U S WEST to augment its interoffice transport capacity). attached hereto as Appendix 2. The Commission, however, failed to address this issue and simply ordered U S WEST to permit a single point of interconnection. Decision at 7 ¶ 34. In U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004 (D. Ariz. 1999), the court held that even if a State commission could permit a carrier to establish only one point of interconnection in a LATA, the Commission must consider the additional costs such an interconnection imposes on the incumbent LEC. Id. at 1021-22. The Court should remand this issue to the Commission to consider the additional costs U S WEST incurs when AT&T establishes a single point of interconnection per LATA.

H. The Agreement Imposes Obligations That Are Contrary to the Act.

1. Liability for Lost Profits and Punitive Damages

In its Decision at 4 ¶ 16, the Commission ordered that "there is no liability for either party for indirect, incidental, special, or consequential damages," but that "the parties shall be liable for lost profits." The Commission interprets § 19.3 of Part A to exclude any requirement that U S WEST pay lost profits. Commission Brief at 27-28. Based upon the Commission's interpretation of this provision to bar recovery of lost profit damages, the Court need not address this issue.[13]

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[13] AT&T nevertheless contends that § 19.3 the Commission must have intended to award lost profit damages, even though it excluded four other categories of consequential damages. AT&T Brief at 28-29. If this Court decides to address this issue, the Agreement, at best, is ambiguous and should be remanded to the Commission for clarification and consistency. More appropriately, however, the Court should strike any such requirement. South Dakota law includes lost profits in the category of consequential damages that the Commission expressly excluded, and neither the Commission nor AT&T identifies any provision of the Act that defines lost profits consistently with the Commission's decision or that even permits the Commission to award such damages.

The Commission also points out in its brief that although its Order on Reconsideration required U S WEST to include a punitive damages provision in the Agreement, the Agreement does not permit the parties to obtain punitive damages. Commission Brief at 27-28; see Agreement, Part A, §§ 19.3, 27.1. Because the Commission acknowledges that the Agreement does not impose a punitive damages requirement, U S WEST will withdraw its Tenth Claim for Relief on this issue.[14]

2. Aggregation of the Avoided Cost Discount Among All Resold Services

Section 252(d)(3) expresses Congress's preference for discount rates for each telecommunications service subject to resale. See 47 U.S.C. § 252(d)(3) ("a State commission shall determine the wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested"). Neither AT&T nor the Commission disputes that the costs U S WEST avoids varies according to the services it offers and that the aggregate discount, as applied to some services, is inappropriate. See U S WEST Opening Brief at 34-35; Commission Brief at 28-30; AT&T Brief at 30-31. Rather, both contend that since U S WEST did not propose a discount for every telecommunications service the Commission ordered U S WEST to resell, the Commission should not have ordered separate discounts.

The proper course, however, was for the Commission to direct that U S WEST provide avoided cost information on all services. It failed to do so, and simply ordered an aggregate discount despite the inappropriateness of that discount as applied to some services. Furthermore, although the Commission claims that U S WEST failed to show that its discounts were based on individual data, U S WEST testified that its discounts were based on avoided costs by product. See Direct Testimony of D.M. Marti Gods (No. 39) at 5-12, attached hereto as Appendix 3; Exhibits 2-7 and worksheets thereto. The Court should remand this issue to the Commission to establish separate discounts for each telecommunications service subject to resale.

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[14] U S WEST will also withdraw its claim regarding the cumulative remedies in the Agreement.

3. Negotiation of Third-Party Licenses on Behalf of AT&T

As AT&T points out in its responsive brief, the FCC is expected to provide guidance on this issue in currently pending proceedings. See AT&T Brief at 36 n. 21. U S WEST agrees with AT&T's suggestion that the Court withhold ruling on this issue until the FCC provides this guidance. Id. Other district courts have followed this approach on this issue. See AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., No. A-97-CA-329-SS, 1998 US Dist LEXIS 15663 (W.D. Tex. Aug. 17, 1998).

4. Customer Transfer Charge Limited to $5.00

The Commission makes no attempt to defend the $5.00 customer transfer charge ("CTC") as cost-based. Commission Brief at 33-34. Instead, it simply asserts that the $5.00 charge was within the range the parties proposed: $.45, proposed by AT&T and $12.64 or $22.20 proposed by U S WEST depending on whether the transfer is mechanized or not. Id. However, AT&T proposed its $.45 charge based on a study involving BellSouth, a different incumbent LEC. Moreover, AT&T simply introduced this rate; it did not provide the actual study supporting it. Transcript (No. 79) at 1353, attached hereto as Appendix 4. U S WEST, however, provided a study supporting its CTC. See Lehner Direct (No. 34) at 120-21, attached hereto as Appendix 5.

As AT&T acknowledges, the CTC is a non-recurring charge that U S WEST incurs under the Act. See AT&T Brief at 36. Accordingly, the Act mandates that the Commission set the CTC according to cost. See 47 U.S.C. § 252(d)(1). The Commission does not fulfill its obligations to set rates based on cost by simply "splitting the difference." See Sprint Communications, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) (improper for agency to make a decision by "throwing up [its] hand and splitting the difference"); Public Utils. Comm'n of California v. FERC, 894 F.2d 1372, 1383 (D.C. Cir. 1990) (an agency cannot ignore its duty to follow the law by engaging in "baby splitting").

AT&T, likewise, does not defend the CTC as cost-based. Instead, it claims that the Commission's decision was "reasonable" and would alleviate customer confusion by applying the same rate to changes of local and long distance customers. AT&T Brief at 36-37. This argument

suffers two fatal flaws. First, the Commission made no finding that the costs U S WEST incurs to transfer a local customer are the same as those that apply to switching long distance customers. See Decision at 22 ¶¶ 179-82. Second, the Act requires non-recurring costs to be cost-based. A policy goal to "alleviate customer confusion," id. ¶ 182, is plainly impermissible.

AT&T claims that the Commission properly rejected U S WEST's CTC because "U S WEST's cost studies were infected with error." AT&T Brief at 36 (citing paragraphs 192-94 of the Decision). The portion of the Commission's Decision that AT&T cites, however, addresses U S WEST's cost study for determining the wholesale discount, not the CTC cost study. At paragraphs 179-82, where the CTC is discussed, the Commission makes no such finding.

In U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1008 (D. Ariz. 1999), the court remanded the CTC to the Arizona commission for precisely the same reasons U S WEST sets forth here. The Jennings court noted that the Arizona commission, like the Commission here, "made no finding that the [$5.00 CTC] accurately reflects the costs that U S West incurs." Id. at 1013. In addition, the Jennings court held that even if the $5.00 CTC "accurately reflects the costs of changing long distance carriers, the [Arizona commission] made no finding that the tasks U.S. West must perform to change long distance carriers are comparable to the tasks involved in switching local carriers." Id. The court also rejected the notion that the CTC should be capped so that customers are not discouraged to switch carriers:

> AT&T also contends that a higher customer transfer charge (which reflects U S West's actual costs) would discourage switching between carriers. Perhaps so, but U.S. West is still entitled to be compensated for its actual costs, whether through a customer transfer charge or otherwise.

Id.

As in Jennings, the Commission here failed to make any finding that the $5.00 CTC it imposed bears any relation to U S WEST's costs of transferring customers. It also improperly ignored U S WEST's cost study in favor of a non-cost-based charge. The Court should strike the CTC in the Agreement.

I. The Court Should Construe the Act and the Agreement to Avoid a Taking of U S WEST's Property Without Just Compensation.

U S WEST has fully briefed its claim that this Court should construe the Act and the Agreement to avoid a taking of U S WEST's property in its Opening Brief at 37-39. Here, U S WEST responds to only one issue: AT&T and the Commission's claim that the takings test announced in FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), and Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989), applies to this case.

In Hope Natural Gas, the Supreme Court considered whether a rate order reducing Hope Natural Gas's rates constituted a confiscation of Hope's property. The Court held that in setting rates, a regulator is not bound to use any particular rate-making methodology, since ratemaking, a "species of price-fixing," involves a series of "pragmatic adjustments" to determine the ultimate rate of return for a regulated public utility. 320 U.S. at 601-02. Because these "adjustments" are among regulated services, when a general rate order is challenged courts have examined whether the order viewed in its totality is just and reasonable. Id. at 602. If the total effect of the rate order is reasonable, it satisfies constitutional scrutiny. Id.

As the Hope Natural Gas Court expressly acknowledged, the general ratemaking at issue in that case involved trade-offs between the competing interests of consumers and investors, such as cross-subsidies between rates. 320 U.S. at 603. The "end result" test is also premised on the fact that the utilities were monopolies that could recover whatever the public utility commission ordered they could recover. See Duquesne, 440 U.S. at 313 ("utilities are virtually always natural monopolies . . . relatively immune to the usual market risks").

The Hope Natural Gas/Duquesne "end result" test has no applicability whatsoever to a competitive environment in which cross-subsidies are prohibited and rates are to be based on costs. Thus, Hope Natural Gas and Duquesne "did not address the consequences of deregulation and wholesale abrogation of the regulatory contract in the name of establishing a competitive marketplace." J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. L. Rev. 851, 954 (1996).

In contrast to the general rate orders at issue in Hope Natural Gas and Duquesne, in which the "give and take" of cross-subsidies was presumed and permitted, this case involves an interconnection agreement adopted under a federal statute that requires State commissions to establish prices "without reference to a rate-of-return or other rate-based proceeding." 47 U.S.C. § 252(d)(1)(A)(i). Accordingly, the court in MCI Telecomms. Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1170 (D. Or. 1999), rejected the Hope Natural Gas/Duquesne test as inapplicable to a competitive market. As that court recognized, unlike the regulated monopoly regime at issue in Hope Natural Gas and Duquesne, neither U S WEST nor the Commission can simply raise U S WEST's other retail rates to "make up" for what it does not recover under the Agreement. GTE Northwest, Inc., 41 F. Supp. 2d at 1170 ("If GTE is forced to sell unbundled network elements . . . at below cost to MCI, the PUC cannot simply compensate GTE by raising retail prices for other telecommunications services, because competitors could then under-price GTE"); Associated Gas Distribs. v. FERC, 824 F.2d 981, 1014 (D.C. Cir. 1987) ("Where competition prevails, a firm cannot compensate itself for losses on one venture by raising prices on other lines of business; if it tried to do so, competitors could profitably capture the business").

Thus, the Court should reject any claim that to establish a taking of its property, U S WEST must demonstrate that its overall financial integrity is threatened. That test does not apply to disputes and agreements under the Act.[15]

IV. CONCLUSION

For the foregoing reasons, the Court should grant U S WEST the relief requested on the remaining counts of its Complaint.

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[15] The Commission claims that U S WEST does not identify to which claims its takings argument applies. U S WEST is not seeking compensation for any particular taking at this time and only seeks to have the Court interpret the Act and Agreement to avoid a taking and to permit just compensation. For the Court's convenience, however, U S WEST asserts that its claims regarding recovery of commission charges, a composite wholesale discount, and its customer transfer charge clearly raise takings issues.

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REQUEST FOR ORAL ARGUMENT

Appellant U S WEST Communications, Inc. respectfully requests oral argument before this Court on the issues raised herein.

APPENDIX

1. Lehner Direct (No. 34) at 117-18
2. Transcript (No. 79) at 466-67, 492-97, 508
3. Direct Testimony of D.M. Marti Gude (No. 39) at 5-12
4. Transcript (No. 79) at 1353
5. Lehner Direct (No. 34) at 120-21

D. OTHER RESALE ISSUES

1. Construction Charges

Q. WHEN USWEST CONSTRUCTS FACILITIES TO SERVE A RESELLER, SHOULD CONSTRUCTION CHARGES APPLY?

A. Yes. If USWEST must construct new facilities to service a reseller, USWEST must be permitted to charge the reseller for construction. The cost should be paid in full by the reseller before the facilities are constructed. The Commission should reject AT&T's self-serving position that it should not be responsible for such charges.[90]

Q. WHY IS IT CRITICAL THAT USWEST BE PERMITTED TO ASSESS CONSTRUCTION CHARGES?

A. In most cases, it is likely that resale requests will be received in areas where facilities are available. However, in some cases a reseller may request new facilities to an area not currently served or an area with limited existing facilities. If USWEST is to build facilities to such an area, it must be assured that it will be able to recover the costs of construction. The only way to assure the recovery of these costs is through the assessment of construction charges to the reseller. This

[90] Direct testimony of Arleen Starr on behalf of AT&T, page 8.

is particularly the case with the advent of facilities-based competition. USWEST should not be required to construct facilities for resale, when such facilities may be stranded by the construction of facilities by USWEST's competitors. Without such an arrangement, USWEST and its customers could be left "holding the bag" with no way to recover the construction costs. This would be very unfair to USWEST and its customers, who would be forced to cover the loss.

USWEST should not be forced to build networks for resellers like AT&T out of its own pocket. Said another way, USWEST does not have the financial resources to capitalize the entry of resellers into the market. In addition, USWEST should not be forced to assume all of the capital risks for resellers as they enter and expand their presence in the market.

Q. IS USWEST'S POSITION CONSISTENT WITH THE FEDERAL ACT AND THE FCC'S FIRST INTERCONNECTION ORDER?

A. Yes. The FCC makes it clear that incumbent LECs have the right to recover costs incurred from the carrier that caused the cost.[91] Thus, it is consistent with the intent of the FCC's order to request resellers to pay connection charges when facilities are built by USWEST to service the needs of the reseller.

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91 First Interconnection Order at paras. 200 & 872.

rebuttal, on line 12, section number should be 6.2.1.6. It should also reference attachment five, section 3.3. On page 9, on line 17, in parenthesis it says "formally," it should be "formerly."

Q. Okay. Can you -- Okay.

A. On page 10, line 15, the section reference should be deleted and it should read Attachment 3, Part 2, Section 1.1.1. --

Q. Can you say that again please?

A. Attachment 3, Part 2, Section 1.1.1.

Q. And on page 11, line 20, section reference should be deleted and it should read, attachment 3, Part II, Section 4.1.4. That's all my corrections.

Q. Can you provide a brief summary of your testimony?

A. Yes. My testimony explains modifications that will have to be made to the U S West network to reconfigure it into an architecture that will support multiple service providers. Most of the issues that I describe in my testimony, discussed in my testimony are related to a facilities based service provider. And it's my understanding that AT&T testified this morning that they were not going to be facilities based here for several years. And, therefore, these issues probably will not come to surface until

sometime in the future. However, it is important that U S West presents its position on these issues.

One issue I discussed is the point of interconnection, and how the selection of a point of interconnection can have significant impact on the network, and can result in a significant investment required by U S West to provide that interconnection point. It is U S West's position, and consistent with FCC Order, paragraphs 199 and 209, that new entrants must compensate U S West for costs incurred to provide these interconnection points.

Let me give you an example of one situation. My understanding from the AT&T contract is that AT&T will initially interconnect at U S West access tandem. And in a case of serving customers in Pierre, they might at that time collocate equipment somewhere here in the Pierre serving wire center. And connect to U S West unbundled loops. When an AT&T customer would then place a call to a U S West customer, AT&T would deliver that call to the U S West network at the Rapid City access tandem. U S West would have to transport that call across interoffice facilities to Pierre to deliver that call to the U S West customer to serve it off to Pierre. That's an issue that we refer to as back call. AT&T

would require U S West to do this without compensation and U S West is opposed to this. Also, this takes calls that were local in nature. In the telephone case, calls that were intended to remain, in other words, when one customer in Pierre calls another customer in Pierre, that call is switched by the Pierre switch. It doesn't leave the vicinity of the Pierre office, and the switch in effect connects the two calls together so the customers can talk. In the scenario I described, that customer, the connection would be from Pierre to the Rapid City access tandem, all the way back to Pierre, and out to the U S West customer. It's those types of reconfigurations that are going to create significant, result in significant significant investment by U S West to add additional capacity to our network, and we feel that interconnectors, AT&T and other CLECs should compensate U S West for that.

I discuss other types of interconnection point scenarios. Midpoint meets. How the choice of that midpoint can also affect the investment incurred by U S West. If U S West does not recover that investment from the CLEC, then it will be U S West and users that have to pay for that, and this is not fair. I also discussed collocation. The collocation

of equipment in U S West's central office buildings. It is U S West's position that interconnectors may collocate their transmission equipment in U S West central offices that house U S West end offices, and tandem switching. This is -- U S West requirement of transmission equipment only is consistent with the FCC's Order. In paragraph 581 of the Order. And that paragraph also says that U S West has the right to place restrictions on the type of equipment that can be collocated.

I discussed the fact that U S West will not allow CLECs to collocate remote switching units in the collocation space in U S West's buildings. FCC Order does not require that U S West do so, and U S West exercising its right to restrict that type of equipment from being collocated there.

I address unbundling of the signaling network. That's the signaling system seven network. U S West will unbundle the network consistent with the Order. Mr. Riggert, and I believe it's in his rebuttal testimony, testifies that U S West will not provide transit signaling service and that is incorrect. I believe he's basing his opinion on reading of the U S West access tariff. It is U S West's decision that transit service will be

APPENDIX 2

A. I suppose so, yes.
Q. And not having RSUs, AT&T didn't have the ability to collocate RSUs, that would be one kind of a barrier to competition for AT&T, wouldn't it?
A. No, because you have other alternatives. The Order says that you collocate equipment that are necessary for interconnection. It's U S West's opinion that RSUs are not necessary. You have transmission equipment that you can use.
Q. I think we will address what the Order says about the definition of necessary in a moment. But I need to know, does in your opinion the Act or the Order permit U S West to refuse to allow collocation where the basis is because U S West wants to implement a barrier to competition? Would that be allowed?
MR. OLLE: I'll object. That's argumentative.
MR. SOLOMON: It is not argumentative. It is a question as to the state of mind of the witness.
MS. WIEST: Objection sustained.
BY MR. SOLOMON:
Q. In your testimony, you argue that AT&T should not be permitted to interconnect solely at U S West tandems, because it would increase the use of

the tandem switching units; isn't that correct?
A. I believe what I'm discussing is that we should use a mix of direct trunking and tandem trunking.
Q. And what I said was they shouldn't be allowed to solely use U S West tandems, because it would increase the use of the tandem's switching unit, that's what you testified?
A. Yes.
Q. And then you further testified that the increased use of the tandem switching unit justifies a requirement that AT&T inform you in advance of its fore forecast regarding service at each tandem up to six months in advance. That's your testimony, isn't it?
A. Would you tell me where you're reading then from?
Q. Sure. Your direct testimony, page 6.
A. And tell me what the question was again.
Q. Your testimony is that because of this issue you've raised about the tandem use being increased, you believe AT&T should be required to forecast regarding the service at each tandem that AT&T anticipates will occur at each tandem up to six months in advance. That's your testimony, isn't it?

A. No, that isn't what it says. It says that we require forecasts in advance because we have to have time to install the equipment, and that number was as long as six months to provision the equipment.
Q. But the extent to which you would be able to forecast more in advance, sometimes up to six months in advance, correct?
A. No. That is not what it says. It says I need the equipment --
Q. But that's the result, isn't it?
A. My testimony is not about a suggestion when AT&T should provide the forecasts.
Q. I believe I was up to six months?
A. They could provide them on a monthly basis or whatever we agree to. All I'm trying to explain here is that without sufficient time to provision the equipment, I need six months in advance of when that equipment is required to be in service. U S West cannot guarantee that that equipment will be there on time.
Q. Does U S West do any forecasting of its own as to --
A. Absolutely. And what we recommend here is that AT&T provide us forecasts, but that we work

jointly on forecasts. That means that we and AT&T would be working together in developing the required forecasts for that equipment.
Q. So AT&T would have to divulge something that could be considered proprietary, which is unknown will be the case, for example down the line, wouldn't it? That's the result? Not what you testified would be used, but it is the result, isn't it?
A. Well, as you know, we have proprietary information agreements. Today we do forecasting, joint forecasting, with independent wireless companies, with wireless service providers, we exchange that information with our network. And that information is kept under lock and key and only allowed to be used by the engineers and network design engineers that need that information to design the network. There are proprietary agreements. There are processes in place to protect that information.
Q. Now you've also testified that because of this increased use of the tandem that would occur based on the U S West proposal, AT&T should have to pay U S West for additional use of the tandem. That's your testimony, isn't it?
A. I believe what my testimony is, is that

consistent with the Order, is that what expenses that U S West incurs to provide interconnection arrangements to new entrants, should be paid for by the new entrant.

Q. Okay. Now per your testimony, the problem we have with the tandem arises because in the monopoly environment, what we have now, two calls entering the same central office would be switched at the central office rather than at the tandem. But in the competitive environment, under U S West's proposal, the CLECs are to transport that same traffic out of the central office and switch it at a tandem. I'm referring to pages four through six, and I'm not quoting, but that is, I think, the essence of the argument.

A. No, it's not. I don't say that the CLECs have to transport the call out of the tandem. If you interconnect at U S West tandem, and your switch is therefore receiving all of its calls from U S West customers, at the U S West tandem, then calls that were intraoffice in nature, as I described here in Pierre, when a U S West customer now calls an AT&T customer, instead of delivering that call through the Pierre central office, it'll have to be transported to the U S West tandem over U S West facilities and

delivered to AT&T's point of interface at, or point of interconnection, at the U S West tandem. Therefore, U S West will have to augment or increase the capacities between the end office and the tandem to accommodate that new network arrangement. That is not what occurs today in the U S West network.

Q. Let me see if I can make that into a short sentence. Smith and Jones want to call each other, currently they're neighbors, their call is currently switched at U S West central office; correct?

A. Yes.

Q. In the new environment, Smith and Jones calls may end up being switched somewhere other than the U S West central office, such as the tandem; correct?

A. No.

Q. Well, in the new environment, Smith and Jones call, still neighbors, won't be switched to necessarily the U S West central office, at the U S West central office; correct?

A. It depends on who the service provider is for Smith and who the service provider is for Jones.

Q. Smith and Jones are not provided by U S West anymore, because Smith and Jones decided they wanted to go to another provider. Smith and Jones no longer

are being switched by U S West central office in your environment. They're being switched somewhere else, and as a result of not being switched at the U S West central office, the tandem use goes increased, right?

A. No.

Q. I take your [illegible] to [illegible] any of my questions as correct, but --

A. No, I'm not [illegible] to [illegible] answer, but you're not describing the situation that I'm describing in my testimony. The situation I'm describing in my testimony is today Smith and Jones are served at Pierre central office. Tomorrow, Mr. Smith becomes an AT&T subscriber. Mr. Jones calls today, when Mr. Jones calls Mr. Smith, that call is switched within Pierre central office. However, tomorrow, now I forget which one became your customer, whoever, if Mr. Jones is still a U S West customer and he calls Mr. Smith, AT&T's customer, and AT&T has chosen to have point of interconnection to be at the U S West tandem, then U S West will have to route that call across U S West facilities to the tandem. It will be switched there and delivered to AT&T, who will then take it to their switch and [illegible] it and give it to Mr. Smith.

Q. And potentially that could happen if Smith

and Jones are both AT&T customers, right?

A. No.

Q. Potentially, that is one thing that could happen?

A. Not that description, no. It is not.

Q. The switching --

A. In the case of them being, in the case of them both being AT&T customers, when they call each other, the call will be an AT&T switch, not in U S West network.

Q. Mr. [illegible], have AT&T collocated [illegible] to a central office, and Mr. Smith is U S West customer and Jones is an AT&T customer, that switching doesn't have to go through the tandem anymore. It can go through the U S West office, can't it?

A. No. Not as long as your point of interconnection with U S West network is at the tandem, the call would still go from the U S West end office to the tandem, and then back to the AT&T.

Q. But you could route the calls without going through the tandem, if you wanted, if you had [illegible] collocated there, couldn't you?

A. Not if your point of interconnection is at the tandem.

Q. What if your point of interconnection is not

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at the tandem, its at the central office, the RSU is the point of the interconnection? What about that?

A. Well, I'm not trying to be argumentative, if your point of interconnection is between the RSU and the central office, is that what you're describing?

Q. Yes.

A. We would not have to transport the call to the tandem, but we would still have to build new facilities between the U S West end office and the RSU. Even though they are in the same building, potentially, there still has to be facilities put between the two switches. Those facilities don't exist today. My my point in my testimony is that those augmentations of the network should be recovered from the party that causes them. That being AT&T. Not from U S West end users.

Q. Just referring to my chart again, though, it sounds like about allowing the collocation of the RSU, the U S West central office, when one customer belongs to AT&T and another customer belongs to U S West, I can do my interconnection here, not overload my tandem wherever it might be. That's something I could do, couldn't I?

A. Well, I can't go along with necessarily 100 percent of your presumption. I mean, you're asking

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me to assume that by putting that RSU there, that I would not overload my tandem, and I can't go along with that. It all depends on who is making the call to who. In other words, what point of interconnection you have. But it doesn't -- Those issues with U S West, it's still U S West's opinion, our position is that an RSU will not be collocated on U S West collocation property.

Q. I understand the opinion. But I do believe that if you, I believe you would have to agree that if an RSU were collocated, despite your wishes that this Commission were to Order that, then some of the traffic that you claimed would have gone to the tandem, not all, but some, wouldn't have to go to the tandem anymore, because you could, in fact, do the switching still at the central office.

A. I would agree that all of that traffic, some of that traffic would not have to go to the tandem. But U S West still has to build facilities between the U S West central office, and RSU.

Q. Understood. Now you satisfied, and I promise to come back to this word. Necessary. You testified and then said earlier, that U S West opposes collocation of RSUs, because they are not what you call necessary for interconnection and

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access. Isn't that correct?

A. Yes.

Q. Now the FCC Order, at paragraph 573 says, We conclude that for purposes of Section 251(c)(6) -- That's the section that deals with collocation. We conclude that the term necessary does not mean indispensable, but rather used or useful. Now I believe it goes on. That interpretation, the necessary means used and useful, that interpretation is most likely to promote fair competition consistent the purposes of the Act. Even if the collocator could use other equipment to perform a similar function, the specified equipment may still be necessary, and necessary is what's defined as used or useful. And I believe I got to --

We can easily imagine circumstances, for instance, in which alternative equipment would perform the same function, but with less efficiency or at a greater cost. A strict reading of the word necessary could allow LECs to avoid collocating the equipment of the interconnector's choosing thus undermining the procompetitive purpose of the 1996 Act. Isn't that true what it says?

A. Yes.

Q. So necessary means used or useful, isn't

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that correct?

A. That's what it is defined as, yes.

Q. And if RSUs, used or useful in interconnection access, an FCC Order would permit this Commission to Order that they be collocated, wouldn't it?

A. You're asking me for a legal opinion, and I'm not a lawyer.

Q. Fair enough. Now I know you've said that the FCC Order doesn't have a general requirement regarding switching equipment. So I now turn to your testimony. Into the next sentence of the paragraph at issue, paragraph 131, 581 states: We recognize, however, that modern technology has eroded in that the line between switching equipment and transmission equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that State Commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements. Isn't that what it says?

A. Yes.

Q. And in paragraph 582, the preceding paragraph. It says that U S West -- I'm not going to

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respect to that collocation at these locations?
A. Yes. And safety. These are --
MR. SOLOMON: I would like to interpose an objection to the question. The Order says what has to be done, and the Order doesn't say that it is subject to any explanation or modification. And so since there is an admission that what's about to be stated is going to be why U S West doesn't want to comply with the particular paragraph of the Order, it's really not proper testimony.
MS. WIEST: It's not proper why?
MR. SOLOMON: Well, the Order says, what premises are and what has to be collocated, and if I understood the question, it follows, the question was, is U S West going to comply with the Order? The answer was, No. And that sounded like the next question was why. Why is it U S West position that they don't want to comply with the Order? And I don't see how that's relevant. The Order is the Order. It has to be complied with, and it's not as though we're now debating whether or not U S West interpretation of the Order is different. They're flat out saying, we don't like what the Order says, and here is why. Why would it matter what U S West's position was as to why the Order is not correct.

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MR. OLLE: The issue relates to the ability of U S West to indicate that collocation in certain areas is not technically feasible, and technically feasible is defined as creating concerns regarding network reliability, or security. I asked Mr. Wiseman, with respect to network reliability, security, and safety, why U S West would oppose collocation in some instances in these vaults containing loop concentrate. It seems like perfectly appropriate question.
MR. SOLOMON: And the reason it's not appropriate is the Order, unlike certain things where technical feasibility is left open, the Order doesn't leave technical feasibility of this open at all. The FCC has found it feasible, and says here is what has to be done. So arguing now that it's not technically feasible, it's something that had to occur prior to August 8, 1996. It's not one of those things where it's an issue of technical feasibility. That's the reason for my objection.
MS. WIEST: I'm going to overrule the objection.
A. Collocated equipment needs to be partitioned off from U S West's equipment. In cable vaults, there is usually an aisleway that's approximately

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three feet wide, and there is only room for one technician to be in there. There is no room to put in a wall or room protecting enclosure to protect AT&T's equipment, for instance, from damage by people accessing U S West's equipment, or vice versa. That is a network reliability concern.
We have said that we would address requests for collocation in these spaces on a case-by-case request basis. That way we would have ability to see what type of equipment they want to place there, see what type of space requirements it will take, and see if it can be placed there, and adequately protected. And that's why we were to do it on a case-by-case request and not on just a global basis.
Q. Mr. Solomon in a discussion with respect to Mr. Solomon's chart, and the issue of whether if AT&T established its point of interconnection at the U S West central office, wouldn't that relieve potential pressure on the U S West tandem? Do you recall those questions?
A. Yes, I do.
Q. And I believe the question went to the ability of AT&T to receive a call headed off at the U S West central office, and then switch it to their remote switching unit, instead of having that call go

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to the tandem. Do you recall that?
A. Yes, I do.
Q. Based on your understanding of AT&T's positions in this case, and the contract, is it AT&T's position that they are going to establish a point of interconnection at each U S West central office?
A. My understanding from AT&T's counsel is that their initial points of interconnection will be at the U S West access tandems.
Q. And if that, if that is, in fact, what AT&T plans to do, irrespective of whether there is a remote switching unit, in the U S West central office, if there is a call between an AT&T and a U S West customer in that same central office that call is going to go to the tandem, for hand off to AT&T.
A. Yes.
MR. OLLE: That's all.
THE CHAIRMAN: Let me back up, then. You're saying that, but AT&T won't they want to be able to go tandem office anyway?
A. I have not seen any specific requests for instance for South Dakota. But in their contract and attachment, I believe, it's attachment 4, Section 4, it states that AT&T's initial point of

EMBEDDED AVOIDED COST STUDY OVERVIEW

Q. WHAT DATA SOURCES WERE USED TO DEVELOP THE USWC EMBEDDED AVOIDED COST STUDY?

A. The USWC Embedded Avoided Cost Study was prepared from the Company's booked financial records. Specifically, the USWC Embedded Avoided Cost Study was based on 1995 operating results. Data was drawn from 1995 FCC ARMIS Reports, certain TELRIC avoided cost study related assumptions and the Company's Embedded Cost Allocation Accounting System, CAAS/CARS. The CAAS (Cost Accounting Allocation System)/CARS (Cost Accounting Reporting System) system is the USWC accounting process which produces the Company's detailed, product specific, embedded cost data. An overview of the assignment methodologies used in CAAS as well as a description of the purpose, objectives and cost assignment principles used in the system are included in Schedule 2 of my testimony. This embedded cost data is used in many USWC jurisdictions, including South Dakota, where State Commissions have required the Company to provide embedded cost support and/or detailed product information on an embedded basis.

Q. WHY DID USWC EMPLOY COMPANY SPECIFIC DATA, OTHER THAN THE FCC ARMIS DATA, TO DEVELOP ITS EMBEDDED AVOIDED COST STUDY?

A. Relying solely on publicly available ARMIS data, as filed with the FCC, does not permit a comprehensive, State specific, product specific analysis. The FCC's

Automated Reporting and Management Information System (ARMIS) contains only aggregated information for all the products offered by the Company in the State of South Dakota. The ARMIS reports do not lend themselves to a more refined product specific analysis which is desirable in establishing resale discounts to be applied to specific South Dakota tariffs. For example, the ARMIS 43-03 - Joint Cost Report, provides annual data for each account prescribed under the FCC Part 32 Uniform Systems of Accounts (USOA) for "Total State" operations prior to FCC Part 36 jurisdictional separations between interstate and intrastate operations. The ARMIS 43-04 - Access Report, further delineates the 43-03 Report Subject-to-Separations amounts by splitting revenues, costs and investments between Intrastate and Interstate operations, as well as the various components of Interstate Access and Billing and Collecting. The jurisdictional split reflected in the 43-04 report reflects compliance with FCC Part 36 and Part 69 rules. Neither of these reports, nor any of the other ARMIS Reports, refines the Company's reported financial data to reflect specific products. Although the FCC utilized "Total USWC" ARMIS data to prepare its overall default resale discount for application in all USWC states, more specific USWC - South Dakota product specific intrastate data can and should be used where it is available.

Q. WHAT GUIDELINES DID YOU EMPLOY TO DEVELOP THE USWC EMBEDDED COST STUDY?

A. The principle guidelines for preparing the USWC embedded avoided cost study included:

1. *Employ a simple approach which reflects the FCC directives of identifying Avoided Direct and Indirect cost components for services subject to resale. In*

preparing this "simplified" embedded avoided cost study, USWC patterned its format to coincide with a format that has been previously filed by AT&T and MCI in many of USWC's jurisdictions. Although not identical, this format recaps and depicts (a) ARMIS intrastate booked revenue and operating expense components, (b) "Retail" revenue, expense and capital cost components (exclusive of Non-Resale services), (c) the split of Direct and Indirect costs, (d) the avoided cost percentage assumptions for each Retail service Direct and Indirect cost element and (e) the resultant avoided cost estimates and calculated resale discounts. Where appropriate, the USWC embedded study coincides with the FCC's Interconnection Order directives (i.e. Plant Specific and Non-Plant Specific costs are presumed not avoidable and General Support costs are considered avoidable in proportion to avoided direct costs)[1].

2. *Employ "Intrastate Product Specific" data.* It is important to isolate intrastate operations in order to properly evaluate avoided costs and to calculate cost discounts for specific and disaggregated "*intrastate* resale services". Since the current USWC - South Dakota "Intrastate" rates were originally established by the South Dakota Commission based on the jurisdictional intrastate cost assignments resulting from the FCC's Part 36/69 separations procedures,[2] the Embedded Avoided Cost Study and embedded discount calculations must reflect corresponding intrastate data. Exchange access service is not subject to discount under the requirements of Section 251(c)(4) of the Act. Therefore, elimination of all Interstate Access revenue and Part 36/69 separated costs (including all CCL

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1 See FCC First Interconnection Order at par. 918 and 919

2 See CFR 47, Part 36 and Part 69

loop costs, including the End-User SLC[3]) is the only appropriate starting point for performing the embedded avoided cost analysis and subsequent resale discounts for retail tariffed services that are subject to the jurisdiction of the South Dakota Commission.

3. ***Isolate and exclude "Non-Resale Services" from the analysis of avoided costs and the calculation of discounts.*** Non-Resale services must be removed so that the avoided costs identified and the resultant discount calculations are not artificially inflated or deflated for services that are not subject to resale discounting. Services such as Intrastate Access (Interstate is jurisdictionally removed automatically by starting the analysis with Intrastate operations), Intrastate Billing and Collection (Interstate is already removed), Public Services and Operator Services/Directory Assistance have been excluded in developing the USWC embedded study (see Schedule 1, Worksheet 1). USWC's embedded study removes the same services as those excluded in the development of the Company's TELRIC study. These services are one of the following: services that are not subject to the discount provisions of the Act, services that are grandfathered, or services that will be provided under separate agreement with resellers. More specific rationale for USWC's removal of these services is also discussed in the USWC TELRIC study[4].

4. ***Use appropriate Company/State/Product Specific assumptions and embedded cost data necessary to obtain the most meaningful embedded avoided costs and***

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[3] See FCC First Interconnection Order at par. 873, 874 and 984

[4] See USWC TELRIC Study and Testimony of Ms. Geri Santos-Rach

resale discount results. The use of ARMIS public information, the FCC's generalized industry wide avoided cost proxies contained in their Order, "Total State" operating results, and aggregate product information is inappropriate for calculating meaningful resale discount percentages when more precise, although non-public, USWC - South Dakota data is available. The USWC Embedded Study employs USWC - South Dakota product specific intrastate CARS data and replaces FCC general industry assumptions regarding avoided costs where appropriate. The FCC's avoided cost assumptions were not USWC or USWC - South Dakota specific, nor were they product specific. Rather, they were compromise factors created from Total USWC data and comments collected from a variety of agencies and Companies other than USWC. Specific USWC - South Dakota data should be used wherever possible to create resale discounts for USWC - South Dakota Intrastate rates.

5. *Incorporate USWC's previous experience with its wholesale Access Product in developing avoided costs for resale services.* USWC's non-resale/wholesale Access product experience provides a good foundation for determining the avoided costs for Customer Operations (Marketing and Customer Services) and Uncollectibles expense for resale services.

This experience has shown that significant Marketing expenses for Product Management will remain while other marketing expenses such as "retail" sales expense and "retail" advertising, would be eliminated. While it is true that Product Management costs may change, they will certainly not go away completely just because a service is provided on a wholesale basis. Although U S WEST product managers do some work that would apply specifically to retail

offerings (e.g., setting up sales procedures, etc.), these same U S WEST product managers also provide product development work that applies to the resold service. For example, costs associated with developing and implementing resale product methods and procedures and rate and tariff filings will apply whether the service is provided on a retail or wholesale basis. Also, while U S WEST will avoid some retail product management expense, it will also incur additional product management expense to serve the resale market. U S WEST has employed wholesale product managers for years to serve the wholesale access needs of interexchange carriers. It is worth noting that U S WEST today has a "Carrier" market unit that is dedicated to serving the access needs of interexchange carriers, by providing these customers with "wholesale" switched and dedicated access products. These are real marketing costs that are incurred to provide wholesale services. As U S WEST gears up to meet the needs of resellers, it will incur additional product management expenses. In fact, U S WEST has established a new market unit to service competitive local exchange providers and resellers. U S WEST also has product managers now in place that are specifically focused on serving the resale market. These product managers are responsible for developing the resale products that are presented in U S WEST's proposed interconnection agreement. The FCC Order is clear that new wholesale costs such as these should be netted against avoided costs.[5]

In sum, it is unreasonable to use the FCC's 95% avoided cost factor assumption for all Marketing costs. Therefore, USWC's Embedded Study employs a separate factor for each resale product evaluated and for each of the three

[5] See FCC First Interconnection Order at par. 228

components of retail Marketing expense - Product Management, Sales and Advertising. As a result, the Product Management portion of Customer Operations "Marketing Costs", in the USWC Embedded Avoided Cost Study, reflects avoided cost factors ranging from 0% to 85%. These percentage factors were determined to be appropriate and were applied on a product specific basis in the embedded study. They also correspond to the factors that were developed, documented and employed in the Company's TELRIC study. [6]

Customer Service costs for billing and collection expenses is another area of Customer Operations where costs may be reduced, but certainly not eliminated at the FCC's 90% total account proxy level. Although U S WEST will not be billing reseller end users, it will be billing resellers for the wholesale service. These wholesale billing costs may be lower than retail billing costs, but they are real costs nonetheless, and should be included in the analysis. In addition, USWC will still continue to incur usage recording costs for measured local service and toll service. Like Product Management, specific product related avoided cost factors of approximately 49% to 98% are used for Customer Services expenses in the USWC embedded study.

Q. DOES THIS AVOIDED COST DISCOUNT STUDY PRODUCE A SINGLE AGGREGATE DISCOUNT OR PRODUCT SPECIFIC DISCOUNTS?

A. USWC's Embedded Study produces both an aggregate as well as product specific discount calculations. USWC does not endorse the use of a composite discount

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6 See USWC Embedded Study Worksheet 3a

1 format and it is provided only for general reference. Aggregate discount calculations
2 are inappropriate and somewhat distorted given the wide range in individual product
3 avoided cost assumptions, product capital costs and individual product margins.
4 USWC supports the development and application of product specific resale
5 discounts.
6
7 **Q. ARE THE RESULTS OF THE USWC EMBEDDED AVOIDED COST STUDY**
8 **PROVIDED AS AN ATTACHMENT TO YOUR TESTIMONY?**
9
10 A. Yes. Schedule 1 is a summary of the USWC Embedded Avoided Cost Study.
11 Exhibits 1 through 7 depict the aggregate and Product Category Avoided Costs and
12 discount calculations. Worksheets 1 through 5 provide further supporting
13 calculations for these Exhibits.
14
15 **DESCRIPTION OF EMBEDDED COST STUDY**
16
17 **Q. PLEASE EXPLAIN MORE FULLY THE EMBEDDED STUDY DATA AND**
18 **THE EXHIBITS THAT ARE ATTACHED TO YOUR TESTIMONY.**
19
20 A. As previously stated, the data employed in this Embedded Avoided Cost Study is
21 taken from the Company's journalized results from operations. The initial data
22 corresponds to the data reflected in the Company's FCC ARMIS 43-03 and 43-04
23 Reports. The South Dakota CAAS/CARS system data also originates with this
24 ARMIS data. However, the CARS reports, which depict intrastate product specific
25 operations, also incorporate the South Dakota Commission's ordered treatment for
26 costs such as depreciation and employee related benefit amortization costs. These

preparation fee over 2,000, and the common facility charge over 3,000. Foremost of these, yes, I want to add especially on the unbundled elements there are just the non-time charges in addition to the monthly charges they're proposing.

The local service provider charge charge, AT&T's rate here is 45 cents. And this is some of the corrections made to my testimony. I kind of want to explain what that position was based on. In my direct testimony at the time AT&T was unable to properly cost this and due to lack of information. So what we did was and on an interim basis used something similar in the long distance industry, the PIC charge, which is $5.00. Since that time then, my rebuttal testimony, we've gained access to some information from another ILEC, Bell South, based on a complaint filed by MCI with the PCC against U S West for their excessive PIC charges. This gave us a lot of information. It outlined all the steps involved in actually processing a change of this type and the cost associated with all of these steps. So that is how we determined the 45 cents. Of the actual study, I guess, had some mechanized process and some manual based on a forward-looking environment. AT&T's costing is based on totally mechanized option.

MR WELK: I'm going to make an objection. I don't believe this was testified in her testimony any place about this new study and Bell South. That has not been in the prefiled or rebuttal.

A. It's in my rebuttal testimony.

MR WELK: The study attached?

A. No.

MR WELK: It was $5.00 before; right?

A. Correct. And in my rebuttal it stated that at that time we hadn't done complete analysis. The rebuttal says less than a dollar until we could clearly determine what it would be. Since the rebuttal was filed we've done our costing and determined 45 cents is reasonable.

MR. WELK: But this information hasn't been provided U S West in connection with this proceeding, has it?

A. Well –

MS. TRIBBY: You're not asking to introduce the study at this time, are you?

MR. WELK: Just the rate?

MS. TRIBBY: Yes.

MR. WELK: I'll continue to object to the reference.

MS. WEST: Objection overruled.

A. I guess just summarizing on, yes, the charge here that U S West are proposing range from $11.16 to $22.36. They are by no service, between service unbundled and a manual option.

The last thing I want to talk about is operational modifications. AT&T's position is that cost recovery should be based on cost causation. All carriers ordering the unbundled elements should pay their own development costs, that U S West pay their own development costs. Any recurring nonrecurring transaction and should be determined using a TELRIC methodology, and they should be included in the one-time per order charge.

Just to briefly summarize AT&T's position in terms of pricing, we believe that prices should be consistent with the federal Act. They should be based on sound economic principles. Impose the same impact on AT&T as U S West when it incurs the same facilities. And they should be competitively neutral amongst all providers.

That concludes my presentation.

MR. WELK: U S West.

MR. WELK: Thank you.

CROSS-EXAMINATION

BY MR. WELK:

Q. Good morning, Miss Starr.

A. Good morning.

Q. Basically what you're doing with your testimony is presenting all of the issues that have been previously presented in the cost studies by U S West – excuse me, by AT&T in this proceeding?

A. Generally that's true. There are a few that don't really come out of the study but generally, yes.

Q. But generally what you're doing is part of the witnesses we heard this week having the cost studies, you've taken basically those issues and related them primarily to the cost of –

A. Yes.

Q. And so you didn't do the cost studies that's all been relayed to Commissioners. You're just presenting them as a fact today, is that correct?

A. That's correct.

Q. Now, if the cost methodologies presented by AT&T are not accepted by the Commission, then the prices won't be accepted, isn't that correct?

A. I'm sorry, can you state that one more time?

Q. It's integral of your rates testimony is based upon the cost studies of AT&T. If the Commission rejects in whole or in part any of those cost studies, some of those prices are going to

the extent technically feasible."[92] Thus, a reseller can purchase resold local exchange services from USWEST and self provision operator services and directory assistance. Please refer to the "Operator Services" and "Directory Assistance" sections of my testimony for additional discussion.

4. Operational Support

Q. WILL USWEST PROVIDE OPERATIONAL SUPPORT (E.G., ELECTRONIC INTERFACES) FOR RESELLERS?

A. Yes. Please refer to the "Unbundling" section of my testimony for a discussion of the operational support that USWEST proposes to provide.

5. Customer Transfer Charge

Q. WHAT IS THE CUSTOMER TRANSFER CHARGE?

A. The Customer Transfer charge is a nonrecurring charge that will apply when a USWEST end user account is transferred to a reseller.

The transfer of customers to a reseller will be facilitated through electronic interfaces. In most cases, a reseller will have mechanized access to USWEST

---

92 First Interconnection Order at para. 526.

APPENDIX 5

systems, and can effectuate the transfer electronically. In these cases, when an reseller accesses USWEST operational support systems, the reseller will pay USWEST for the use of the USWEST systems via transaction charges.

Since system costs are recovered separately, the Customer Trans fer Charge only recovers non-systems costs incurred by USWEST to transfer service. These costs include the costs to handle orders that "drop out" of the order system. Via electronic interfaces, a reseller will initiate an order without the involvement of USWEST personnel. In most cases, the order will also be processed without the involvement of USWEST personnel. However, some orders (e.g., an order that is incomplete) will drop out of the system and must be handled manually. The CTC recovers the costs incurred by USWEST to manually process these orders. In addition, the CTC recovers the costs for USWEST personnel to check the account to be sure that it is not in arrears. If a customer's bill is delinquent, the transfer will not be completed.

USWEST's nonrecurring customer transfer charge is presented in Exhibit C. The cost study for this nonrecurring charge is included in the testimony of Ms. Sandra Rach.

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JAN 20 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

U S WEST COMMUNICATIONS, INC.'S MOTION FOR STAY

Plaintiff U S WEST Communications, Inc. ("U S WEST") moves this Court to stay consideration of U S WEST's Fifth Claim for Relief regarding unbundling of dark fiber and vertical features of the switching element pending the final effective date of the Federal Communications Commission's ("FCC") Third Report and Order.[1] U S WEST also seeks a stay of its claim regarding the requirement that U S WEST procure third-party intellectual property licenses for AT&T until the FCC decides that issue. The grounds in support of this motion are contained in U S WEST's Reply Brief on the Merits of its Affirmative Claims.

Dated this 19th day of January, 2000.

Respectfully submitted,

Thomas J. Welk
Tamara A. Wilke
BOYCE, GREENFIELD, MCDOWELL & GREENFIELD, L.L.P.
P.O. Box 5015
Sioux Falls, SD 57117-5015

[1] Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("Third Report and Order").

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Attorneys for U S WEST Communications, Inc.

RECEIVED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON,
LASKA SCHOENFELDER, Commissioners
of the Public Utilities Commission of the
State of South Dakota, AT&T COMMUNICATIONS
OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

CERTIFICATE OF SERVICE

I, Tamara A. Wilka, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 19th day of January, 2000, true and correct copies of U S WEST Communications, Inc.'s Reply Brief on the Merits of its Affirmative Claims and Motion for Stay were sent by U S mail, postage paid, to the following at the following addresses:

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January 19, 2000

RECEIVED

JAN 27 2000

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of the Motion for Admission Pro Hac Vice and Order together with a check in the amount of $100 for the filing fee. Please forward the Order to Judge Battey for his signature.

I have also enclosed a second copy of the documents. Please file stamp and return to me in the enclosed stamped, self-addressed envelope.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosure
cc: Rolayne Ailts Wiest
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex M. Duarte

Russell P. Rowe
Philip L. Douglass
Bonnie Ulrich
Larry Tidd
Jon Lehrer
Steven Zarling

FILED
JAN 25 2000

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	CIV. 99-5024 ORDER TO ADMIT NONRESIDENT ATTORNEY

RECEIVED
JAN 28 2000
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Thomas J. Welk has filed a motion to allow nonresident attorney, Philip L. Douglass, to participate in all proceedings in the above case. The Court has reviewed the file and good cause appearing, it is hereby

ORDERED that Philip L. Douglass is hereby admitted to participate in all proceedings of this case pursuant to the Rules of Practice of the United States District Court of the District of South Dakota.

IT IS FURTHER ORDERED that Philip L. Douglass shall pay to the Clerk of this Court the sum of $100 as his admission fee.

Dated January 25, 2000.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

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Rolayne Ailts Wiest

South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 4, 2000

Mr. Joseph A. Haas
Clerk
United States District Court
515 9th Street, No. 302
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T Communications of the Midwest, Inc.
Civil No. 99-5024

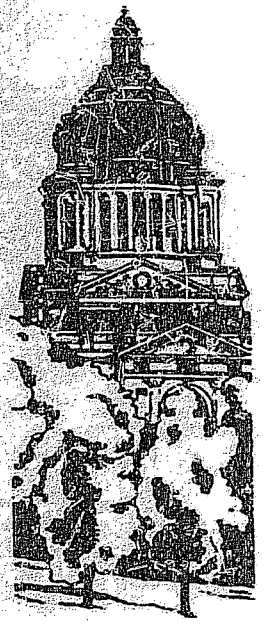
Dear Mr. Haas:

Enclosed for filing you will find original and copy of Commissioners' Response to U S WEST Communications, Inc.'s Motion for Stay with reference to the above captioned matter.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.



South Dakota
Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 4, 2000

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Mr. David Zaring
Trial Attorney
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Civil Division
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P. O. Box 883, Room 907
Washington, DC 20044

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Counsel:

Enclosed each of you will find a copy of Commissioners' Response to U S WEST Communications, Inc.'s Motion for Stay in the above captioned matter. This is enclosed for service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

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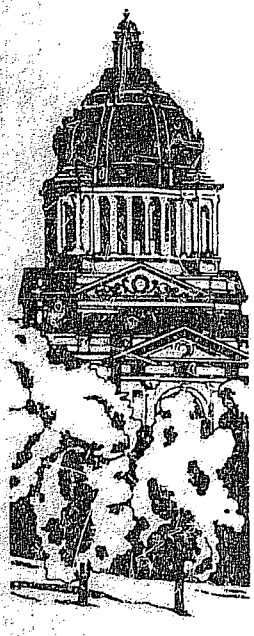

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Keith Senger
Rolayne Ailts Wiest

February 4, 2000

The Honorable Richard H. Battey
Senior Judge
United States District Court
515 9th Street, No. 318
Rapid City, SD 57701

Re: U S WEST Communications, Inc. v. James A. Burg, Pam Nelson, Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota At&T Communications of the Midwest, Inc.
Civil No. 99-5024

Dear Judge Battey:

Enclosed you will find a courtesy copy of Commissioners' Response to U S WEST Communications, Inc.'s Motion for Stay in the above captioned matter. The original has been filed with the Clerk.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

RAW:dk
Enc.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation,

Defendants.

Civ. No. 99-5024

COMMISSIONERS' RESPONSE TO U S WEST COMMUNICATIONS, INC.'S MOTION FOR STAY

Defendants James A. Burg, Chairman of the Public Utilities Commission of the State of South Dakota, Pam Nelson, Commissioner of the Public Utilities Commission of the State of South Dakota, and Laska Schoenfelder, Commissioner of the Public Utilities Commission of the State of South Dakota, through the undersigned representative, do not object to the granting of U S WEST Communications, Inc.'s Motion for Stay dated January 19, 2000.

Dated at Pierre, South Dakota, this 4th day of February, 2000.

Rolayne Ailts Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Commissioners' Response to U S WEST Communications, Inc's Motion for Stay were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 4th day of February, 2000.

Mr. Michael Thompson
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Rolayne Ailts Wiest
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February 10, 2000

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Rolayne Ailts Wiest
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Pierre, SD 57501

[illegible]

FILE

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

RE: 99-5024

Dear Counsel:

Enclosed herewith please find a true and correct copy of AT&T Communications of the Midwest, Inc.'s Response to U S WEST's Motion to Stay and Notice Regarding New Authorities.

Very truly yours,

John S. Lovald

JOHN S. LOVALD
Attorney at Law

JSL/sdr

Encl: as

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February 10, 2000

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Clerk, United States District Court
225 S. Pierre Street, #405
Pierre, South Dakota 57501

RE: 99-5024

Dear Clerk:

Enclosed herewith please find original and two copies of AT&T Communication of the Midswest, Inc.'s Response to U S WEST's Motion to Stay and Notice Regarding New Authorities for filing.

Very truly yours,

John S Lovald

JOHN S. LOVALD
Attorney at Law

JSL/sdr

Encl: as

cc: Michael Thompson
Bonnie Ulrich
Rolayne Ailts Wiest
Thomas Welk
Tamara Wilka
David Zaring

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

U S WEST COMMUNICATIONS, INC., Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa Corporation, Defendants.	)	Civ. No. 99-5023

AT&T COMMUNICATIONS OF THE MIDWEST INC.'S RESPONSE TO U S WEST'S MOTION TO STAY AND NOTICE REGARDING NEW AUTHORITIES

Defendant AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits its response to U S WEST Communications, Inc.'s ("U S WEST") Motion for Stay. In addition, AT&T also wishes to direct the Court to two recent cases decided by the United States Court of Appeals for the Fourth Circuit that are directly pertinent to the issues in this case. See GTE South, Inc. v. Morrison, 1999 WL 1186252 (4th Cir. Dec. 15, 1999) ("Morrison II"); AT&T Communications of Virginia, Inc. v. Bell Atlantic – Virginia, Inc., 197 F.3d 663 (4th Cir. 1999) ("Bell Atlantic – Virginia").

I. THE COURT SHOULD NOT ABSTAIN FROM DECIDING U S WEST'S CLAIMS RELATING TO DARK FIBER AND VERTICAL FEATURES

There is no valid reason for U S WEST's request for stay of its Fifth Claim for Relief relating to unbundling of dark fiber and vertical features of the switching element. As AT&T demonstrated in its Opposition to U S WEST's Merits Brief (at 22-23), these issues were

correctly decided by the PSC and should be affirmed forthwith by the Court. Moreover, the FCC's Third Report and Order, which it adopted and announced on September 15, 1999, and issued on November 5, 1999, makes clear that incumbent local exchange carriers ("LECs") must offer unbundled access to dark fiber and to vertical features of the switch.[1]

Even though the Third Report and Order is dispositive of U S WEST's claims and fully supports the PSC's holding below, U S WEST nonetheless asserts that the Court should abstain from deciding its claims until the Third Report and Order "becomes final and any request for a stay of that Order is addressed." U S WEST's Reply Brief on the Merits, at 11. There is no basis for U S WEST's stay request. In fact, the Third Report and Order will become effective on February 17, 2000, only a few days from now. See 61 Fed. Reg. 2542. To AT&T's knowledge, although U S WEST has filed a Notice of Appeal, no party (including U S WEST) has requested either the FCC or any Court of Appeals to stay the effectiveness of the Third Report and Order. Accordingly, just like the initial Local Competition Order and any other effective FCC rule, the Third Report and Order has "the force and effect of law," and must be applied by this Court. See AT&T's Opposition to U S WEST's Brief on the Merits, at 8.[2] Therefore, the Court should not

---

[1] Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, ¶¶ 244 & n.475, 340-50 (FCC rel. Nov. 5, 1999). See AT&T's Opposition to U S WEST's Merits Brief at 22-23.

[2] In Morrison II, the Fourth Circuit adopted and applied the scope and standards of review advocated by AT&T in its Opposition to U S WEST's Merits Brief (pp. 7-10, filed Dec. 2, 1999). See 1999 WL 1186252 at *7-8 & n.5. In particular, the Court held that a "party cannot use an appeal from a district court to circumvent the Hobbs Act's requirement that a challenge to an FCC Order is subject only to direct review in a Court of Appeals." Id. *7.

only decide U S WEST's claims regarding dark fiber and vertical features, but should reject them on the basis of the FCC's Third Report and Order.[3]

Moreover, the Fourth Circuit's recent holding in Mercatus II demonstrates that a stay would not be appropriate on this issue. In that case, an incumbent LEC challenged the State Commission's determination to set prices based upon a forward-looking cost methodology rather than the LEC's historic costs. 1999 WL 1186252, at *3-4. As part of its argument, the LEC asserted the FCC's pricing rules (which contain a similar cost methodology) violated the terms of the Act. Id. at * 7. The Court held that it lacked jurisdiction to address that claim because those rules are currently the subject of a direct appeal in the Eighth Circuit pursuant to the Hobbs Act. Id.; see n.2 supra. But significantly, the Court also rejected the incumbent LEC's alternative claim that it should "hold th[e] appeal in abeyance until the Eighth Circuit" decides the validity of the pricing rules. 1999 WL 1186252, at *8. The Fourth Circuit recognized that "some or all" of the rules "may later [be] invalidated," but determined that it should adjudicate the merits of the LEC's challenge to the State Commission's pricing determination. Id. That was because going forward would not "work any fundamental unfairness" on the LEC, and also would avoid "considerable delay," which is "inconsistent with Congress's express policy to bring about competition quickly in the local markets." Id. The same reasoning applies here: like the FCC's pricing rules, the FCC's unbundling rules on dark fiber and vertical features will soon be effective, and although they are subject to challenge in

[3] U S WEST does not even request that the Court delay its ruling on this issue until a court of appeals addresses the merits of the Third Report and Order, and with good reason. No briefing schedule has been issued in that case, and any final ruling appears to be at least several months away. To delay ruling on these issues would only provide U S WEST with another way to delay opening its local markets to competition.

another forum, courts should continue to apply those rules in the course of adjudicating appeals pursuant to section 252(e)(6).

Finally, the Fourth Circuit's ruling Bell Atlantic – Virginia provides yet additional support for the PSC's holding on dark fiber. The Fourth Circuit, "like every other court that has heard th[e] argument," rejected an incumbent LEC's claim that dark fiber could not be a network element because it is not currently "used." 197 F.3d at 672 (citing U S WEST Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004, 1018-19 (D. Ariz. 1999), appeal pending, 9th Cir. No. 99-16247 et al.); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 49 F. Supp. 2d 416, 425 (E.D. Ky. 1999)). The Court found that even though dark fiber is not attached to the electronics required to light it, dark fiber is still a network element because it is "capable of being used." Id. Noting that the Supreme Court has acknowledged the Act's broad definition of network element, id. (citing AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 734 (1999)), the Court also concluded that including dark fiber as a network element is "in harmony with Congress's express goal of fostering competition" in local markets, because competing carriers can use dark fiber to "deploy newer, more efficient technologies instead of remaining captive to the existing network architecture." Id. Thus, the Bell Atlantic – Virginia decision further confirms that the Court should not hesitate and should reject U S WEST's Fifth Claim for Relief.

II. AT&T DOES NOT OBJECT TO U S WEST'S REQUEST THAT THE COURT SHOULD STAY ITS CONSIDERATION OF THE INTELLECTUAL PROPERTY ISSUE PENDING THE FCC'S FULLY BRIEFED PROCEEDING

U S WEST also moves for a stay of its claim regarding the PSC's determination that the Act's nondiscrimination provisions require U S WEST to negotiate licenses to intellectual property on behalf of competing carriers. AT&T suggested the way to its brief to

Opposition, and because the FCC is conducting a proceeding on this very issue that is fully briefed and ripe for decision, AT&T does not object to this request.[4]

If the Court were to reach the merits, however, AT&T again directs the Court to the recent decision of the Fourth Circuit in Bell Atlantic – Virginia. In that case, the Fourth Circuit concluded that a state commission wrongfully refused to require the incumbent LEC to negotiate licenses for intellectual property used in the incumbent LEC's network. Bell Atlantic – Virginia, 197 F.3d at 670-71. The Court ruled that an agreement without a licensing provision "discriminates because it does not provide [competing carriers] equal license to the intellectual property embedded in [the incumbent's] network." Id. at 670. That violates the Act's requirement of nondiscriminatory access to unbundled network elements, id. (citing 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.311(b)), and is "inconsistent with the Act's purpose of fostering competition by removing barriers to entry in the local telephone market." Id. at 671. Thus, as this decision confirms, the South Dakota PUC's holding is not only consistent with the Act, it is mandated by it. See id.; AT&T's Opposition to U S WEST's Merits Brief at 31-35.[5] Although the Court need not reach the issue, if it does, the PUC's holding should be affirmed.

---

[4] The fact that the FCC proceeding has already been fully briefed distinguishes this request for stay from U S WEST's request for stay of its Fifth Claim for Relief.

[5] In addition, the Court in Bell Atlantic – Virginia also reversed the determination of the state commission and held that binding FCC rules required an incumbent LEC "to allow [competing carriers] to use their collocated [remote switching module's] for switching and routing." 197 F.3d at 669-670. Accordingly, the South Dakota PUC's conclusion requiring U S WEST to permit collocation of RSM's is not merely reasonable, but is the only permissible interpretation of the Act. See AT&T's Opposition to U S WEST's Merits Brief at 17-20. U S WEST, however, has stated that it has withdrawn this claim from consideration. Brief at 2-3.

CONCLUSION

For the reasons stated herein, and for the reasons stated in AT&T's Opposition to U S WEST's Merits Brief, U S WEST's request for stay of its Fifth Claim for Relief should be denied, and judgment should be entered in favor of AT&T on all counts of U S WEST's complaint.

Respectfully submitted,

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Attorneys for AT&T Communications of the Midwest, Inc.

February 10, 2000

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February 25, 2000

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RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest
(United States Dist. Ct. - Western Div. Civ. No. [illegible])
Our File No. 2104.007

Dear Counsel:

Please find enclosed a copy of U S WEST's Reply to AT&T's Response to U S WEST's Motion to Stay and Certificate of Service. This is intended as service upon you by mail.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosures
cc: Russell P. Rowe
Phillip L. Douglass
Alex Duarte

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February 25, 2000

Clerk of United States District Court
515 9th Street, #302
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)
Our File No. 2104.007

Dear Clerk:

Please find enclosed for filing the original and one copy of U S WEST's Reply to AT&T's Response to U S WEST's Motion to Stay and Certificate of Service. I have also enclosed a second copy of the brief. Please file stamp and return to me in the enclosed stamped, self-addressed envelope.

Thank you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosure
cc: Rolayne Ailts Wiest
John Lovald
Maria Arias Chapleau
Michael D. Warden
Alex M. Duarte
Kara Sacilotto
Russell P. Rowe
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Larry Toll
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Steven Zacharias

RECEIVED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

JAMES A. BURG, et al.,

Defendants

CIV NO. 96-5024

U S WEST'S REPLY TO AT&T'S RESPONSE TO U S WEST'S MOTION TO STAY

U S WEST Communications, Inc. ("U S WEST") submits this reply to AT&T Communications of the Midwest, Inc.'s Response to U S WEST's Motion to Stay and Notice Regarding New Authorities ("Response").

I. INTRODUCTION

U S WEST has asked the Court stay consideration of U S WEST's claims regarding (1) negotiation of third-party intellectual property licenses on behalf of AT&T, (2) access to vertical switching features, and (3) dark fiber. In its Response, AT&T, like the South Dakota Public Utilities Commission and its Commissioners (collectively "the Commission"), agrees that the Court should stay consideration of the intellectual property issue. See Response at 3. AT&T contends, however, that the Court should not stay consideration of the vertical features and dark fiber issues and should reject U S WEST's claims.

In light of the recent publication of the FCC's Third Report and Order,[1] U S WEST agrees that the Court should not stay consideration of the vested Sections claim; instead, U S WEST will withdraw that claim.[2]

With respect to the dark fiber claim, the dark fiber obligations the Third Report and Order impose do not take effect until 120 days after publication of that order in the Federal Register. Third Report and Order ¶ 526. Regardless, the dark fiber obligations the Commission has imposed on U S WEST are inconsistent with the Third Report and Order and violate the Act. Therefore, the Court could stay consideration of the dark fiber claim until the dark fiber provisions of the Third Report and Order take effect, but if it chooses not to, it should remand the dark fiber provisions of the Agreement to the Commission with instructions to modify them for consistency with the Act and the Third Report and Order.

II. DISCUSSION

On January 18, 2000, after U S WEST filed its reply brief and motion to stay, the FCC published its Third Report and Order in the Federal Register and, as a result, certain provisions of that order have gone into effect. Although some carriers (including U S WEST)

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[1] Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999)" or "Third Report and Order" for 3) ("Third Report and Order").

[2] U S WEST has challenged the Third Report and Order on the merits and believes that aspects of the order violate the Act. Nothing herein should be construed as an endorsement of the order or a waiver of its claims that the Third Report and Order violates the Act. If U S WEST or any other challenging party prevails on its challenge to the order, U S WEST reserves the right to seek appropriate amendments to the Agreement.

have challenged the Third Report and Order in federal court, U S WEST is unaware of any request for a stay of that order, and no court has issued a stay.

Vertical Features of the Switch. The Third Report and Order requires incumbent local exchange carriers ("incumbent LECs") to unbundle switches, including the vertical features of switches, except in certain markets and under certain circumstances. Third Report and Order ¶¶ 241-99. Because this aspect of the Third Report and Order is now in effect and U S WEST has not sought a stay of this order, U S WEST will withdraw its Fifth Claim for Relief regarding vertical features of the switch.

Dark Fiber. AT&T is incorrect that the Third Report and Order is in effect with respect to dark fiber. Any dark fiber obligations under the Third Report and Order will not take effect until 120 days from publication in the Federal Register. Third Report and Order ¶ 526. In any event, regardless of the Third Report and Order, the Commission's decision was incorrect and the Agreement violates the Act and FCC orders.

U S WEST does not dispute that when the dark fiber provisions of the Third Report and Order take effect, incumbent LECs who receive requests from competitive local exchange carriers ("CLECs") are required to provide dark fiber, except to the extent a carrier can retain reserves to serve customer demands. Third Report and Order ¶¶ 535, 541-51. The Third Report and Order, however, does not require U S WEST to "light" dark fiber for CLECs. Id.

The Commission, however, reached the opposite conclusion in the dark fiber provisions it imposed. The Commission determined that U S WEST has no duty to provide *dark* fiber to AT&T, but that if U S WEST could not meet a capacity request of AT&T with "lit" fiber and U S WEST could meet the capacity request by "lighting" dark fiber, U S WEST would be required to so do. The Act and the Third Report and Order impose no such duty on

incumbent LECs. Further, the Third Report and Order renders unfounded the Commission's justification for imposing this "lighting" requirement.

The Commission's rationale for requiring U S WEST to "light" dark fiber is inextricably intertwined with its conclusion that it could not order U S WEST to provide dark fiber. The Commission was "concern[ed] that U S WEST could install fiber, not install the electronics to make the fiber operational, and then refuse requests for unbundled local loops because the fiber was 'unlit.'" Commission's Responsive Brief at 15. In light of the Third Report and Order, the Commission's "lighting" requirement in Agreement, Part A, § 5.1.3 went too far. From U S WEST, AT&T gets dark fiber only. AT&T must attach its own electronics to light the fiber. Otherwise, AT&T gains access to more than U S WEST's "existing" network. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), aff'd in part, rev'd on other grounds, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); U S WEST Opening Brief at 23. Stated differently, U S WEST is not required to "convert" dark fiber into something else.

Indeed, in attempting to justify its "lighting" requirement, the Commission fueled the downfall of this requirement that follows from the FCC's determination that dark fiber is a network element. "If dark fiber were a network element then AT&T would have the ability to buy the dark fiber and place its own electronics on the fiber." Commission's Responsive Brief at 16. Accordingly, while this Court could stay consideration of this issue until the fatal fiber portions of the Third Report and Order take effect, if the Court chooses not to do so, it should remand the issue to the Commission to modify Section 5.1 of the Agreement to permit AT&T to access U S WEST's dark fiber only in a manner consistent with the Third Report and Order and to eliminate any requirement that U S WEST "light" dark fiber for AT&T.

Negotiation of Third-Party Intellectual Property Rights. Finally, U S WEST replies to the "Notice Regarding New Authorities" portion of AT&T's Response. As noted above, both AT&T and the Commission agree that the Court should stay consideration of U S WEST's challenge to the provisions of the Agreement relating to negotiation of third party intellectual property licenses. Nevertheless, AT&T did not stop there. Instead, it submits the decision in AT&T Communications of Virginia, Inc. v. Bell Atlantic – Virginia, Inc., 197 F.3d 663 (4th Cir. 1999), as new authority pertinent to the merits of the intellectual property issue.

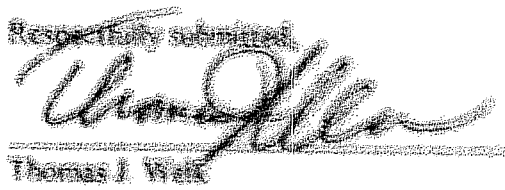
AT&T's briefing of this issue is inconsistent with U S WEST's, the Commission's and AT&T's agreement that the Court should stay consideration of this issue until the FCC addresses it. If the FCC disagrees with the Fourth Circuit, the Fourth Circuit's decision will be meaningless. Accordingly, U S WEST requests that the Court accept the suggestion of all parties and stay consideration of this issue until the FCC addresses it in its pending proceedings. After issuance of that determination, not now, the parties should address the merits of this issue and the relevance, if any, of AT&T's new authority.

III. CONCLUSION

Accordingly, U S WEST respectfully requests that the Court stay consideration of its Ninth Claim for Relief regarding negotiation of third party intellectual property licenses. U S WEST requests that the Court remand its Fifth Claim for Relief regarding fees back to the Commission with instructions to modify the Agreement to comply with the Act and the Third Report and Order. U S WEST will withdraw its Fifth Claim for Relief regarding unbundling of vertical features of the switch.

DATED: February 25, 2000

Respectfully submitted,



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U S WEST Communications, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Civ No 99-4024

Plaintiff,

v.

CERTIFICATE OF SERVICE

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

I, Thomas J. Welk, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, and on the 25th day of February, 2000, true and correct copies of U S WEST's Reply to AT&T's Response to U S WEST's Motion to Stay were sent by U S mail, postage paid, to the following at the following addresses:

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Federal Programs Branch
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Washington, DC 20044

Thomas J. Welk

FILED
MAY 22 2000

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	CIV. 99-5024 ORDER SCHEDULING ORAL ARGUMENT

Upon good cause appearing, it is hereby

ORDERED that oral arguments on the claims remaining in U S WEST's complaint shall be heard on Tuesday, July 11, 2000, at 9:00 a.m. in the Federal Building, 515 Ninth Street, Room 301, Rapid City, South Dakota.

Dated May 22nd, 2000.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY

The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 5-22-00.

CLERK

RECEIVED
MAY 23 2000
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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June 30, 2000

RECEIVED
JUL 03 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Clerk, United States District Court
515 9th Street, No. 302
Rapid City, South Dakota 57701

RE: U S WEST Communications, Inc vs. James A. Burg, Pam Nelson, and Lasha Schoenfelder

Dear Clerk:

I enclose herewith an original and two copies of a **MOTION FOR ADMISSION PRO HAC VICE AND ORDER** to be forwarded to Judge Burney for his signature and filing. I also enclose herewith a check in the amount of $100.00 for the filing fee.

Please file stamp the second copy and return it to me in the enclosed stamped addressed envelope.

Yours very truly,

John S. Lovald
Attorney at Law

cc: Tamara Wilka
Rolayne Ailts Wiest
Alex Duarte
Michael Thompson
Bonnie Ulrich
David Zaring

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

RECEIVED
JUL 03 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

U S WEST COMMUNICATIONS, INC., Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa Corporation, Defendants.	Civ. No. 99-5034 MOTION FOR ADMISSION PRO HAC VICE AND ORDER

STATEMENT OF MOVANT

I, John S. Lovald, an active member of the Bar of the U.S. District Court for the District of South Dakota, request that this Court admit pro hac vice Michael J. Hunseder, an attorney admitted to practice in the Maryland Court of Appeals, District of Columbia Court of Appeals, and the United States District Courts for the District of Columbia and the District of Maryland but not admitted to the Bar of this Court, who will be counsel for the Defendant AT&T Communications of the Midwest, Inc. in the case listed above. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: June 30, 2000

By: [signature]

STATEMENT OF PROPOSED ADMITTEE

I, Michael J. Hunseder, am currently a member in good standing of the Maryland Court of Appeals, District of Columbia Court of Appeals, and the United States District Courts for the District of Columbia and the District of Maryland, but not admitted to the Bar of this Court. I am aware of Local Rule 83.2(E) regarding the appearance of attorneys pro hac vice.

Dated: June 29, 2000 By: Michael J. Hunseder

Law Firm: Sidley & Austin
Suite/Building: 1722 Eye Street, N.W.
Address: Washington, DC 20006
Telephone Number: (202) 736-8000

ORDER

It is hereby

ORDER that the above-entitled Motion for Admission Pro Hac Vice is granted and it is further

ORDERED that a Pro Hac Vice admission fee in the amount of $100.00 shall be paid to the Clerk of Courts, 515 9th Street, #302, Rapid City, South Dakota 57701.

Dated this _____ day of _____, 200x.

By the Court:

_____
U.S. District Judge

ATTEST:

JOSEPH HAAS, Clerk

By: _____

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WADE A. REIMERS

June 30, 2000

RECEIVED
JUL 03 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Clerk, United States District Court
225 S. Pierre Street
Pierre, South Dakota 57501

RE: U S WEST Communications, Inc vs. James A. Burg, Pam Nelson, and Leslie Schoenfelder

Dear Clerk:

I enclose herewith an original and two copies of a notice we would like filed regarding new authorities. We are filing to disclose cases decided since our brief in this matter was filed.

Yours very truly,

John S. Lovald
Attorney at Law

cc: Tamara Wilka
Rolayne Ailts Wiest
Alex Duarte
Michael Thompson
Bonnie Ulrich
David Zaring

RECEIVED
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

U S WEST COMMUNICATIONS, INC., Plaintiff, v. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa Corporation, Defendants.	Civ. No. 99-5024

AT&T COMMUNICATIONS OF THE MIDWEST'S INC.'S NOTICE REGARDING NEW AUTHORITIES

Defendant AT&T Communications of the Midwest, Inc. ("AT&T"), by undersigned counsel, respectfully submits the following supplemental authority consisting of cases decided by federal courts and decisions of the Federal Communications Commission ("FCC") that are directly pertinent to the issues in this case scheduled for oral argument on May 14, 2000.

Combinations of Network Elements

AT&T addressed the issues regarding combinations of network elements at pages 10 to 13 of its brief (filed Dec. 2, 1999). The following authorities relate to that claim.

In MCI Telecommunications Corp. v. U S WEST Communications, 204 F.3d 1262, 1267-68 (9th Cir. 2000), a panel of the Ninth Circuit held that a provision "requiring U S West to refrain from separating already combined network elements" met the requirements of the Act because the "Supreme Court has . . . reinstated Rule 315(b)." Id. The Court also held that a

provision that "requires U S West to combine otherwise separate elements" upon request was also lawful, and reversed the district court's decision to strike that provision. Id. at 1268. The Court recognized that the Eighth Circuit had invalidated rules of the FCC that mandated such a provision, but held that the Supreme Court's ruling "confirms that the Eighth Circuit's interpretation of the Act was incorrect." Id.

In U S WEST Communications, Inc. v. Hix, Civil Action No. 97-D-152 et al., Slip Op. I at 10-16 (D. Colo. June 26, 2000) (Attachment 1 hereto), the District Court, relying on MCI Telecomm. Corp., 204 F.3d at 1268 and U S WEST Communications v. MFS Intelenet, 193 F.3d 1112, 1121 (9th Cir. 1999), also held that provisions that "require [U S WEST] to combine network elements at the request of new entrants are fully consistent with Section 251(c)(3) of the Act, as dispositively interpreted by the Supreme Court." Slip. Op. I at 14.

Likewise, the District Court for the Northern District of Florida recently held that a provision requiring BellSouth to provide "'recombined' network elements" was consistent with the Act because the "Supreme Court now has definitively resolved this issue against BellSouth." MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., Case No. 4:97cv141-RH, Slip Op. at 37-38 (N.D. Fla. June 6, 2000) (Attachment 2 hereto) (citing MCI Telecomm. Corp., 204 F.3d at 1268; MFS Intelenet, 193 F.3d at 1121).

Performance Standards

AT&T addressed the issues relating to performance standards at pages 11 to 17 of its brief. The following authority relates to that claim.

The Court in U S WEST Communications, Inc. v. Hix, Civil Action No. 97-D-152 et al., Order Denying US WEST Relief On Its Superior Quality Claim, (D. Colo. June 23, 2000) (Attachment 3 hereto), denied a claim by U S WEST that its interconnection agreement

required it to provide competitive LECs with superior quality access, finding that it had "already ha[d] upheld as consistent with the Act" the provisions at issue and that "there is a complete absence of proof to support" U S WEST's assertions of superior quality. Order at 3-5 (citing U S WEST Communications, Inc. v. Hix, 57 F. Supp 2d 1112, 1120 (D. Colo. 1999)).

Remote Switching Modules

AT&T addressed the issues relating to remote switching modules ("RSMs") at pages 17-20 of its brief. The following authorities relate to that claim.

In MCI Telecomm. Corp., 204 F.3d at 1268-69, the Ninth Circuit upheld a provision of an interconnection agreement that required U S WEST to allow competitive LECs to collocate RSMs.

In U S WEST Communications, Inc. v. Hix, Civil Action No. 97-D-1552 et al., Slip Op. II at 19-26, (D. Colo. June 23, 2000) (Attachment 4 hereto), the Court also upheld a provision of an interconnection agreement requiring U S WEST to allow collocation of RSMs. The Court adopted the reasoning of the Ninth Circuit and found that "[a]lthough the Act may not require the provision [of the agreement requiring U S WEST to allow a CLEC to co-locate RSMs], it certainly does not proscribe it." Slip Op. II at 23-24. The Court recognized that the D.C. Circuit recently vacated the FCC's definition of "necessary" in the section of the Act requiring incumbent LECs to allow collocation of equipment "necessary" for interconnection or access to unbundled elements. Id. at 23-24 (citing GTE Serv. Corp. v. FCC, 205 F.3d 416, 422-24 (D.C. Cir. 2000)). However, the Court found that that holding "does not change the fact that allowing collocation of RS[M]s does not violate the Act." Id.

Dark Fiber

AT&T addressed the issues relating to dark fiber at page 21 of its brief. The following authority relates to that claim.

In MCI Telecomm., 204 F.3d at 1268, the Ninth Circuit affirmed a district court that upheld an interconnection agreement provision requiring U S WEST to provide dark fiber. The Court held that the conclusion that dark fiber is subject to unbundling "has since been solidified by the FCC's new rule, which treats dark fiber as a network element and therefore mandates U S WEST to provide competitors access to it. 47 C.F.R. § 51.319(a)(1). Because unbundled access to dark fiber is now not only consistent with the Act but affirmatively required by it," the Court affirmed the district court.

Further, in U S WEST Communications, Inc. v. Hix, Civil Action No. 97-D-1552 et al., Slip Op. III at 2-10, (D. Colo. Apr. 14, 2000) (Attachment 5 hereto), the Court, citing numerous other cases, found that U S WEST's argument that it may not be required to unbundle dark fiber was "without merit" and that the state commission properly "recognized that dark fiber was a network element, and accordingly, that [U S WEST] was required to unbundle dark fiber." Id. at 5-7.

Single Point of Interconnection

AT&T addressed the issues relating to a single point of interconnection at pages 27 to 28 of its brief. The following authority relates to that claim.

In U S WEST Communications, Inc. v. Hix, Civil Action No. 97-D-1552 et al., Slip Op. IV at 1-4, (D. Colo. June 23, 2000) (Attachment 6 hereto), the Court reversed a decision of the state commission requiring a CLEC to establish a point of interconnection "in each local calling area," and held that the Act provides that "it is the CLEC's choice, subject to technical

feasibility, to determine the most efficient number of interconnection points, and the location of those points." Id. at 3. Following the holdings of numerous other courts, id. at 3-4 (citing cases), the Court required the interconnection to be reformed to allow CLECs to establish a single point of interconnection. Id. at 4.

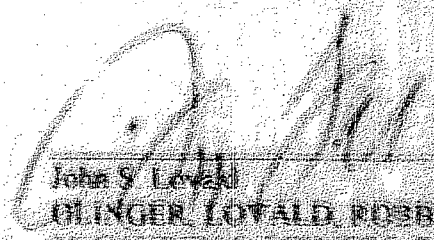
Intellectual Property

AT&T addressed the issues relating to intellectual property at pages 31 to 36 of its brief. The following authorities relate to that claim.

The FCC has now issued a decision in a proceeding to determine the obligations of incumbent LECs with regard to intellectual property rights. See In the Matter of Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License of Rights to Use Agreements Before Purchasing Unbundled Elements, CCBPol 97-8, CC Docket 96-98 (Apr. 27, 2000) (Attachment 7 hereto). The FCC held that "the 'nondiscriminatory access' obligation in section 251(c)(3)" requires incumbent LECs to "exercise their best efforts to obtain co-extensive [intellectual property] rights for competing carriers purchasing unbundled network elements." Id. ¶ 9. In addition, incumbent LECs must "allocate any costs associated with acquiring the necessary intellectual property rights among all requesting carriers, including themselves." Id.

Relying on the FCC's decision, the District Court in Southwestern Bell Tel. Co. v. Apple, CIV-97-1507-A et al., Order, (W.D. Okla. June 1, 2000) (Attachment 8 hereto) "directed" Southwestern Bell "to immediately begin using its best efforts to obtain necessary licensing." Order at 2.

Respectfully submitted,



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June 30, 2000

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I hereby certify on this 21st day of June, 2000, that a copy of the foregoing Response of AT&T Communications of the Midwest, Inc. was served on the following by first class mail, postage prepaid:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 97-D-152 (Consolidated with Nos. 97-D-387, 97-D-1667, 97-D-2041, 97-D-2096, and 98-D-934)

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

ROBERT J. HIX, et al.,

Defendants.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
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JAMES R. MANSPEAKER
CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON U S WEST'S AND MCI'S COMBINATIONS CLAIMS

DANIEL, Judge

I. Introduction

THIS MATTER arises under Sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252 ("the Telco Act"). The Telco Act fundamentally restructured local telephone markets, ending the monopolies that States historically granted to local exchange carriers ("LECs") and subjected incumbent LECs ("ILECs") to an array of duties intended to facilitate market entry, including the obligation under 47 U.S.C. § 251(c) to share their network with competitors. Section 251(c)(3) requires ILECs to provide nondiscriminatory access to elements of its network.

Under the Telco Act, U S West Communications, Inc. ("USWC"), the ILEC, brings suit against certain competitive local exchange carriers ("CLECs") challenging provisions of interconnection agreements approved by the Colorado Public Utilities

Commission ("CPUC" or "the Commission") pursuant to the Telco Act. The CLECs have asserted a number of counterclaims also challenging provisions of the interconnection agreements.

On April 13, 2000, this Court entered Findings of Fact and Conclusions of Law wherein the Court rejected two of USWC's challenges to the combination provisions in the interconnection agreements between USWC and various CLECs. The Court first rejected USWC's claim that the Telco Act prohibits new entrants from obtaining unbundled network elements ("UNEs") at cost-based rates and using those elements to provide finished telecommunications services (its so-called "sham unbundling" claim). See U S West Communications, Inc. v. Hix, Civil Action No. 97-D-152, Findings of Fact and Conclusions of Law, at 23-24 (D. Colo. Apr. 13, 2000). Second, the Court held that the provisions of the interconnection agreements between USWC and CLECs that require USWC to provide already-combined network elements are fully consistent with FCC Rule 315(b) as reinstated by the Supreme Court in AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 393-95 (1999). See Hix, Findings of Fact and Conclusions of Law, at 22-23.

The Court deferred the related issue of whether these provisions violated the Telco Act by requiring USWC to combine network elements that are not already combined in its network and lease those newly-combined elements to new entrants. However, the Court did conclude in its April 13, 2000, Order that USWC was not precluded from raising its duty to combine claim and that it was not obligated to raise this claim through the alternative dispute resolution ("ADR") provisions of its

interconnection agreements with new entrants. Id. at 21-24. Finally, the Court also deferred consideration of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc.'s (collectively "MCI") alternative combinations claim.

A hearing was held on April 20 and 21, 2000, in connection with certain issues concerning the merits of this case. The Court, being fully advised in the premises, hereby issues its Findings of Fact and Conclusions of Law in regard to USWC's challenge to provisions of the interconnection agreements that require it to combine network elements that are not already combined for new entrants and in regard to MCI's claim that the CPUC erred by restricting its ability to order combinations of network elements from USWC under its interconnection agreement.

II. Findings of Fact

1. USWC challenges provisions in each of its separate interconnection agreements ("Agreements") with AT&T Communications of the Mountain States, Inc. ("AT&T"), ICG Telecom Group, Inc. ("ICG"), MCI, Sprint Communications Company L.P. ("Sprint"), and WorldCom Technologies, Inc. ("WorldCom"),[1] claiming that these provisions violate the Telco Act to the extent that they require USWC to combine network elements that are not already currently combined for new entrants.

2. Specifically, USWC challenges provisions in the AT&T/MCI Agreements that require it to "offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit AT&T to provide

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[1] WorldCom was substituted for MFS Communications Company, Inc. and MFS Intelenet, Inc. (collectively "MFS") in this litigation.

Telecommunications Services to its subscribers." USWC-AT&T Agr., Att. 3, § 2.4 (J.A. Vol. 13, Tab 126, at 25053); USWC-MCI Agr., Att. 3, § 2.4 (Id. Tab 128, at 26200).[2] The AT&T/MCI Agreements define "combinations" as the "provision by USWC of two or more currently connected Network Elements ordered by [AT&T/MCI] to provide its Telecommunications Services in a geographic area or to a specific subscriber." USWC-AT&T Agr., part B (J.A. Vol. 13, Tab 126, at 25027); USWC-MCI Agr., part B (J.A. Vol. 13, Tab 128, at 26174).

3. USWC also challenges Section XXXI.A.3 of the MFS-USWC Interconnection Agreement. That section provides that:

> USWC will not restrict the types of telecommunications services MFS may offer through unbundled network elements, nor will it restrict MFS from combining elements with any technically compatible equipment that MFS owns. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

J.A. Vol. XII, Tab 120, at 5862. USWC challenges virtually identical provisions in the ICG and Sprint agreements. See J.A. Vol. 12, Tab 125, § 31.A.2 at R. 7397 (ICG); J.A. Vol. 11, Tab 112, § 32.1.2 at R. 1673 (Sprint).

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[2] The USWC-MCI Agreement is identical to the USWC-AT&T Agreement.

4. In Count Eight of MCI's claim in Case No. 97-C-2047, MCI challenges the provision in its interconnection agreement with USWC which restricts MCI's ability to order combinations of network elements from USWC. Specifically, MCI challenges the provision defining what "combinations of network elements" USWC must provide to MCI:

> "COMBINATIONS" means provision by [USWC] of two or more currently connected Network Elements ordered by [MCI] to provide its Telecommunication Services in a geographic area or to a specific subscriber and that are placed on the same or related order by [MCI], subject to restrictions, if any, imposed by the [Commission].

J.A. Vol. 13, Tab 128, at R. 26174 (emphasis in original).

5. In its order approving the interconnection agreements between MCI, AT&T and USWC, the CPUC ordered that the word "currently" shown in bold and underlined above be inserted into the definition of "combinations." J.A. Vol. 13, Tab 105, at R. 26132. The Commission ordered that revision in response to the Eighth Circuit's decision in Iowa Utilities Bd. v. Fed. Communications Comm'n, 120 F.3d 753 (8th Cir. 1997), described below. MCI objects to this revision.

6. Section 251(c)(3) of the Act obligates ILECs to provide "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide [] telecommunications service." In its rulemaking implementing the Act, the Federal Communications Commission ("FCC") promulgated regulations that prohibited ILECs from separating network elements requested by CLECs that the ILECs currently combine, 47 C.F.R. § 315(b), and otherwise required incumbents to combine

network elements that are not "ordinarily combined in the incumbent's network." 47 C.F.R. § 315(c)-(f). See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996) ("Local Competition Order"). The Eighth Circuit vacated FCC Rules 315(b)-(f), see Iowa Utils. Bd., 120 F.3d at 813, but the Supreme Court reinstated Rule 315(b), see AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 393-97 (1999). Rule 315(c)-(f) remain vacated, as the Supreme Court in AT&T Corp. did not address these rules.

7. After the Eighth Circuit's decision, USWC argued to the CPUC in the AT&T and MCI arbitration proceedings that the Telco Act did not require it to combine network elements for new entrants. USWC did not raise this issue in the WorldCom, ICG, and Sprint dockets because the CPUC decisions and the interconnection agreements in those dockets were already on appeal before this Court when the Eighth Circuit's decision was handed down. Nevertheless, USWC did raise this issue with respect to each of these CLECs in the CPUC's separate pricing docket, known as Docket No. 96S-331T ("331T Docket").

8. In the 331T Docket, after the Eighth Circuit had vacated FCC Rules 315(b)-(f), but before the Supreme Court reinstated Rule 315(b), the CPUC issued its Decision Regarding Commission Authority to Require Combination of Network Elements, Decision No. C98-267 (Feb. 18, 1998) ("Combination Decision") (R. 39962-71), where it concluded that the Commission had authority under state law to require USWC to combine network elements. Id. at 10. The CPUC stated, however, that the determination of "[w]hether such an order is proper depends upon the factual

investigation presently being conducted in this case" and that determining whether USWC's proposed method of providing access to network elements is "discriminatory, unjust, and unreasonable" "constitutes a factual assertion which must be considered in light of the evidentiary hearing." Id. Allowing new entrants to obtain access to USWC's facilities to combine elements is necessary because, as the Eighth Circuit held in Iowa Utilities Board, and as the Supreme Court affirmed, new entrants are "entitled to gain access to all of the [incumbent carrier's] unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services." 120 F.3d at 815, aff'd, 525 U.S. at 393-95.

9. The CPUC held hearings in the 331T Docket on USWC's proposal for enabling new entrants to combine network elements on April 20 and 21, 1998. On October 28, 1998, the CPUC issued its Commission Order on Rehearing, Docket No. 96S-331T, Decision No. C98-1047 (Colo. PUC Oct. 28, 1998) at p. [illegible] ("331T Order on Rehearing"). That order rejected USWC's so-called Single Point of Termination or "SPOT" Frame proposal for providing new entrants with access to network elements based on the record evidence before the Commission in that docket. Among other things, the CPUC concluded that the SPOT Frame proposal "introduces unnecessary points of failure into the telephone network," 331T Order on Rehearing, at 12, is "inefficient and would result in unnecessary service disruption to customers," Id. at 13, needlessly raises costs, and is "discriminatory and therefore violates the Federal Act." Id. at 15. The CPUC therefore concluded that because USWC's proposal for permitting new entrants to combine UNEs should be rejected, USWC instead must

combine network elements for CLECs. It made clear, however, that USWC "is not precluded from making a future proposal for CLECs to combine UNEs themselves." Id. at 16. The CPUC ordered USWC to include in its Colorado tariff a provision that requires USWC to combine network elements for CLECs. That tariff provision is identical to the provision in the MFS agreement quoted in paragraph 3 above. See Local Network Interconnection and Service Resale Tariff, Colo. P.U.C. No. 17 § 6.1.3 (issued April 19, 1999).

10. USWC argues that the Interconnection Agreements, the CPUC's Combination and 331T Order on Rehearing Decisions, and the resulting tariff violate the Act as interpreted by the Eighth Circuit in Iowa Utilities Board because they require USWC to combine network elements for new entrants.[3] USWC argues that although the Supreme Court reversed the Eighth Circuit's decision regarding Rule 315(b), and reinstated that provision, none of the petitioners before the Supreme Court appealed FCC Rules 315(c)-(f) which require ILECs to combine elements for CLECs that are not ordinarily combined in their networks. Thus, according to USWC, because Rules 315(c)-(f) remain vacated, the provisions in the Agreements and the tariff that require it to combine network elements violate the Telco Act as well as the Hobbs Act, which vests review of FCC regulations in the courts of appeals, and this Court is precluded from upholding the challenged provisions of the Agreements. Moreover, USWC argues

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[3] AT&T and USWC do not agree upon the meaning of the phrase "currently connected Network Elements" in their interconnection agreement. Because the Court concludes for the reasons stated below that interconnection agreements that require ILECs to combine network elements are consistent with the Telco Act, the Court need not resolve this dispute.

that the CPUC's state law basis for requiring it to combine network elements is preempted by the Telco Act.

11. In response to USWC's claim, the CLECs argue that, although Rules 315(c)-(f) remain vacated, the issue before this Court is not whether the vacated FCC Rules require USWC to combine network elements, but rather whether the Agreements and tariff provisions are inconsistent with the Act. The CLECs note that the Supreme Court has rejected the Eighth Circuit's interpretation of Section 251(c)(3) of the Telco Act, and assert that the challenged provisions of the Agreements and tariff are consistent with the Act as interpreted by the Supreme Court. The CLECs alternatively argue that because the CPUC concluded in the 331T Docket, based on an extensive evidentiary hearing, that USWC's SPOT Frame proposal violated the nondiscrimination provisions of the Telco Act and because the Telco Act explicitly permits new entrants to combine network elements, the CLECs are entitled to a nondiscriminatory means to obtain combinations of network elements. Thus, according to the CLECs, unless and until USWC develops a nondiscriminatory mechanism for new entrants to combine network elements themselves, the provisions challenged by USWC are consistent with the Telco Act. Finally, the new entrants contend that the Telco Act preserves state law in a number of respects and that there is an independent state law basis for upholding the provisions challenged by USWC.

12. With respect to its affirmative claim, MCI argues that under its interconnection agreement with USWC, it can neither request that USWC provide it with unrestricted combinations of network elements, nor gain access to USWC's network to

combine those elements itself. Hence, MCI argues that the CPUC erred in revising the Agreement because under the revised Agreement, MCI cannot provide telecommunications services entirely through USWC's network elements, as both the Eighth Circuit and the Supreme Court have held MCI is entitled to do. Moreover, the revised Agreement is not consistent with the CPUC's later decision in the 331T Docket to require USWC to combine elements for the CLECs.

III. Conclusions of Law

1. As stated above, USWC argues that certain provisions of the Agreements and its tariff violate the Telco Act because the Act prohibits the CPUC from requiring ILECs to combine unbundled network elements. Because this issue involves the CPUC's compliance with the Act and the FCC's implementing regulations, the Court reviews this issue de novo. U S West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997).[4]

2. This Court's task under Section 252(e)(6) of the Act is to determine whether the challenged provisions of the interconnection agreements "meet the requirements of section 251 and [252] of the Act," 47 U.S.C. § 252(e)(6) or, in this instance, "to decide whether a provision requiring combination [of network elements] violates the Act," MCI Telecomms. Corp. v. U S WEST Communications, Inc., 204 F.3d 1262, 1267 (9th Cir. 2000). The Court holds for the reasons stated below that the

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[4] The Court does not address the standard of review for the argument that the CPUC had authority under state law to order combinations or the argument that the "SPOT" frame analysis fails to provide new entrants with a nondiscriminatory means to combine network elements themselves since the Court does not base its decision on these arguments.

provisions in the Agreements and tariff requiring USWC to combine network elements at new entrants' request are consistent with the Act.

3. All of the FCC's combinations regulations were overturned by the Eighth Circuit in Iowa Utilities Board, 120 F.3d at 813 & n. 39, which held that the "plain meaning of the Act indicates that the requesting carriers will combine the unbundled network elements themselves." The Eighth Circuit thus invalidated 47 C.F.R. § 315(b)-(f).[5] The Court based its rationale for Rules 315(c)-(f) on the same rationale that it did in vacating Rule 315(b), i.e., that these rules "cannot be squared with the terms of subsection 251(c)(3)" because "we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements." Iowa Utilities Bd., 120 F.3d at 813. The Eighth Circuit went on to state in connection with these rules:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b),

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[5] The Eighth Circuit reaffirmed, however, that CLECs are "entitled [by section 251(c)(3)] to gain access to all of the [incumbent carrier's] unbundled elements that, when combined by the [new entrant], are sufficient to enable the [new entrant] to provide telecommunications services." Id. at 815.

> which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis. . . . Consequently, we vacate Rule 51.351(b)-(f) as well as the affiliated discussion sections.

Id. at 813.

4. The Supreme Court reversed the Eighth Circuit's decision in regard to Rule 315(b), but did not address the validity of Rules 315(c)-(f) since this issue was not appealed to that court. However, it reversed the decision in regard to Rule 315(b) based on the Eighth Circuit's interpretation of § 251(c)(3) of the Act, the same statutory section that the Eighth Circuit used to invalidate Rules 315(c)-(f). The Supreme Court found as to § 251(c)(3) that the statutory language was ambiguous and that it was "entirely reasonable for the [FCC] to find that the text does not command [the] conclusion" that 251(c)(3) "contemplates the leasing of network elements in discrete pieces." AT&T Corp., 525 U.S. at 394. The Supreme Court further held that § 251(c)(3) "does not say, or even remotely imply, that elements must be provided in this fashion [in discrete pieces] and never in combined form." Id. Likewise, relying on the dictionary definition of "unbundled," the Supreme Court rejected the ILECs' view that "on an unbundled basis" means "physically separated." Id.

5. Although USWC notes that Rules 315(c)-(f) remain vacated,[6] the Ninth Circuit has concluded that the decision in AT&T Corp. "confirms that the

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[6] The issue of whether those rules should be reinstated in light of AT&T Corp. is currently awaiting decision in the Eighth Circuit.

Eighth Circuit's interpretation of the Act was incorrect." MCI Telecomms. Corp. v. U S WEST Communications, Inc., 204 F.3d 1262, 1268 (9th Cir. 2000); see also U S WEST Communications v. MFS Intelenet, 193 F.3d 1112, 1121 (9th Cir. 1999) (Supreme Court's "interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred"). Accordingly, two separate panels of the Ninth Circuit in cases involving USWC have upheld substantially identical provisions of interconnection agreements that require USWC to combine network elements for new entrants, relying on the Supreme Court's interpretation of Section 251(c)(3). See MCI Telecomms. Corp., 204 F.3d at 1268; U S WEST Communications, 193 F.3d at 1121; see also U S WEST Communications, Inc v. Jennings, CIV 99-591-PHX-RGS (D. Ariz. Mar. 30, 2000) (recognizing that Ninth Circuit decisions upholding validity of challenged provisions "are dispositive of the current case" and "leave no doubt as to the validity of this interconnection agreement").

6. The Court finds the reasoning of the Ninth Circuit cases persuasive, and adopts them herein. As the Ninth Circuit noted in MCI Telecomms., "the Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). Id., 204 F.3d at 1268. "That is, the Eighth Circuit concluded that requiring combinations was inconsistent with the meaning of the Act because the Act calls for 'unbundled access'." Id. However, "[t]he Supreme Court's interpretation of the Act makes it absolutely clear that [a provision requiring combinations] does not violate the Act." Id.

7. Based on the foregoing, the Court finds that the provisions of the Agreements between USWC and the CLECs and the identical tariff provision that

require USWC to combine network elements at the request of new entrants are fully consistent with Section 251(c)(3) of the Act, as dispositively interpreted by the Supreme Court. Consequently, the Court upholds Attachment 3, Section 2.4 of the AT&T and MCI Agreements, Section XXXI.A.3 of the WorldCom Agreement, Section 31.A.2 of the ICG Agreement and Section 32.1.2 of the Sprint Agreement.[7]

8. USWC also contends that the Hobbs Act, 28 U.S.C. § 2342(1), prevents the Court from upholding the validity of the Agreements and tariff provision because FCC Rules 315(c)-(f) have been vacated by the Eighth Circuit and the validity of those rules was not addressed by the Supreme Court. As this Court has held, the FCC's Rules as set forth in the Local Competition Order that have not been vacated are binding both on state commissions in arbitration proceedings and on federal courts in their review of interconnection agreements. Hix, 57 F. Supp. 2d at 1117-18. However, the fact that Rules 315(c)-(f) have been vacated does not compel the conclusion that the Agreements and tariff provision requiring combinations are prohibited by the Act. Instead, the Court must question whether the interconnection agreements and tariff provisions regarding combinations are consistent with the Act independent of Rules 315(c)-(f). As discussed previously, the Court has answered this question affirmatively, concluding that the interconnection agreements and tariff are consistent with the Act.

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[7] Because the Court concludes that the challenged provisions are consistent with § 251(c)(3) of the Telco Act, the Court does not reach the CLECs' alternative arguments that these provisions are consistent with state law or that the CPUC acted reasonably in imposing this requirement based on the evidence taken in the 331T Docket as consistent with the Telco Act's nondiscrimination requirements.

9. As the Ninth Circuit observed in rejecting an identical claim by USWC

> The Eighth Circuit's decision to vacate the FCC regulations still stands, and is immune under the Hobbs Act from collateral attack. See 28 U.S.C. § 2342; MFS Intelenet, 193 F.3d at 1120. All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not. . . .

MCI Telecomms., 204 F.3d at 1268. By reviewing the provisions of the Agreements to determine their compliance with the Telco Act, the Court is not passing on the validity of FCC Rules 315(c)-(f). That issue is within the exclusive jurisdiction of the court of appeals.

10. As to MCI's affirmative claim against USWC, the Court finds that the MCI/USWC Agreement violates the Act because it does not contain provisions which allow MCI to have access to USWC's network in a manner that allows MCI to combine network elements for itself to enable it to provide telecommunications service. Although USWC argues that MCI should have proposed such terms during the arbitration process, the Court concludes that it was unnecessary for MCI to propose such terms, because at that time USWC was required by the FCC to do the combining of network elements for MCI. The Court agrees with MCI that, absent specific provisions giving MCI access to USWC's network in order to combine network elements, the Agreement violates § 251(c)(3), the Supreme Court's decision, and the Eighth Circuit's decision in Iowa Utilities Board. USWC cannot have it both ways -- it cannot simultaneously

deprive MCI of access to its network so that MCI cannot combine network elements on its own, and also refuse to combine network elements itself.

11. Accordingly, the Court agrees with MCI that USWC is required to provide network elements to MCI in combinations and that those combinations should not be limited to current combinations. The CPUC is ordered to reform MCI's Agreement to delete the word "currently" from the definition of combinations.[6]

IV. Conclusion

For the foregoing reasons, it is

ORDERED that judgment shall be entered in favor of the Defendants and against USWC on Count One of USWC's Supplemental Complaint in Civil Action Number 97-D-152, Count One of USWC's Complaint in Civil Action 97-D-1687, and Count One of USWC's Complaint in 97-D-2036 to the extent that these Counts challenge USWC's obligation to provide combinations that do not already exist within its network to the CLECs. In accordance therewith, it is

ORDERED that the challenged provisions in the Sprint, MCI, AT&T interconnection agreements are AFFIRMED. It is

FURTHER ORDERED that in light of this Order and the Court's prior Orders, Count One of USWC's Supplemental Complaint in Civil Action Number 97-D-132,

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[6] AT&T requested that its agreement be reformed in the same manner as MCI's because the MCI and AT&T agreements are identical and both agreements were modified in the same manner by the CPUC. However, AT&T did not affirmatively request such relief in its Cross Claim and Counterclaim against USWC; thus, the Court is unable to provide AT&T such relief in this proceeding. This does not preclude AT&T, however, from requesting a reformation of the agreement by the CPUC based on the Court's ruling.

Count One of USWC's Complaint in Civil Action 97-D-1667, and Count One of USWC's Complaint in 97-D-2096 are DISMISSED in their entirety. It is

FURTHER ORDERED that judgment shall enter in favor of MCI and against USWC on Count Eight in Civil Action No. 97-D-2047. This issue shall be REMANDED to the CPUC who is directed to reform the MCI-USWC Interconnection Agreement to delete the word "currently" from the definition of combinations in the Interconnection Agreement, J.A. Vol. 13, Tab 128, at R. 26174.

Dated this 26th day of June, 2000.

BY THE COURT:

Wiley Y. Daniel
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MCI TELECOMMUNICATIONS
CORPORATION, et al.,

Plaintiffs,

v. CASE NO. 4:97cv141-RH

BELLSOUTH TELECOMMUNICATIONS,
INC., et al.,

Defendants.

ORDER ON MERITS

This action is a challenge under the Telecommunications Act of 1996, 47 U.S.C. §§ 251-52, to a decision of the Florida Public Service Commission with respect to the terms and conditions under which the defendant incumbent local exchange carrier must make facilities and network elements available to the plaintiff competitors. I rule in favor of the plaintiff competitors and against the defendants.

ENTERED ON DOCKET 6-6-00 BY

Pineapple, Miller, Wrell, Ozam, Kellogg, Lee, Zeder, Smith, Blondeau

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incumbent local exchange carrier on each of the four contested issues. I direct the defendant Commissioners of the Florida Public Service Commission to take appropriate action to implement this decision.[1]

Background - The Statutory Framework

Historically, local telephone service was provided in the United States on a monopoly basis by carriers regulated under state law by state public service commissions. Congress fundamentally changed that approach by enacting the Telecommunications Act of 1996. The Act imposes on local carriers, as a matter of federal law, various duties designed to foster competition. The Act allows state commissions the option of taking a major role in implementing the Act's requirements.[2]

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[1] The plaintiffs are MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., related entities that will be collectively referred to in this order as "MCI." Defendants are BellSouth Telecommunications, Inc. ("BellSouth"); each of the five commissioners of the Florida Public Service Commission in his or her official capacity; and the Florida Public Service Commission itself.

[2] Local telephone service is inextricably intertwined with the interstate (indeed, international) communications

The federal duties imposed on each "incumbent local exchange carrier" - that is, on each carrier who previously provided local service on a monopoly basis - include these. First, incumbents must offer their services for resale at wholesale rates, must not prohibit or unreasonably limit resale, must provide number portability and dialing parity to competitive carriers, must afford competitive carriers access to existing rights-of-way, and must establish reciprocal compensation arrangements for transport and termination of calls handled by more than one carrier. See 47 U.S.C. §§ 251(b) & 251(c)(4).[3] More fundamentally, each

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system. Congress clearly has authority under the Commerce Clause to act in this area. Because the Telecommunications Act does not require state commissions to participate in its regulatory scheme, the Act does not contravene the principle of Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (holding that Congress cannot require state law enforcement officers to perform background checks mandated by federal firearms statute). Nothing in the United States Constitution prevents the federal and state governments from taking cooperative action, nor does the Constitution prevent Congress from allowing state administrative agencies to participate in a federal regulatory scheme if they so choose.

[3] The Act imposes some of these duties on all local exchange carriers, not just incumbents. See 47 U.S.C. § 251(b).

incumbent must allow any other carrier to interconnect with its facilities and equipment on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2). Finally, each incumbent must provide to any requesting carrier nondiscriminatory access to "network elements" on an unbundled basis, again on "rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3), at least when access to such network elements is "necessary" (in the case of proprietary network elements) or when failure to provide such access would "impair" the requesting carrier's ability to provide services (in the case of non-proprietary network elements). See 47 U.S.C. § 251(d)(2). "Network elements" are broadly defined by the act to include any "facility or equipment used in the provision of a telecommunications service" as well as features, functions, and capabilities that are provided by means of any such facility or equipment. 47 U.S.C. § 153(29).

The Act also imposes on each incumbent the duty to

negotiate in good faith with any requesting carrier on the terms and conditions of an agreement under which these various duties will be fulfilled. See 47 U.S.C. § 251(c)(1). The Act likewise imposes on requesting carriers the duty to negotiate in good faith. Id.

If the parties reach a negotiated agreement, it must be submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). If the parties fail to agree on all terms and conditions, any party to the negotiation may request binding arbitration before the state commission of "any open issues." 47 U.S.C. § 252(b)(1). If the state commission chooses not to act on either a negotiated agreement or request for arbitration, the Federal Communications Commission must assume the responsibilities of the state commission. 47 U.S.C. § 252(e)(5).

If a state commission chooses to act on either a negotiated agreement or request for arbitration, the Act provides for judicial review of the commission's decisions in federal district court. See 47 U.S.C. § 252(e)(6). The case at bar is an action for judicial review under this

provision.[4]

Background - The Case at Bar

Defendant BellSouth is the incumbent local exchange carrier in parts of the state of Florida. Plaintiff MCI is a prospective competitor. In accordance with the

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[4] Such an action for judicial review of a state commission's decision may proceed against the individual commissioners in their official capacities in accordance with Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), and thus is not barred by the Eleventh Amendment. See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., WL1133611 (N.D. Fla. 1997) (order denying motion to dismiss in case at bar). Although the Florida Public Service Commission as an entity also is a named defendant in this action, see footnote 1 supra, it did not move for dismissal of the claims against the entity, apparently choosing to stand together with its commissioners so long as they remained in the case. I understand the Florida Commission's position to be that the case should be dismissed under the Eleventh Amendment against both the entity and the commissioners, but that, if the action is not going to be dismissed against the commissioners (as I have ruled), then the entity does not seek separate dismissal of the case as against the entity. This allows the Florida Commission to submit pleadings in its own name and otherwise is of no practical significance. Because the Florida Commission has not sought separate dismissal of the case as against the entity, I have not addressed the issue of whether, by voluntarily participating in proceedings implementing the Telecommunications Act of 1996, the Florida Commission waived its Eleventh Amendment immunity from actions such as the case at bar.

Telecommunications Act, BellSouth and MCI entered negotiations for an agreement under which MCI would interconnect with BellSouth's facilities and have access to BellSouth's network elements. They were unable to agree on all terms and conditions of an agreement and thus sought and obtained arbitration before the Florida Public Service Commission. Following an evidentiary hearing, the Florida Commission issued a final arbitration order and, on motions of each side for reconsideration, an amended final order. MCI now brings this action challenging the Florida Commission's decision in certain respects, and BellSouth counterclaims challenging the decision in another respect.

Specifically, MCI challenges the pricing methodology employed by the Florida Commission to set the rates for network elements and non-recurring charges; the Florida Commission's exclusion of "dark fiber" - fiber optic cable that is in place but not in active use - from the group of network elements that must be provided by BellSouth; and the Florida Commission's failure to require a compensation mechanism (in the nature of a liquidated damages provision

as part of the agreement. In its counterclaim, BellSouth challenges the Florida Commission's treatment of "recombining" unbundled network elements for sale as complete service. This order addresses these four issues in turn.[5]

The parties have agreed that this court's review should be conducted based solely on the record as compiled in the Florida Commission. The parties have submitted briefs and presented oral argument, and more recently have submitted supplemental briefs addressing the decision of the United States Supreme Court in AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). This order constitutes the court's ruling on the merits.

I conclude that (1) the Florida Commission's pricing methodology for network elements and non-recurring charges

[5] MCI initially also challenged the Florida Commission's failure to adopt geographically deaveraged rates for network elements reflecting differences in the cost of providing network elements in different locations in the state of Florida. MCI has withdrawn this claim, however, on the grounds of a stipulation entered before the Florida Commission for deaveraged interim rates pending determination by the Florida Commission of permanent deaveraged rates.

is invalid because it is inconsistent with governing FCC regulations, and the Florida Commission thus must reconsider its pricing decisions; (2) the Florida Commission incorrectly concluded that "dark fiber" is not a "network element" within the meaning of the Act, and the Florida Commission therefore must reconsider its decision not to require BellSouth to provide MCI access to dark fiber; (3) the Florida Commission has authority to, and must, arbitrate the issue of whether the parties' interconnection agreement should include a compensation mechanism; and (4) BellSouth's counterclaim challenging the Florida Commission's treatment of the issue of "recombining" unbundled network elements is unfounded.

Standard of Review

The Telecommunications Act provides for actions such as the case at bar in a single sentence:

> In any case in which a State commission makes a determination under [the Act], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the

requirements of [the Act].

47 U.S.C. § 252(e)(6).[4] The Act does not further specify the standard of review to be applied in determining "whether the agreement . . . meets the requirements of" the Act.

I conclude that district court review of the meaning and import of the Telecommunications Act should be de novo and that, when acting in conformance with a correct interpretation of the Act, state commissions have broad discretion reviewable only under the arbitrary and capricious standard. I base this conclusion on the statutory language, the standards generally applicable to judicial review of administrative action, the apparent purpose of involving state commissions in this process while providing for federal district court review of their decisions, and the emerging case law under the Act. I address each of these considerations in turn, beginning with

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[4] The "agreement" to which this provision applies is an interconnection agreement of the type here at issue. The "statement" to which this provision applies is a statement of a Bell operating company of generally available terms under 47 U.S.C. § 252(f). No such statement is involved here.

the statutory language.

The statute provides for an action in federal district court "to determine whether the agreement . . . meets the requirements of" the Act. 47 U.S.C. § 252(e)(6). Although this language does not explicitly set forth a standard of review, it provides guidance in two ways. First, the statute assigns to the district court the job of determining whether the agreement as approved or mandated by the state commission meets the requirements of the Act, and in doing so the statute suggests not at all that any deference is due the state commission. Second, the statutory language makes no reference to any district court review of the state commission's action other than for compliance with the Act. Although some level of review of state commission action may be necessary to render meaningful the district court's review for compliance with the Act's legal requirements, the omission of any provision for review for any other purpose suggests that, within the bounds of the Act's legal requirements, review should be deferential.

This standard of review is generally consistent with

the standards applicable to judicial review of administrative action in other settings. Courts generally review agency factual determinations under a deferential standard such as whether the agency decision is supported by substantial evidence. See, e.g., 5 U.S.C. § 706(2)(E). Courts generally review an agency's policy determinations or actions implementing established legal standards under a deferential standard such as whether the action is arbitrary and capricious or an abuse of discretion. See, e.g., 5 U.S.C. § 706(2)(A). And although judicial review of a federal agency's interpretation of a federal statute it is charged with administering is also deferential, federal courts generally do not similarly defer to interpretations of federal law by state agencies. Compare Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984) (requiring court to give "controlling weight" to federal agency legislative regulations "unless they are arbitrary capricious, or manifestly contrary to the statute") with AMISUB(PSL), Inc. v. Colorado Dep't of Social Servs., 879

F.2d 789, 795-96 (10th Cir. 1989) (holding "state agency's determination of procedural and substantive compliance with federal law is not entitled to the deference afforded a federal agency"); Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989) (declining to apply Chevron deference to state agency decision where federal scheme "does not envision any unitary or uniform application from state to state"); and Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1988) (finding deference to state agency inappropriate due to the state's inexperience implementing federal laws, the absence of continuous congressional supervision and the lack of delegated authority under the federal statute at issue). Accordingly, reading § 252(e)(6) to require de novo review of a state commission's interpretation of the Act, but otherwise to require deference to the state commission, is generally consistent with the backdrop of precedent against which Congress acted. Cf. United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990) ("Under accepted rules of statutory construction, it is generally presumed that Congress, in drafting legislation, is aware of well-

established judicial construction of other pertinent existing statutes").

This approach makes sense, both as an original matter and based on the apparent purpose of Congress's decision (1) to involve the state commissions in this process but (2) to provide for federal district court review of their determinations. Congress of course could have provided for judicial resolution of disputes in the first instance, or could have provided for initial resolution of disputes by an administrative law judge, or could have provided for arbitration before a private arbitrator or arbitration panel chosen by the parties or designated in various other ways. Congress chose instead to have disputes resolved initially by the appropriate state commission (if it agreed to participate in the process), and Congress undoubtedly did so in recognition of the state commission's considerable expertise in the telecommunications field generally and in the state at issue in particular. It would make no sense to adopt a standard of review that did not recognize that expertise. At the same time, however, Congress chose not to

leave the matter solely to the state commission but to have a federal district court determine "whether the agreement . . . meets the requirements of" the Telecommunications Act. State commissions have no special expertise in interpreting federal statutes and no authority to make federal law. Federal courts are or should be at least as adept as state commissions in interpreting federal statutes. There is thus far less reason for deference to state commissions on issues of the meaning and import of the Act, and it makes sense for district courts to address such issues de novo, as Congress apparently intended.

In sum, I will review de novo issues regarding the meaning and import of the Telecommunications Act and will review the Florida Commission's determinations of how to implement the Act as so construed only under the arbitrary and capricious standard. This accords with the consistent approach of courts that have addressed this issue under the Act. See, e.g., MCI Telecommunications Corp. v. Michigan Bell Telephone Co., 79 F. Supp. 2d 768, 773 (E.D. Mich. 1999); Bell Atlantic-Delaware, Inc. v. Global NAPs South, Inc., 77 F. Supp.

2d 492, 502 (D. Del. 1999); BellSouth Telecommunications, Inc. v. ITC DeltaCom Communications, Inc., 62 F. Supp. 2d 1303, 1307 (M.D. Alabama 1999); U.S. West Communications, Inc. v. M.C.I., 995 F. Supp. 13, 19 (D. Colo. 1997).[7]

[7] I have not overlooked that the Act refers to state commission proceedings as "arbitration" and that decisions of arbitrators are ordinarily reviewed under an even more deferential standard, even with respect to issues of law. See, e.g., Marshall & Co., Inc., v. Duke, 114 F.3d 1150, 1153 (11th Cir. 1997); Excel Corp. v. United Food and Commercial Workers Int'l Union, Local 911, 103 F.3d 1461, 1467 (8th Cir. 1996). I conclude, however, that the reference to state commission proceedings as "arbitration" is intended to recognize that Congress did not - and indeed perhaps could not - require state commissions to participate in the process at all. See Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). Thus, like arbitrators and unlike administrative agencies under more typical circumstances, state commissions participate in this process only voluntarily. Absent any accepted term for the process by which a state agency voluntarily participates in implementing a federal statute in this manner, Congress used the term "arbitration." There is no reason to believe that this was intended to effect the standard of review in district court, and, for the reasons set forth in the text, I conclude that the appropriate standard driven from that ordinarily applicable to judicial review of administrative decisions, not arbitration decisions.

Revised

I. PRICING METHODOLOGY

The Telecommunications Act directs state commissions to set "just and reasonable" prices for interconnection and network elements "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." 47 U.S.C. § 252(d)(1). All parties to this action apparently agree that this means prices must be based on cost that reasonably would be incurred to provide the service or network element at issue prospectively, not cost that may have been incurred historically but would not reasonably be incurred to provide the service or network element prospectively. As the parties have said, prices must be based on "forward-looking," not historical, cost.

The parties disagree, however, on the proper method of calculating "forward-looking" cost. MCI advocates the use of Total Element Long-Run Incremental Cost ("TELRIC"), a methodology adopted by regulations of the Federal

Communications Commission ("FCC"). See 47 C.F.R. §§ 51.505, 51.511. The FCC regulations were stayed before they took effect and eventually were invalidated by a controlling decision of the United States Court of Appeals for the Eighth Circuit on the grounds they were beyond the FCC's jurisdiction.[6] Because of the Eighth Circuit's stay, the Florida Commission addressed the matter independently, without regard to the FCC regulations. The Florida Commission adopted a different methodology known as Total Service Long-Run Incremental Cost ("TSLRIC").

The essential difference between the FCC's "TSLRIC" method and the Florida Commission's "TSLRIC" method lies in their treatment of the existing network structure of the incumbent local exchange carrier at issue. While the Florida Commission's version of TSLRIC uses the current network architecture and future replacement technology as the basis for determining long-run incremental cost, TSLRIC assumes only that the existing wire centers are in place and

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[6] See Iowa Utilities Bd. v. Bell Atlantic Corp., 120 F.3d 753, 800 (8th Cir. 1997), rev'd in relevant part, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

then builds a hypothetical, efficient network around them. See 47 C.F.R. §§ 51.503, 51.505.

Nothing in the Telecommunications Act specifies which of these two methodologies must be followed. Reasonable arguments can be made either way. Congress has not definitively resolved the issue. This is, therefore, an issue on which the appropriate administrative agency's adoption of either methodology would survive judicial review under the applicable arbitrary and capricious standard.

The dispositive issue now before the court, therefore, is which agency's view - the FCC's or the Florida Commission's - will prevail. As noted above, when the Florida Commission acted, the United States Court of Appeals for the Eighth Circuit had stayed the FCC's regulations; that court eventually held that the FCC had no jurisdiction to adopt pricing rules governing local (as opposed to interstate) telephone service. Had that decision remained intact, the Florida Commission's adoption of TSLRIC would have been unassailable. But that decision did not remain intact. The United States Supreme Court reversed the Eighth

Circuit decision and held that the FCC does indeed have jurisdiction to adopt pricing rules governing local service interconnection agreements of the type here at issue. See AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

In its initial brief in this court, submitted prior to the Supreme Court's reversal of the Eighth Circuit's decision, the Florida Commission acknowledged that it would have been bound to follow the FCC regulations and apply the TELRIC methodology "[h]ad the FCC's jurisdiction to set national pricing standards been upheld and its rules not invalidated." (Florida Commission Brief at 16). Now, the FCC's jurisdiction to set national pricing standards has been definitively upheld by the United States Supreme Court, and the FCC's rules have not been invalidated. The Florida Commission's adoption of TSLRIC in the order under review thus cannot be upheld.

The result is that the Florida Commission must reconsider its order. This is so notwithstanding three grounds now asserted for reaching a different result.

First, the Supreme Court decision in Iowa Utilities came down only after the Florida Commission's action. I cannot for that reason, however, decline to follow the Supreme Court decision, or review the Florida Commission's decision without regard thereto. My duty is to resolve this case based on the Telecommunications Act as adopted by the Congress, signed by the President, and interpreted by the Supreme Court. A decision to apply instead the now discredited view of the Eighth Circuit would inappropriately expand the reach of that court's error and in effect divest the FCC of lawful jurisdiction to issue pricing standards applicable to the interconnection agreement at issue. Settled law[9] requires application of the Supreme Court

[9] See, e.g., Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction", quoting with approval Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372, 30 S. Ct. 140, 54 L. Ed. 228 (1910) ("Judicial decisions have had retrospective operation for near a thousand years") (Holmes, J., dissenting); see also United States v. Third National Bank, 390 U.S. 171, 193, 88 S. Ct. 882, 19 L. Ed. 2d 1015 (1968) (vacating district court judgment based in part on intervening decision and suggesting district court consider reopening record on

decision to this case.[15]

Second, it is true, as the Florida Commission and BellSouth note, that in Iowa Utilities the Supreme Court addressed only the FCC's jurisdiction to adopt national pricing standards and did not address substantive challenges to the FCC's adoption of TELRIC. Substantive issues remain open on remand to the Eighth Circuit. The Florida Commission and BellSouth suggest I hold my ruling in the case at bar until the Eighth Circuit renders its decision on

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remand for the taking of additional evidence in light of that intervening decision). The overwhelming majority of courts reviewing arbitration decisions rendered prior to Iowa Utilities have agreed. See, e.g., GTE South, Inc. v. Morrison, 199 F.3d 733, 740-41 (4th Cir. 1999); AT&T Communications Systems v. Pacific Bell, 203 F.3d 1183, 1187 (9th Cir. 2000); MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1268 (9th Cir. 2000).

[15] The rapidly evolving judicial, administrative and technological developments in the telecommunications field render the task of the Florida Commission (and this court on review) somewhat akin to shooting at a moving target, one whose movements are neither constant nor predictable. That the task is daunting, however, does not mean that the governing principles should be changed. A strength of administrative agencies is, one hopes, their ability to make nice adjustments and deal with evolving circumstances. Nothing in this order should be read to question the authority of the FCC or Florida Commission to adopt appropriate interim or transition measures to the extent consistent with governing law.

remand. Substantial time has passed, however, and the Eighth Circuit has not ruled. Moreover, it is clear that, no matter how the Eighth Circuit may ultimately rule, the Supreme Court decision has altered the legal landscape sufficiently to make it appropriate for the Florida Commission to reconsider its decision in light of that decision and any other relevant developments, including any ruling the Eighth Circuit may make. I thus conclude that entry of this order should not be further delayed.

Third, the Florida Commission also seems to assert that it would have made the same decision based on the record before it anyway, even had it applied the FCC's TELRIC regulations. While that seems at least somewhat unlikely, I need not address at this time whether the Florida Commission could make the same substantive decision by applying the correct standards. It is enough for resolution of this case that the Florida Commission has not yet made a decision based on the proper standards and should be given the first opportunity to do so.

In sum, the Florida Commission's decision on pricing is

invalid because it is contrary to the Telecommunications Act of 1996 as interpreted by the FCC. The defendant Commissioners will be directed to reconsider the issue.

II. DARK FIBER

Dark fiber is fiber optic cable that is in place but not in active use. Without the associated electronic equipment needed at both ends of the cable, the fiber remains "unlit" and inactive. BellSouth likens dark fiber to warehoused inventory: while the fiber optic cable has been laid, BellSouth says it is essentially stored in that location to facilitate later access. Unlike warehoused inventory, however, dark fiber is in place and connected to the network.

The Telecommunications Act requires an incumbent local exchange carrier to provide competitors nondiscriminatory access to "network elements" on an unbundled basis. 47 U.S.C. § 251(c)(3), subject to consideration of whether such access is "necessary" (in the case of proprietary elements) or failure to provide such access would "impair" the

competitor's ability to provide service (in the case of non-proprietary elements).

The Florida Commission refused to require BellSouth to provide MCI access to BellSouth's dark fiber on the grounds that, because dark fiber is not "used" in the provision of telecommunications service, dark fiber is not a "network element" as defined in the Act.

The Act defines "network element" as:

> . . . a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29) (emphasis added).

If "used" within this definition means currently in active use, the Florida Commission correctly determined that dark fiber is not a "network element" and that BellSouth therefore need not provide MCI access to BellSouth's dark fiber. But if "used" is broad enough to include fiber that

is "used" in the provision of telecommunications service only in the sense that this is what it is used for when it is used,[11] or broad enough to include fiber that is connected to the network and stands ready for active use if needed, the Florida Commission decision was wrong.

This is, once again, an issue on which the legal landscape has changed substantially since the Florida Commission acted. The FCC, an emerging majority of state commissions, and an apparently unbroken line of federal courts reviewing the decisions of state commissions have concluded that dark fiber is a network element.[12] The FCC

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[11] In addressing this issue, the Fourth Circuit gave this example of this broader meaning of "used":

> (A)ccording to Webster, a hammer is a "hand tool consisting of a solid head set cross-wise on a handle and used for pounding." Webster's Third New International Dictionary 1025 (1981) (emphasis added). We doubt that a hand tool becomes a hammer only when someone starts to pound with it.

AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 672 (4th Cir. 1999) (emphasis in original). On this view, fiber does not become "used in the provision of telecommunications service" only when someone starts to communicate with it.

[12] See, e.g., MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1260 (9th Cir. 2000); AT&T

has analyzed the issue as follows:

> Because dark fiber is already installed and easily called into service, we find that it is similar to the unused capacity of other network elements, such as switches or "dead count" or "vacant" copper wire that is dormant until carriers put it in service.
>
> . . . We agree with state commissions and competitive LECs that dark fiber meets the statutory definition of a network element . . . . Section 153(29) of the Act defines the term "network element" as a "facility or equipment used in the provision of a telecommunications service," including "features, functions, and capabilities that are provided by means of such facility or equipment." The Supreme Court upheld this broad definition of a network element and acknowledged that it includes not only physical elements but non-physical elements as well. Because dark fiber is unused transport capacity, we find that it is "a feature, function, and capability of facilities

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Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 672 (4th Cir. 1999); U.S. West Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004, 1018-19 (D. Ariz. 1999); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 40 F. Supp. 2d 414, 421 (E.D. Ky. 1999); In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd. 3696 ¶¶ 325-28 (1999) ("Third Report & Order"). In Gulf Power Co. v. FCC, 208 F.3d 1263, 1278 (11th Cir. 2000), the Eleventh Circuit said that dark fiber "is bare capacity" and thus does not constitute a "telecommunications service"; this is, however, an analytically distinct issue from whether dark fiber is a "network element."

used to provide telecommunications services." In addition, we note that since the Commission released its Local Competition First Report and Order, several states, acting through arbitration proceedings, have required incumbent LECs to unbundle dark fiber interoffice transport facilities, and several federal district courts, in affirming state commission decisions, have held that dark fiber meets the statutory definition of an unbundled network element.

. . . We reject incumbent LECs' arguments that because dark fiber is transport that is not currently "used" in the provision of a telecommunications service, within the meaning of section 153(29), it does not meet the statutory definition of a network element . . . . Rather, we agree with the Illinois Commission that the term "used in the provision of telecommunications service" in section 153(29) refers to network facilities or equipment that is "customarily employed for the purpose" of providing a telecommunications service. Although particular dark fiber facilities may not be "lit" they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always "currently used" as the term is interpreted by incumbent LECs. For example, switches, loops, and other network elements each may have spare, unused capacity, yet each meets the definition of a network element.

. . . We acknowledge that it would be problematic if some facilities that the incumbent LEC customarily uses to provide service were deemed to constitute network elements (e.g., unused copper wire stored in a spool in a

> warehouse). Defining such facilities as network elements would read the 'used in the provision' language of section 153(29) too broadly. Dark fiber, however, is distinguishable from this situation in that it is physically connected to the incumbent's network and is easily called into service. Thus, as indicated above, we conclude that dark fiber falls within the statutory definition of a network element.

In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd. 3696 ¶¶ 328-28 (1999) ("Third Report & Order") (footnotes omitted).

Whether this FCC view should be applied in this case presents a different issue from the question addressed above about the applicability of the Supreme Court's Iowa Utilities decision. That decision addressed FCC regulations adopted prior to the Florida Commission decision under review. The FCC's dark fiber interpretation as quoted above came after the Florida Commission's decision. While judicial interpretations of preexisting statutes or regulations ordinarily apply back to the date of adoption of the statute or regulation at issue, it is less clear that administrative interpretations - which appropriately may have legislative as well as judicial elements - should

always do so.[13] But even if not technically applicable, the FCC's analysis has considerable persuasive force, as do the Fourth Circuit's decision in AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 672 (4th Cir. 1999), and the Ninth Circuit's decision in MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1268 (9th Cir. 2000), which reached the same result.

I conclude, for the reasons set forth by the FCC and Fourth and Ninth Circuits, that dark fiber is a "network element" within the meaning of the Telecommunications Act.

This does not necessarily mean, however, that the Florida Commission must require BellSouth to provide MCI access to its dark fiber. When the Florida Commission acted, the FCC's Rule 319, 47 CFR § 51.319 (1997), had

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[13] Cf. Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) (setting forth and contrasting general principles governing retrospective application of statutes and judicial decisions); Bradley v. School Bd., 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974) (setting forth standards governing issue of whether statute adopted after district court decision should be applied on review by court of appeals).

interpreted the Telecommunications Act's "necessary" and "impair" standards in a manner that posed little obstacle to a competitive carrier seeking access to an incumbent carrier's network elements. In Iowa Utilities, however, the Supreme Court invalidated Rule 319, putting teeth back into the "necessary" and "impair" standards. See AT&T Corp. v. Iowa Utilities Bd., 525 U.S. at 387-92. The Florida Commission has not had the opportunity to address the application of this decision to MCI's request for access to BellSouth's dark fiber. That issue is not foreclosed by this decision.[14]

XVI. COMPENSATION PROVISIONS

As part of its petition for arbitration before the Florida Commission, MCI sought to include in the interconnection agreement specific performance criteria and a compensation mechanism similar to a liquidated damages

[14] Leaving this issue for resolution by the Florida Commission in the first instance accords with the Fourth Circuit's approach in AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 673-74 (4th Cir. 1999).

provision.

The Florida Commission refused to address MCI's requested approach because, it concluded, it lacked authority to do so under either the Telecommunications Act or state law. The Florida Commission determined that the Telecommunications Act authorized arbitration only on "the items enumerated to be arbitrated in Sections 251 and 252 of the Act, and matters necessary to implement those items." (Arbitration Order at 74). The Florida Commission determined that a compensation mechanism was not such an item. The Florida Commission also concluded that it had no authority under state law to mandate a compensation mechanism of the type at issue.

I reject the Florida Commission's narrow reading of the Telecommunications Act's arbitration provisions. The Act imposes various duties on incumbent local exchange carriers and sets forth two methods for determination of the terms and conditions under which any specific incumbent will allow any given competitive carrier to interconnect with the incumbent's facilities and obtain access to its network

elements. The first method - the preferred method - is through an agreement voluntarily negotiated between the incumbent and competitive carriers. The second method, applicable only to the extent that voluntary negotiation fails, is through arbitration of "any open issues." 47 U.S.C. § 252(b)(1). The statutory term "any open issues" makes clear that the right to arbitrate is as broad as the freedom to agree; any issue on which a party unsuccessfully seeks agreement may be submitted to arbitration.

MCI and BellSouth obviously would have been free to enter a voluntary agreement that included a compensation mechanism for breaches of the agreement. Nothing in the Telecommunications Act would have foreclosed any such voluntary agreement. Neither the Florida Commission nor BellSouth apparently contends otherwise. BellSouth chose, however, not to agree voluntarily to any such provision. That was BellSouth's right. When BellSouth determined not to agree, this became an "open issue" that MCI was entitled to submit to arbitration.

When the Florida Commission chose to act as the

arbitrator in this matter, its obligation was to resolve "each issue set forth in the petition and the response, if any." 47 U.S.C. § 252(b)(4)(C). MCI's request for a compensation provision was such an issue. This was, therefore, an issue the Florida Commission was obligated to resolve.[15]

This does not mean, of course, that the Florida Commission was obligated to adopt a provision of the type MCI seeks. Had the Florida Commission decided, as a matter of discretion, not to adopt such a provision, MCI would bear a substantial burden in attempting to demonstrate that that determination was contrary to the Telecommunications Act or arbitrary and capricious. But the Florida Commission made

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[15] The Florida Commission makes no assertion it can pick and choose which issues it will arbitrate and which it will not. The Telecommunications Act seems to make this an all or nothing proposition; a state commission can opt to perform the arbitration or can decline to do so, in which event the Act assigns the arbitration function to the Federal Communications Commission. The Florida Commission's view was not that it could decline to arbitrate an issue properly presented under the Telecommunications Act, but instead that this was not an issue properly presented under the Act. For the reasons set forth in the text, this view was mistaken.

no such determination, instead deciding it lacked authority to address the issue. That was an incorrect interpretation of the Telecommunications Act.

The Florida Commission also asserts that it was precluded by state law from adopting a compensation mechanism of the type sought by MCI, because any such mechanism would require the Florida Commission in effect to make an award of damages, contrary to the principle of Southern Bell Tel. and Tel. Co. v. Mobil America Corp., 29: So. 2d 199 (Fla. 1974). That is incorrect, for two reasons.

First, any compensation provision in the arbitrated agreement would not necessarily require enforcement by the Florida Commission. A compensation provision could, for example, be self-executing or, to the extent necessary, enforceable in court. Thus, whatever the effect of Mobil America on the Florida Commission's ability to enforce a compensation provision, there is assuredly nothing in that decision that precludes the Florida Commission from arbitrating a request for a compensation provision as part of an arbitration proceeding otherwise properly undertaken

by the Florida Commission.

Second, if a compensation provision were truly required by the Telecommunications Act and could be adopted in some form without imposing on the Florida Commission an unconstitutional burden, see Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), then any contrary Florida law obviously would not preclude adoption of such a provision. Under the Supremacy Clause, see U.S. Const. Art. VI, the Telecommunications Act, not any contrary Florida provision, is the supreme law of the land.[16]

In sum, when the Florida Commission undertook to arbitrate the dispute between BellSouth and MCI, it became obligated under the Telecommunications Act to arbitrate all

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[16] Nothing in this order should be read as an indication that the Telecommunications Act imposes on state commissions an obligation to perform any enforcement role requested by the parties, or that Congress lawfully could impose any such obligation on state commissions. The holding here is simply that, having undertaken to arbitrate "any open issues" under the Act, the Florida Commission must arbitrate the open issue of whether or not the parties' arbitrated interconnection agreement should or should not include an enforcement or compensation mechanism of the type requested by MCI.

"open issues," including MCI's request for a compensation provision. The defendant Commissioners will be directed to arbitrate this issue.

IV. "RECOMBINING" UNBUNDLED NETWORK ELEMENTS

In its counterclaim, BellSouth asserts that the Florida Commission improperly required BellSouth to provide MCI with "recombined" unbundled network elements, thus in effect allowing MCI to purchase complete service from BellSouth not at the wholesale price properly charged in connection with the sale of complete service for resale, but instead at the substantially lower price determined by adding up the prices of the various unbundled network elements that, when combined, constitute complete service. BellSouth asserts this "sham unbundling" violates the Telecommunications Act. In response, the Florida Commission asserts that in the order under review, it did not decide the issues BellSouth now raises.

The dispute over what the Florida Commission did or did not decide is of little consequence. The United States

Supreme Court now has definitively resolved this issue against BellSouth. In AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 119 S. Ct. 721, 736-38, 142 L. Ed. 2d 835 (1999), the Court upheld the FCC's Rule 315(b), 47 CFR § 51.315(b), by which the FCC adopted the very approach BellSouth now challenges. In reaching this result, the Court rejected the same arguments BellSouth now makes, as advanced in that case by incumbent local exchange carriers challenging Rule 315(b). See also MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1268 (9th Cir. 2000) (holding that Supreme Court's decision in Iowa Utilities mandates this result); U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1120-21 (9th Cir. 1999) (same).

BellSouth is entitled to no relief on its counterclaim.[17]

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[17] The Supreme Court noted that the arguments of the incumbent local exchange carriers in that case might be "academic" in light of the Court's simultaneous invalidation of the FCC's "necessary" and "impair" rule, as discussed above. See Iowa Utilities, 525 U.S. at 392. Nothing in this order forecloses the Florida Commission from taking otherwise proper action in response to the Supreme Court's decision on the "necessary" and "impair" rule.

Conclusion

The Florida Commission acted contrary to the Telecommunications Act of 1996 when it (1) adopted the TSLRIC pricing methodology, (2) concluded that "dark fiber" is not a "network element" within the meaning of the Telecommunications Act of 1996, and (3) decided not to arbitrate the open issue of whether the interconnection agreement between BellSouth and MCI should include a compensation provision. Accordingly,

IT IS ORDERED:

The clerk shall enter judgment stating, "The Florida Public Service Commission's Final Order on Arbitration, as amended, is declared invalid, as set forth in the Order on Merits entered June 6, 2000. Defendants Susan F. Clark, J. Terry Deason, Julia L. Johnson, Diane K. Kiesling, and Joe Garcia, in their official capacities as Commissioners of the Florida Public Service Commission, shall conduct further

proceedings consistent with the Court's Order on Merits and this judgment." The clerk shall close the file.

SO ORDERED this 6th day of June, 2000.

Robert L. Hinkle
United States District Judge

FILED
UNITED STATES DISTRICT COURT
DENVER COLORADO
JUN 23 2000
JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 97-D-152 (Consolidated with Nos. 97-D-387, -934, -1667, -2047, and 2096)

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

ROBERT J. HIX, et al.,

Defendants.

ORDER DENYING US WEST RELIEF ON ITS SUPERIOR QUALITY CLAIM

THIS MATTER arises under Sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252 ("the Telco Act"). The Telco Act fundamentally restructured local telephone markets, ending the monopolies that States historically granted to local exchange carriers ("LECs") and subjected incumbent LECs to an array of duties intended to facilitate market entry, including the obligation under 47 U.S.C. § 251(c) to share their network with competitors.

Under the Telco Act, U S West Communications, Inc. ("USWC"), the incumbent local exchange carrier ("ILEC"), brings suit against certain competitive local exchange carriers ("CLECs") challenging provisions of interconnection agreements approved by the Colorado Public Utilities Commission ("CPUC" or "the Commission") pursuant to the Telco Act. The CLECs have asserted a number of counterclaims also challenging provisions of the interconnection agreements.

A hearing was held on April 20 and 21, 2000, in connection with certain issues concerning the merits of this case. During the hearing, AT&T withdrew its vertical features surcharges claim asserted in Count IV of AT&T's Amended Answer and Counterclaim in the consolidated cases. The Court, being fully advised in the premises, hereby issues its Order Denying U S WEST Relief on its Superior Quality Claim.

1. In Count 11 of its Complaint in Civil Action No. 97-D-2096 against AT&T Communications of the Mountain States, Inc. ("AT&T") and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI"), USWC claims that an unspecified number of provisions in its interconnection agreements with AT&T and MCI that require USWC to meet certain technical specifications or performance standards violate the Act because they require USWC to provide AT&T and MCI interconnection or access to network elements at a level of quality superior to that which USWC provides itself or its own customers. See Complaint ¶¶ 145-150, 156-158.

2. Section 251(c)(2) of the Act requires ILECs to permit new entrants to interconnect with the incumbent's facilities, and section 251(c)(3) requires incumbents to provide nondiscriminatory access to unbundled network elements, all at just, reasonable and nondiscriminatory rates in accordance with the provisions of section 252 of the Telco Act. As part of its rulemaking implementing the Act, the Federal Communications Commission ("FCC") promulgated certain rules requiring incumbents, upon request, to provide new entrants access to network elements and interconnection superior in quality to that which the incumbents provide to themselves or to their own customers. See 47 C.F.R. §§ 51.305(a)(4), 51.311(c). On direct review from the FCC, the Eighth Circuit

vacated these provisions as inconsistent with the language of the Telco Act. See Iowa Utils. Board v. FCC, 120 F.3d 753, 812-813 (8th Cir. 1997), aff'd in part and rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).[1] No party appealed that portion of the court of appeals decision to the Supreme Court.

3. Consistent with the Court's prior ruling on the scope and standard of review, the Court concludes that USWC, as the proponent of this claim, has the burden of demonstrating based on record evidence that the provisions of the interconnection agreements require it to provide superior quality service in violation of the Act. See US WEST Communications, Inc. v. Hix, 986 F. Supp. 13, 15 (D. Colo. 1997). The CPUC's substantive and procedural compliance with the Telco Act and FCC implementing rules is reviewed de novo. Any determination by the CPUC as to whether any particular provision of the agreements requires or does not require superior quality service will be reviewed under the arbitrary and capricious standard of review. See id. at 19.

4. The Court denies USWC's superior quality challenge because USWC has failed to prove its claim based on record evidence and has otherwise failed to demonstrate that the challenged provisions violate the Telco Act.

5. As an initial matter, this Court already has upheld as consistent with the Act certain of the very provisions of the agreements that USWC challenges here as requiring

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[1] The court of appeals agreed with the FCC that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." Id. at 813 n.33 (quoting In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 ¶ 198 (1996)).

"superior quality" service. See U S WEST Communications, Inc. v. Hix, 57 F. Supp.2d 1112, 1120 (D. Colo. 1999). There, the Court noted that "the FCC stated that it 'expect[s] the states will implement the general nondiscrimination rules set forth herein by adopting, inter alia, specific rules . . . and any other specific conditions they deem necessary to provide new entrants . . . with a meaningful opportunity to compete in the local exchange markets.'" Id. (quoting Local Competition Order ¶ 310).

6. After the Eighth Circuit ruled and at the request of USWC, the CPUC in its Order Approving Application Regarding Interconnection Agreement, With Modifications (August 20, 1997), ordered modifications to the proposed interconnection agreements with AT&T and MCI "to reflect the court [of appeal's] interpretation of the Act." See R. 24978 (J.A. vol. 10, tab 98, p. 9). For example, the Commission ordered that Attachment 4 Section 6.1 of the interconnection agreements be amended to make clear that AT&T and MCI can obtain higher quality service only if "USWC agrees to provide it." R. 25127. (J.A. Vol. 13, Tab 126, § 6.1). Similarly, in Att. 10, § 1.1, the service standards section of the agreements, the Commission struck a provision that read, "In the event the Performance Standards specified in this Agreement are different than the standards or measurements USWC provides or is required to provide by law or its own internal procedures, the highest Performance Standards shall apply." R. 25261. (J.A. Vol. 13, Tab 126, §§ 1, 1.1). Thus, contrary to USWC's claim here, the CPUC acted in conformity with the Telco Act and the FCC's implementing regulations.

7. Moreover, there is a complete absence of proof to support USWC's claims. USWC cites no evidence in the voluminous record in this case to support its claim that any

of the challenged provisions violate the Telco Act by requiring it to provide superior quality service, and the Court was not directed to any such evidence during oral argument. In all events, USWC bears the burden of demonstrating that the challenged provisions of the agreements violate the Telco Act, and it has failed to come forward with any evidence supporting its claim. Accordingly, the Court denies that claim.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Count Eleven of the Complaint in Civil Action Numbers 97-D-2506 is DISMISSED.

Dated this 23rd day of June, 2000.

BY THE COURT:

Wiley Y. Daniel
U.S. District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 97-D-152 (Consolidated with Nos. 97-D-387, 97-D-1667, 97-D-2047, 97-D-2096 and 98-D-934)

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

ROBERT J. HIX, et al.,

Defendants.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUN 23 2000
JAMES R. MANSPEAKER
CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER arises under Sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252 ("the Telco Act" or "the Act"). A hearing was held on September 22, 1998, in connection with issues concerning the merits of this case. The Court, being fully advised in the premises, hereby issues its Findings of Fact and Conclusions of Law in regard to certain of the issues argued at the hearing.

I. ISSUES WITHDRAWN BY U S WEST COMMUNICATIONS, INC. ("USWC")

The Court first addresses USWC's Notice of Withdrawal of Moot Claims filed April 5, 2000. In this pleading, USWC seeks to withdraw a number of issues as moot given certain changes in the law since the hearing held in September, 1998. The Court DENIES USWC's request to withdraw the challenge in the First Claim for Relief in 97-D-152, 97-D-1667, and 97-D-2096 that USWC not separate network elements that are currently combined in its network, because the Court spent time analyzing this issue

before the filing of the Notice and has ruled on the merits of same in a separate Order issued previously. Moreover, the Court **DENIES** USWC's request to withdraw that portion of the Twelfth Claim for Relief in 97-D-2096 that addresses the unbundling of dark fiber for the same reason.

However, the Notice also seeks to withdraw a number of other claims which the Court finds should be allowed. Accordingly, the Court **GRANTS** USWC's request to withdraw the following claims, and these claims are **DISMISSED** to the extent set forth below:

A. Second Claim for Relief in Civil Action Numbers 97-D-152, 97-D-1667 and 97-D-2096 regarding the "most favored nations" provision of the agreement to the extent that USWC argued that the competitive local exchange carriers ("CLECs") should not be allowed to "pick and choose" provisions in other CLECs' interconnection agreements. The Supreme Court in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) upheld the FCC's "pick and choose" rule. USWC maintains the right to challenge the agreements to the extent they permit CLECs to opt into tariff provisions.

B. Third Claim for Relief in 97-D-152, 97-D-1667, and 97-D-2096 regarding restrictions on resale of services, to the extent that it challenges provisions requiring USWC to resell services already subject to wholesale discounts. However, USWC maintains the right to challenge the agreements to the extent they require USWC to resell services that are not "telecommunications services" such as enhanced services and inside wiring.

C. Seventh Claim for Relief in 97-D-152, Fifth Claim for Relief in 97-D-1667, and Sixth Claim for Relief in 97-D-2096 to the extent that they challenge the agreements' requirement to sell unregulated and deregulated services. However, USWC maintains the right to challenge the agreements to the extent that they require USWC to resell services that are not "telecommunications services."

D. Sixth Claim for Relief in 97-D-152 and Fifth Claim for Relief in 97-D-2096 to the extent that they challenge provisions of the agreements that require USWC to permit collocation at its "premises." However, USWC maintains the right to challenge the agreements to the extent that they allow the CLECs to determine whether their equipment may be collocated on USWC's premises, subject to the Court reviewing any waiver arguments on this issue. USWC also maintains the right to challenge those provisions of the agreements that permit those CLECs to collocate remote switching units ("RSU's") or other equipment that is not "necessary" for interconnection or access to unbundled elements, again subject to any waiver arguments by the CLECs.

E. Tenth Claim for Relief in 97-D-152 relating to "bill and keep" mechanism for recovery of transport and termination costs, and this claim is DISMISSED IN ITS ENTIRETY.

F. Eleventh Claim for Relief in 97-D-152 and Seventh Claim for Relief in 97-D-1667 relating to the division of access charges, and these claims are DISMISSED IN THEIR ENTIRETY.

G. Twelfth Claim for Relief in 97-D-152, Eighth Claim for Relief in 97-D-1667 and Fourteenth Claim for Relief in 97-D-2096 relating to denial of due process, and these claims are DISMISSED IN THEIR ENTIRETY.

H. Twelfth Claim for Relief in 97-D-2096 to the extent that it relates to unbundling of vertical switching features. However, USWC retains the right to challenge that unbundling of vertical switching features is only required where USWC must provide switching services.

II. USWC's CHALLENGE TO RESTRICTIONS ON RESALE OF SERVICES (TELECOMMUNICATIONS SERVICES)

A. Findings of Fact

1. USWC challenges provisions of the AT&T, MCI, TCG, Sprint and MFS interconnection agreements that require it to resell retail services that are not "telecommunications services."[1]

2. Specifically, USWC challenges Attachment 2, § 1.2 in its interconnection agreements with AT&T and MCI, which requires USWC to make available for resale:

> all retail Telecommunications Services USWC currently provides, or may offer hereafter, including, but not limited to, non-tariffed services, deregulated services which are offered at retail which qualify as Telecommunications Services, grandfathered service contract services, packaged services, residential services, business services, services offered on an individual case basis, discounted services, ancillary services, and promotional offerings where offered for a period of greater than ninety days. This description of services is neither all inclusive nor exclusive. Specific services offered for resale shall also include, Centrex, Optional Calling Plans, Voice Mail, Inside Wire Maintenance, and Custom Calling Services.

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[1] The Court finds that this claim is not properly asserted as to TCG because this claim was not asserted against it in the First Amended Complaint in Civil Action No. 97-D-152. The claim was asserted in that complaint only as to MFS. After TCG demonstrated that this claim was not properly before this Court, USWC responded with a motion for constructive amendment of the pleadings to assert the claim against TCG. The Court denied that motion; thus, this claim does not exist against TCG. As to WorldCom, although the issue was not originally briefed as to MFS, USWC did assert this claim against MFS in its First Amended Complaint in 97-D-152 in the third and seventh claims for relief. Thus, the Court finds that this claim is properly asserted against MFS. For future reference, WorldCom has been substituted for MFS in this proceeding.

Joint Appendix ("J.A.") Volume ("Vol.") 13, Tab 128, at Record ("R.") 26188; id. Tab 126, at R. 25041.

3. USWC challenges § 31.2.5.5 of the Sprint agreement which requires that USWC "offer all deregulated services to Sprint at a discount for resale." J.A. Vol. 11, Tab 112, at R. 1644.

4. As to MFS, although USWC does not assert what provision of the agreement is implicated, the Court notes that Section XXX provides that "USWC Basic Exchange Telecommunications Service . . . will be available for resale from USWC . . . ." J.A. Vol. 12, Tab 120, at R. 05859.

B. Conclusions of Law

1. Section 251 requires USWC "to offer for resale at wholesale rates any *telecommunications service* that [USWC] provides at retail to subscribers who are not telecommunications carriers . . . ." 47 U.S.C. § 251(c)(4) (emphasis added).

2. The Court finds that enhanced services are not "telecommunications services" subject to regulation under Title II of the 1934 Communications Act. See Amendment of § 64.702 of the Commission's Rules (Second Computer Inquiry), 77 F.C.C.2d 384, 428 (1980), modified on recon., 84 F.C.C.2d 50 (1980), further modified on recon., 88 F.C.C.2d 512 (1981), aff'd sub nom., Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982); Memorandum Opinion and Order, Petition for Emergency Relief & Declaratory Ruling Filed by Bell South Corp., 7 FCC Rcd 1619 (1992), aff'd sub nom., Georgia Pub. Serv. Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993); see also 47 C.F.R. § 64.702(a).

3. This distinction is preserved in the Telco Act: it defines "information services" separately from "telecommunications services," 47 U.S.C. §§ 153(20) and (43), and the FCC has expressly stated that all services previously considered to be "enhanced services" are "information services" under the Act. E.g., First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, 12 FCC Rcd 5361 (1997). The Local Competition Order also indicates that enhanced services are not "telecommunications services." First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-98 et al., 11 FCC Rcd 15499 ¶ 581 n. 1416 (1996) ("Local Competition Order").

4. The FCC has reiterated this conclusion in its orders addressing applications of Bell Operating Company to provide in-region long distance service under 47 U.S.C. § 271. In its Memorandum Opinion and Order on BellSouth's second application to provide in-region long distance service in Louisiana, the FCC confirmed that "information services" are synonymous with "enhanced services" and that voicemail is an "enhanced service." Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana, 13 FCC Rcd 20599 ¶ 314 (1998) ("BellSouth Louisiana II") (citing other FCC authority). The FCC further reiterated that the definitions of "information services" and "telecommunications services" are "mutually exclusive," id.; therefore, an incumbent local exchange carrier ("ILEC") is not required to resell any service that is an "enhanced" or "information" service or that is otherwise not a "telecommunications service." Id.

5. The FCC has also concluded that "inside wire maintenance" is not a "telecommunications service" under the Act. For example, in its Second Report and Order in

CC Docket No. 97-21; Third Order on Reconsideration in CC Docket No. 97-21; Sixth Order on Reconsideration in CC Docket No. 96-45, Changes to the Board of Directions of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, CC Docket No. 97-21 and 96-45, 13 FCC Rcd 22908 (Nov. 4, 1998), the FCC held:

> We conclude that inside wiring maintenance – the maintenance of telephone plant – *does not constitute telecommunications or a telecommunications service* because it does not involve the "transmission" of information.

Id., ¶ 5 (emphasis added); Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996, CC Docket Nos. 96-115 and 96-149, 13 FCC Rcd 8061 ¶ 45 (Feb. 26, 1998) ("[I]nside wiring, CPE [customer premises equipment], and information services do not fall within the scope of section 222(c)(1)(A) because they are not 'telecommunications services'"); see also 47 U.S.C. § 153(46) (defining "telecommunications service" as the transmission of information).

6. Several courts have also held that ILECs are not required to resell "information services," such as voicemail, inside wire or inside wire services. See, e.g., U S WEST Communications, Inc. v. Garvey, File No. Civ. 97-913 ADM/AJB, slip op. at 30-31 (D. Minn. Mar. 30, 1999); U S WEST Communications, Inc. v. Thoms, Civ. No. 4-97-70082, slip op. at 46 (S.D. Iowa Jan. 25, 1999).

7. The Court agrees with the reasoning of the decisions of the Minnesota and Iowa districts courts as well as the clear pronouncements of the FCC and holds the Colorado Public Utilities Commission ("CPUC" or "Commission") ERRED in requiring USWC to resell "enhanced" or "informational" services, such as voicemail and inside wire maintenance. Accordingly, those provisions of the AT&T, MCI, Sprint and MFS agreements that can be construed to require USWC to resell "enhanced" or "information" services and inside wire maintenance VIOLATE the Act and are VACATED. Judgment shall be entered in favor of

USWC and against AT&T, MCI, Sprint and MFS/WorldCom on the portions of the Third and Seventh Claims for Relief in 97-D-152, the Fifth Claim for Relief in 97-D-1667, and the Third and Sixth Claims for Relief in 97-D-2096 that require USWC to provide "telecommunications services" in the form of "enhanced" or "informational" services or inside wire maintenance.

III. AT&T'S RESALE ARGUMENT REGARDING CONTRACT SERVICE ARRANGEMENTS ("CSAs")

A. Findings of Fact

1. Contract service arrangements ("CSAs") are "contractual agreements made between a carrier and a specific, typically high-volume, customer, tailored to that customer's individual needs." AT&T Communications of the Southern States, Inc. v. BellSouth Telecomm., Inc., 7 F. Supp. 2d 661, 670-71 (E.D.N.C. 1998) (quoting Memorandum of the FCC as Amicus Curiae, at 15.) In other words, "CSAs are simply contracts between [the ILEC] and a specific customer that are formulated to meet the special needs of that customer." Id. at 671.

2. The CPUC ruled that USWC need not sell retail telecommunications services packaged as CSAs (or individual case-based contracts) to AT&T at a wholesale discount. Order Approving Application Regarding Interconnection Agreement with Modifications, Docket No. 96A-345T, Decision No. C97-857 (Aug. 20, 1997) (J.A. Vol. 10, Tab 98, at 24976-77). AT&T challenges Section 4.6.2 of Attachment 2 to the USWC-AT&T Agreement, which provides that "AT&T can utilize, under the same terms and conditions, any volume discounts that USWC makes available to its end user customers." USWC-AT&T Agr., Att. 2, § 4.6.2 (J.A. Vol. 13, Tab 126, at 25045). AT&T asserts, in part, that it is the absence of a provision permitting AT&T to resell CSAs that violates the Act.

3. AT&T argues the decision by the CPUC and the corresponding provision of the Agreement violate the Act and FCC rules by excusing USWC from its obligation to provide to AT&T CSAs for resale at a wholesale rate under section 251(c)(4)(A) of the Act and

the Local Competition Order. Also, AT&T asserts that the CPUC's decision and the salient provision of the Agreement impose an unreasonable restriction on resale of telecommunications services in violation of section 251(c)(4)(B) of the Act. USWC contends that the Act only requires the resale of retail services at a discount, which retail services are defined as those covered by the tariffs filed by the ILECs. CSAs are not found in the USWC tariffs and are not thus not subject to resale at wholesale prices according to USWC.

B. Conclusions of Law

1. The CPUC's ruling that USWC need not sell retail telecommunications services packaged as CSAs to AT&T at a wholesale discount and the Agreement's corresponding provisions are a result of the CPUC's legal interpretation of the Telco Act and the FCC's rules, and specifically the Local Competition Order. This issue is therefore subject to de novo review. U S West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997).

2. Section 251(c)(4)(A) of the Telco Act requires USWC "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A); see also 47 C.F.R. § 51.605(a). The Telco Act defines "telecommunications service" broadly as "the offering of telecommunications for a fee directly to the public. . . ." 47 U.S.C. § 153(46). The Telco Act in turn defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Moreover, the Telco Act specifies that wholesale rates are determined "on the basis of retail rates charge[d] to subscribers for the . . . service[s] requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3).

3. The FCC has ruled that the obligation to offer telecommunications services to resellers at wholesale rates applies whether the service is provided at retail on a general or, as in the case of contract offerings, a customer-specific basis. Local Competition Order ¶ 943. Rejecting the incumbents' contrary "conten[tion] that section 251(c)(4) resale obligations should not apply to contract . . . offerings," id. ¶ 943 & n. 2231 (citing comments of the United States Telephone Association, a coalition of ILECs), the FCC ruled that section 251(c)(4)(A) "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings." Id. ¶ 948 (emphasis added); see also id. ¶ 951 ("[i]f a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service"). The FCC concluded that "no basis exists for creating a general exemption from the wholesale requirement" for any particular type of telecommunications service. Id. at 948. The Eighth Circuit sustained the FCC's comments as "reasonable interpretations of the Act." Iowa Utils. Bd. v. Federal Communications Comm'n, 120 F.3d 753, 819 (8th Cir. 1997).

4. Exempting incumbents such as USWC from their resale obligation regarding CSAs "would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard [i.e., customer-specific] offerings, thereby eviscerating the resale provisions of the 1996 Act." Local Competition Order ¶ 948; see also id. ¶ 958 ("[g]iven the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so").

5. Indeed, the FCC has specifically confirmed that the argument advanced below by USWC and accepted by the CPUC - that CSAs need not be provided at a wholesale discount because they are already discounted - is contrary to the language and purpose of section 251(c)(4)(A) and the Local Competition Order as upheld by the Eighth Circuit. See In re

Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, FCC 97-418, CC Docket No. 97-208, Memorandum Opinion and Order ¶ 217 (Dec. 24, 1997) ("BellSouth South Carolina Order"). In that decision, the FCC held that the refusal to sell CSAs using a wholesale discount "impedes competition for [an incumbent's] large-volume customers and thus impairs the use of resale as a vehicle for competitors to enter [the local] market." Id., ¶ 215. The FCC also specifically addressed and rejected the reasoning employed by the CPUC by stating that "any service sold to end users is a retail service, and thus is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service." Id., ¶ 217.

6. The FCC's holding that CSAs are subject to resale at a wholesale rate pursuant to section 251(c)(4)(A) of the Act may not be challenged in this section 252(e)(6) appeal. See Southwestern Bell Telegraph Co. v. AT&T Communications, Inc., No. A-97-CA-132-SS, 1998 WL 657717, at *1 (W.D. Tex. Aug. 31, 1998); AT&T Communications, Inc. v. Pacific Bell, C-97-0080, 1998 WL 246652, at *2 (N.D. Cal. May 11, 1998); see also Fed. Communications Comm'n v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984) (holding that Courts of Appeal have exclusive jurisdiction to review FCC orders).

7. One other federal court has rejected the very argument advanced here by USWC, holding that CSAs must be made available for resale to CLECs at the wholesale rate. See AT&T Communications of the Southern States, Inc. v. BellSouth Telecomm., Inc., 7 F. Supp. 2d 661, 672-74 (E.D.N.C. 1998). "[T]he notion that CSAs are likely already discounted is not sufficient to remove them from the Act's clear mandate"). Id. at 672. The Court finds the reasoning in this case persuasive and adopts it herein.

8. Moreover, Section 251(c)(4)(B) of the Telco Act forbids ILECs from "impos[ing] unreasonable or discriminatory conditions or limitations on . . . the resale of [retail] services." Recognizing that restrictions on resale "may reflect an attempt by [ILECs] to preserve their market position" to the detriment of competition and the interests of consumers, the FCC has "conclud[ed] that . . . resale restrictions are [presumptively] unreasonable" and "therefore in violation of § 251(c)(4)." Local Competition Order ¶ 939. An "[ILEC] can rebut this presumption," id., but "only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b); see also AT&T Communications Inc. v. Pacific Bell, C-97-0080, 1998 WL 246652, at *14-15 (N.D. Cal. May 11, 1998); BellSouth South Carolina Order ¶¶ 217-218.

9. The FCC has made clear that this nondiscrimination regulation "does not contemplate . . . that a state commission can create a general exemption of all CSAs from the Act's requirement that retail offerings be available for resale at a discount from the retail price." BellSouth South Carolina Order ¶ 218. Rather, the state commission must employ the presumption of unreasonableness in its review, and the incumbent has the burden of overcoming that presumption. See Pacific Bell, 1998 WL 246652, at *14-15. Here, USWC did not attempt to rebut the presumption of unreasonableness, and the CPUC did not state whether or how its general restriction on all CSAs overcomes the presumption of unreasonableness. Accordingly, the CPUC's decision to exempt "individual case-based contracts," J.A. Vol. 10, Tab 98, at 24976-77, from the requirements of section 251(c)(4)(A) was incorrect as a matter of law. See Bellsouth Telecomm., 7 F. Supp. 2d at 672.

10. The Court rejects the argument made by USWC that the definition of retail service which must be provided at a discount applies only to retail services that are included in the tariffs filed by the ILEC. USWC cites to the Local Competition Order, ¶ 948 in

support of this argument. However, ¶ 948 does not define retail service this way, or even discuss this issue. ¶ 939 of the Local Competition Order does state that resale restrictions "include conditions and limitations contained in the [ILECs'] underlying tariff." However, resale restrictions are not limited to those in the tariff. Instead, the FCC was simply clarifying that resale restrictions can actually be broader than those found in the resale agreement, and can *include* those in the tariff. Id.

11. In conclusion, the Court finds that the CPUC's decision to exempt individual contract-based offerings for resale and the corresponding provision of the USWC-AT&T Agreement VIOLATES the Act. Judgment shall enter in favor of AT&T on Count One of its Cross Claim and Counterclaim in Civil Action No. 97-D-2096, and this issue is REMANDED to the CPUC. The CPUC is directed to modify the USWC-AT&T Agreement to require USWC to offer to AT&T CSAs for resale at a wholesale discount.

IV. AT&T'S RESALE ARGUMENT REGARDING SHORT TERM PROMOTIONS (PROMOTIONS LASTING 90 DAYS OR LESS)

A. Findings of Fact

1. AT&T also challenges the USWC-AT&T Agreement's failure to permit AT&T to resell short-term promotions of 90 days or less. Although the Agreement requires USWC to make available for resale "promotional offerings where offered for a period of greater than ninety (90) days," USWC-AT&T Agr., Att. 2, § 1.2 (J.A. Vol 13, Tab 126, at 25041), there is no provision in that Agreement requiring USWC to offer promotions of 90 days or less for resale.

2. In the CPUC's order clarifying its approval of the USWC-AT&T Agreement, the CPUC stated that "[i]f a promotion (either called 'special' or 'market trial') is longer than 90 days, it shall be offered for resale."[2] However, the CPUC noted that this did not apply to "promotions under the 90-day time period."

3. When the CPUC approved the USWC-AT&T Agreement, it held that with respect to volume or term discounts the Agreement "should not conflict with our ruling in Docket No. 96S-331T." Order Approving Application Regarding Interconnection Agreement with Modifications, Docket No. 96A-345T, Decision No. C97-857 (Aug. 20, 1997) (J.A. Vol. 10, Tab 98, at 24976-77). The ruling in Docket No. 96S-331T states that "the [Local Competition Order] requires the resale of all retail telecommunications services except for promotional offerings of less than ninety days in duration." Decision No. C97-739, Docket No. 96S-331T, ¶ 7(a)(1), at 83-84 (attached as Exhibit D to AT&T's Counterclaims).

4. AT&T contends that the CPUC erred as a matter of law by failing to require the resale of short-term promotions in direct conflict with the Telco Act and FCC rulings. AT&T argues that Sections 251(c)(4)(A) and 251(b)(1) of the Act and the interpreting regulations require that promotional offerings of 90 days or less must be made available for resale at the promotional rate. AT&T, recognizing the FCC's holding on this point, does not contend that it is entitled to a wholesale discount from the promotional rate.

5. USWC maintains that those short-term promotional offerings need not be offered for resale at all because promotional offerings of 90 days or less are not provided at retail rates, and thus they are not "telecommunications services that the carrier provides at retail." See USWC Response Brief at 28. Further, USWC argues that these promotions are

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[2] CPUC Decision Denying, in Part, and Granting, in Part, Applications for Rehearing, Reargument, or Reconsideration; Clarifying Commission Decision No. C96-1231; and Granting Extension of Time To File Interconnection Agreement, Docket No. 96A-345T, Decision No. C97-7 (Colo. PUC Jan. 15, 1997) (J.A. Vol 10, Tab 94, at 10524-10525).

not tariffed services, and are thus excluded from the resale obligation, that the FCC Rules are not clear whether these promotions need to be resold, and that the FCC Rules permit the states to restrict such promotions.

B. Conclusions of Law

1. Because this issue involves the CPUC's interpretation of the Act and FCC rules, it is subject to review de novo. U S West Communications v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997).

2. Section 251(c)(4)(A) of the Act requires that USWC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

3. The Local Competition Order held that section 251(c)(4)(A)'s requirement that incumbent LECs must offer "any telecommunications service" for resale "makes no exception for promotional or discounted offerings." Id., ¶ 948. It further stated, "[w]e therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs." Id. "A contrary result would permit [ILECs] to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." Id., see also ¶ 956 ("[g]iven the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so"). The FCC has reinforced the conclusion that "promotional offerings of less than 90 days are retail services, and, therefore, must be made available for resale." Memorandum of the FCC as Amicus Curiae, at 18, AT&T Communications of the Mountain States, Inc. v. Hix, No. 97-D-1152 (D. Colo. Mar. 3, 1998).

4. The FCC in the Local Competition Order went on to consider whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). Id. ¶ 949. It concluded that "short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." Id. "We therefore establish a presumption that promotional prices offered for a period of 90 days or less [the short-term promotions] need not be offered at a discount to resellers." Id. ¶ 950. "Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A)." In other words, the FCC did not hold that short-term promotional offerings are exempt from the resale requirements of section 251(c)(4), only that they do not have to be offered at the discounted wholesale rates. Finally, the FCC noted that it was "concerned that conditions that attach to promotions . . . could be used to avoid the resale obligation to the detriment of competition." Id. ¶ 952. "Allowing [ILECs] end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effect." Id.

5. However, the FCC concluded that "there may be reasonable restrictions on promotions . . . ." Specifically, it stated, "[w]e conclude that the substance and specificity of rules concerning which . . . promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions." Id. The rule applied to volume discount offerings where the FCC concluded that restrictions were "presumptively unreasonable" (id. ¶ 253) was not applied by the FCC to short term promotions; thus, the FCC left it to the state commissions to fashion reasonable restrictions if they deemed them necessary.

6. The FCC regulations define more specifically what restrictions on resale can be imposed for short term promotions. 47 C.F.R. § 51.613(a)(2). The regulation permits certain restrictions as set forth in § 51.613(a), and then states, "[w]ith respect to any restrictions on resale not permitted under paragraph (a), an [ILEC] may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." Id., § 51.613(b).

7. The Eighth Circuit specifically upheld the FCC's regulations. Iowa Utils. Bd. v. Fed. Communications Comm'n, 120 F.3d 753, 819 (8th Cir. 1997). At least one federal court addressing this issue concluded that the state commission erred by not allowing promotional offerings lasting 90 days or less to be available to the new entrant for resale. MCI Telecomm. Corp. v. BellSouth Telecomm., Inc., 7 F. Supp. 2d 674, 682 (E.D.N.C. 1998).

8. The Court finds that the CPUC's ruling that "the Local Competition Order requires the resale of all retail telecommunications services except for promotional offerings of less than ninety days in duration" is erroneous. As stated previously, promotional offerings of less than ninety days are not exempted from resale in the Local Competition Order; instead, the FCC stated only that these short-term promotions did not have to be offered at the discounted wholesale rate.

9. Further, although the FCC did rule that state commissions could impose reasonable restrictions on such short-term promotions, USWC has not shown that the CPUC imposed its restriction on resale of short-term promotional offerings in accordance with the restrictions allowed pursuant to 47 C.F.R. § 51.613(a). Moreover, USWC has not shown that the CPUC imposed its restriction on short-term promotions based on USWC's proof to the CPUC that the restriction is reasonable and nondiscriminatory in accordance with 47 C.F.R. § 51.613(b).

10. In this regard, USWC's Proposed Findings of Fact and Conclusions of Law on Issues under Advisement filed April 5, 2000 asserts that, "[e]xercising its discretion, the Commission properly found that precluding resale of short-term promotions of less than 90 days is 'procompetitive' and would 'outweigh any anticompetitive effects'", citing A206 at 21. When the Court was unable to find any record cite for "A206 at 21", it asked USWC to provide a copy of this portion of the record. In an Errata to Updated Proposed Findings of Fact and Conclusions of Law of USWC on issues under Advisement filed April 17, 2000, USWC acknowledged that the citation to A206 at 21 was erroneous, and that the terms "procompetitive" and "outweigh any antidiscriminatory effects" contained in USWC's statement were not made by the CPUC but by the FCC in its First Report and Order, ¶ 949.

11. However, USWC asserts that the CPUC did reference paragraph 949 of Local Competition Order in a footnote, and stated that the CPUC saw "no reason to adopt a view different from the FCC", citing the Decision Regarding Petition for Arbitration, Docket No. 96A-345T, Decision No. C96-1231 at R. 10388. The Court finds that this does not support USWC's position that the CPUC decided to impose reasonable restrictions on short-term promotions consistent with the FCC's Order. That is because the CPUC did not cite to the FCC Order in connection with finding that restrictions on resale of short-term promotions were justified as being "procompetitive" or for any other reason. Instead, the CPUC cited to the FCC Order in finding that promotions of up to 90 days do not establish retail rates for the underlying service subject to resale.

12. As stated previously, the FCC Order clearly does hold that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation. However, this does not justify the CPUC's decision to disallow the CLECs to purchase short-term promotions altogether, without any justification for

why such restriction was imposed, and which appears to be based on its mistaken belief that the Local Competition Order requires this absolute restriction on such promotions.

13. Accordingly, it is hereby ordered that the CPUC's decision exempting promotional offerings of 90 days or less VIOLATES the Act. Judgment shall be entered in favor of AT&T on Count Two of its Cross Claim and Counterclaim in Civil Action No. 97-D-2096 and against USWC, and this issue shall be REMANDED to the CPUC. The CPUC is directed to modify the AT&T-USWC interconnection agreement to permit AT&T to obtain promotional offerings of 90 days or less at the retail rate specified in the Local Competition Order.

V. COLLOCATION

A. Findings of Fact

1. USWC challenges the interconnection agreements to the extent they allow the CLECs to determine where their equipment may be collocated on USWC's premises. USWC also challenges those provisions of the agreements regarding equipment those CLECs can collocate in USWC's central offices. Finally, USWC challenges the ability of CLECS to collocate remote switching units ("RSUs").

2. The USWC-AT&T and USWC-MCI Agreements provide that "[AT&T/MCI] may collocate the amount and type of equipment [they] deem[] necessary in [their] collocated space in accordance with FCC and Commission Rules and Regulations" and that "[s]uch equipment may include, but shall not be limited to, transmission equipment, multiplexing equipment and remote switching units, subject to availability of space." US West-AT&T Agr., Att. 5, § 1.5 (J.A. Vol. 13, Tab 126, at 25139); US West-MCI Agr., Att. 5, § 1.5 (J.A. Vol. 13, Tab 128, at 26266). Similarly, USWC asserts that the CPUC also allowed TCG to collocate RSU's on USWC's premises. R. 6753, Decision No. C96-1186 at p. 42 n.37.

3. The CLECs argue that USWC waived or abandoned its right to assert any collocation argument other than the argument that CLECS should not be allowed to collocate RSUs. The Court agrees with the CLECs that USWC affirmatively stated at the hearing on this issue that the only argument it was pursuing in regard to collocation was the one regarding RSUs. See Transcript of Hearing from September 22, 1998, p. 187, ll. 12-20, p. 196, l. 23 - p. 198, l. 5. Accordingly, the Court agrees that collocation issues other than collocation of RSUs were waived or abandoned by USWC. To the extent that USWC is continuing to assert such claims in its Updated Proposed Findings of Fact and Conclusions of Law filed with the Court on April 5, 2000, the Court will not consider them.

4. The issue whether USWC was required to permit collocation of RSUs was arbitrated before the CPUC. The CPUC concluded that it should allow collocation of RSUs based on the evidence before it. AT&T Arbitration Decision, at 57 (J.A. Vol. 10, Tab 93, at 10359); MCI Arbitration Decision, at 85 (J.A. Vol. 10, Tab. 103, at 11568).

5. USWC argues that the CPUC improperly permitted the collocation of RSUs because they are "switching" equipment and not "transmission" equipment. It cites no record support for that argument, however. The CLECS demonstrate that there was significant evidence in the record that RSUs perform transmission functions that are necessary for efficient interconnection, that collocating RSUs avoids problems with the quality of interconnection between the new entrants' and USWC's networks, that collocating RSUs allows customers within a given remote switch to complete calls to each other even if an "umbilical" line to a host switch is cut, and that without collocated RSUs, new entrants like AT&T and MCI would be competitively

disadvantaged. See Direct Testimony of John P. Lynott, at 22-25, 33 (J.A. Vol. 6, Tab 67, at 22-25, 33); Supplemental Direct Testimony of John P. Lynott, at 17-19 (J.A. Vol. 7, Tab 27, at 9816-18); Exh. 7, Supplemental Direct Testimony of John P. Lynott, at 17-20 (J.A. Vol. 8, Tab 44, at 11937-40).

B. **Conclusions of Law**

1. Section 251(c)(6) of the Act imposes on US West:

> The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of US West, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. § 251(c)(6). Collocation refers to an "ILEC's obligation under the statute to permit CLECs to install equipment on the ILEC's property in order to connect to the ILEC's existing network." MCI Telecommun. Corp. v. U.S. West Communications, 204 F.3d 1262, 1269 (9th Cir. 2000).

2. In its Local Competition Order, the FCC held that any "transmission equipment . . . may be collocated," id. ¶ 580, and that "modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated." Id. ¶ 581. Therefore, the FCC left it to state commissions to "determine whether the equipment at issue is actually used for interconnection or access to unbundled elements" if the functionality of a particular piece of equipment is in dispute. Id. This question of fact is reviewed by the Court under the arbitrary and capricious standard. See U S West Communications v. Hix,

986 F. Supp. 13, 18 (D. Colo. 1997). However, the Court reviews de novo any interpretations of the CPUC as to whether collocation of RSUs violate the Act. Id.

3. The Act permits collocation of equipment "necessary for interconnection or access to unbundled network elements." § 251(c)(6). FCC regulations provide that "[w]henever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements." 47 C.F.R. § 51.323(b).

4. In the Local Competition Order, the FCC held that "necessary" as used in section 251(c)(6) "does not mean 'indispensable,' but rather 'used' or 'useful.'" Id. ¶ 579. The FCC required that an "incumbent LEC shall prove to the state commission that such equipment is not 'necessary,' as [the FCC has] defined that term for interconnection or access to unbundled network elements." Id. ¶ 580. These regulations were affirmed by the Eighth Circuit. See Iowa Utils. Bd. v. Fed. Communications Comm'n, 120 F.3d 753, 819 n. 39 (8th Cir. 1997). Consistent with the Local Competition Order, in its First Report and Order and Further Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 4761 ¶ 28 (1999), the FCC ordered incumbent LECs to permit carriers to collocate equipment "used or useful" for interconnection.

5. The Supreme Court in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), vacated the FCC's definition of the term "necessary" as it is found in another provision of the Act.[3] Further, the D.C. Circuit recently relied on the Supreme Court's decision in AT&T Corp. to vacate the subsequent FCC order applying its definition of "necessary" in section 251(c)(6) as "used or useful." GTE Serv. Corp. v. FCC, 205 F.3d 416, 422-24 (D.C. Cir. Mar. 17, 2000).

6. However, the Ninth Circuit recently rejected USWC's argument that AT&T Corp. requires that a state commission decision allowing collocation of RSUs be vacated, noting that while "the Act may not require the provision [allowing collocation of RSUs], it certainly does not proscribe it." MCI Telecommun. Corp. v. US West Corp., 204 F.3d 1262, 1269 (9th Cir. Mar. 2, 2000). The Ninth Circuit explained its holding as follows:

> U S West argues that we must strike the provision because the WUTC relied on the FCC's interpretation of the word 'necessary,' an interpretation with which the Supreme Court has found fault. . . . Were we reviewing this agreement under the judicial review standards of the Administrative Procedure Act, 5 U.S.C. § 701 et seq., we might agree with U S West that the agency's use of an improper definition of 'necessary' requires us to return the agreement to the agency for reconsideration . . . .
>
> We are not reviewing the actions of a federal agency subject to the APA, however. Here, our task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from that process-the provision requiring co-location-has resulted in an agreement

[3] The FCC had defined "necessary" in that other provision, which required the FCC to determine whether "access to such proprietary network elements as are proprietary in nature is necessary," as allowing access "regardless of whether requesting carriers can obtain the requested proprietary element from a source other than" the ILEC. AT&T Corp., 525 U.S. at 389.

> that fails to 'meet the requirements' of the Telecommunications Act. 47 U.S.C. § 252(e)(6). Although the Act may not require the provision [of the agreement requiring USWC to allow a CLEC to co-locate RSUs], it certainly does not proscribe it. Sections 251 and 252 of the Act are designed to provide some flexibility in fixing the provisions of interconnection agreements. Hence, we conclude that the provision is valid and affirm the district court.

Id.

7. This Court finds the Ninth Circuit's reasoning persuasive, and adopts it herein. The Court further notes that the Fourth Circuit and certain district courts have also held after AT&T Corp. that ILECs like USWC should be required to allow collocation of RSUs. See AT & T Communications v. Bell Atlantic-Virginia, 197 F.3d 663, 669 (4th Cir. 1999); MCI Telecommunications v. Bell Atlantic-Pennsylvania, No. 97-1857, Report & Recommendation (M.D. Pa. Sept. 16, 1999); MCI v. Bell Atlantic, 36 F. Supp. 2d 419 (D.D.C. 1999).

8. Finally, the Court finds that the D.C. Circuit's decision in GTE Serv. Corp. does not require that the CPUC's decision be vacated. While the D.C. Circuit did vacate the FCC's implementation of its definition of "necessary" as "used or useful," this does not change the fact that allowing collocation of RSUs does not violate the Act under the rationale adopted by the Ninth Circuit in MCI Telecomm. Corp., 204 F.3d at 1269.

9. Moreover, the D.C. Circuit did not disturb the FCC's regulations placing the burden of proof on an ILEC to demonstrate that a particular piece of equipment is "necessary" for interconnection. USWC has cited no evidence that the CPUC acted in an arbitrary and capricious manner in concluding that USWC failed to

meet its burden of showing that RSUs are not necessary for interconnection or access to unbundled network elements. There was significant evidence in the record supporting the CPUC's conclusion that RSUs should be collocated. See J.A. Vol. 7, Tab 27, at 9816-18; Vol. 8, Tab 44, at 11937-40; Vol. 9, Tab 67, at 22-25, 33.

10. Finally, at oral argument but not in its briefs, USWC asserted that the decision in Bell Atlantic Tel. Cos. v. Fed. Communications Comm'n, 24 F.3d 1441 (D.C. Cir. 1994), requires the Court to read the FCC's definitions narrowly. USWC's reliance on that case is misplaced. Bell Atlantic involved a different statutory provision predating Section 251(c)(6) of the Act that, unlike section 251(c)(6), "does not expressly authorize an order of physical collocation." Id. at 1447. Indeed, it was that very decision that spurred Congress to authorize physical collocation in section 251(c):

> Paragraph (4)(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations. . . . Finally, this provision is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic v. Federal Communications Commission, No. 92-1619 (D.C. Cir. June 10, 1994)).

H.R. Rep. No. 104-204, at 73 (1995).

11. Plainly, the Telco Act authorizes collocation in 251(c)(6), and there is no legal basis for the type of narrowing construction that USWC urges here. In fact, the FCC addressed in the Local Competition Order the possible impact of the Bell Atlantic case on its collocation rules, and concluded that since "section 251(c)(6) expressly requires incumbent LECs to provide physical collocation . . . . under the

court's analysis in Bell Atlantic, there is no warrant for a narrowing construction of section 251[.]" Local Competition Order ¶ 616 (emphasis added).

12. Accordingly, the provisions of the AT&T and MCI Agreements authorizing collocation of RSUs are AFFIRMED. Judgment shall enter in favor of the CLECs and against USWC on the Sixth Claim for Relief in Civil Action No. 97-D-152 and the Fifth Claim for Relief in Civil Action No. 97-D-2096.

VI. USWC'S PICK AND CHOOSE CLAIM (MOST FAVORED NATION)

A. Findings of Fact

1. USWC challenges the most favored nation ("MFN") provisions (also called "pick and choose" provisions) of the AT&T, MCI, ICG and Sprint agreements that permit those CLECs to incorporate tariff provisions into their interconnection agreements.

2. Specifically, each CLEC defendant requested, and was granted by the CPUC, a clause in their contract allowing them to pick any clause from another contract either agreed to or arbitrated by any other carrier who interconnected with USWC. AT&T Agreement, Part A, Section 20.1; MCI Agreement, Part A, Section 20.1; MFS Agreement, Section XXXIV.B.; ICG Agreement, Section XXXIV.B.; TCG Agreement, Section XXVII.; Sprint Agreement, Section 36.2. USWC opposed all these so-called MFN clauses, but the CPUC required them based on FCC Rule 51.809, 47 C.F.R. § 51.809. This Rule states in pertinent part that "[a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunication carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, conditions as those provided in the agreement, subject to certain conditions specified in the Rule.

3. This rule was appealed to the Eighth Circuit which invalidated it on July 18, 1997. Iowa Utilities Bd. v. Fed. Communications Comm'n., 120 F.3d 753, 801 (8th Cir. 1997), rev'd sub nom. AT&T v. Iowa Utils. Bd., 525 U.S. 366, 396 (1999). USWC then sought revisions to the contracts to comply with this decision. The CPUC modified the clauses in the AT&T and MCI contracts which had not yet been approved by the CPUC to largely eliminate the ability to substitute individual clauses from other contracts.[4] The CPUC did not, however, order the Agreement to be altered so as to forbid AT&T and MCI from obtaining services pursuant to a tariff.[5]

4. Later, after the CPUC modified the clauses in the AT&T and MCI Interconnection Agreements, the Supreme Court in AT&T Com., 525 U.S. at 396, upheld the FCC's "pick and choose" rule. Based on this ruling, USWC has withdrawn its claim that the CLECs should not be allowed to "pick and choose" provisions in other CLECs' interconnection agreements. However, it continues to contest the interconnection agreements to the extent they allow the CLECs to pick and choose from services in a tariff.

5. The USWC-AT&T and USWC-MCI Interconnection Agreements state as follows:

> The provisions of Section 252(i) of the Act shall apply to this Agreement, including state and federal interpretive regulations in effect from time to time. In the event any governmental authority or agency permits USWC, via tariff, to provide any service covered by this Agreement in accordance with any terms or

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[4] In re Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. § 252, Docket No. 96A-345S, Decision No. C97-837 at 8, App. A at 1 (Colo. PUC Aug. 20, 1997) (J.A. Vol. 10, Tab 98, at R. 24977, 24982) ("AT&T Modification Order"); In re Petition of MCIMetro Access Transmission Services, Inc. For Arbitration Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with US West Communications, Inc., Docket No. 96A-366T, Decision No. C97-858 at 8, App. A at 1 (Colo. PUC Aug. 20, 1997) (J.A. Tab 10, Tab 105, at R. 26130, 26135) ("MCI Modification Order").

[5] AT&T Modification Order at 8, App. A at 1 (J.A. Vol. 10, Tab 98, at R. 24982); MCI Modification Order at 8, App. A at 1 (Id., Tab 105, at R. 26130, 26135).

conditions that individually differ from one or more corresponding terms or conditions of this Agreement, AT&T may elect to amend this Agreement to reflect any such differing terms or conditions contained in such tariff, with effect from the date AT&T makes such election and for the remainder of the terms of this Agreement. The other services covered by this Agreement and not covered by such decision or order shall remain unaffected and shall remain in full force and effect. Notwithstanding the foregoing, AT&T may purchase services out of an effective tariff, regardless of prices set forth in an existing agreement.

AT&T Interconnection Agreement, § 20.1 (J.A. Vol. 13, Tab 126, at R. 25013-14); MCI Interconnection Agreement, § 20.1 (id., Tab 128, at R. 26160-61).

5. The USWC-Sprint agreement states as follows:

[USWC] shall make available any interconnection, service, or network element provided under an agreement approved under Section 252(i) of the Act to which it is a party to Sprint upon the same terms and conditions as those provided in the agreement. Individual interconnection, service, or network elements from another agreement, are available upon acceptance of all the terms and conditions in the agreement related to such interconnection, service or element. Upon proof provided by [USWC] that Sprint causes [USWC] to incur greater costs in the provision of the service than the current carrier's agreement, Sprint will accept the increased costs for the service. [USWC] shall also permit Sprint to purchase services out of an effective tariff, regardless of prices set forth in an existing agreement. [USWC] shall make all agreements available for public viewing within 10 days of approval by the Commission. Sprint will notify [USWC] of its intent to adopt the provisions of another agreement at least 30 days prior to effectuating the change.

Sprint Interconnection Agreement, Section 36.2 (J.A. Vol. 11, Tab 112, at R. 01696).

6. The USWC-ICG agreement states as follows:

ICG may incorporate and use any interconnection, service or network element from another agreement in accordance with section 252(i) and Decision No. C96-1206. ICG may take service pursuant to this Agreement or in the alternative may order any interconnection, service or network element from any effective, available tariff.

ICG Interconnection Agreement, Section XXXIV.B. (J.A. Vol. 12, Tab 125, at R. 0746).

7. USWC argues that the interconnection tariff filed by USWC pursuant to a CPUC order contains terms which differ from the agreements in this case.

B. **Conclusions of Law**

1. To the extent that the Court must determine whether the CPUC violated the Act in imposing the right for CLECs to pick and choose tariff terms, the Court must review this issue de novo. U S West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997).

2. The Supreme Court upheld the FCC's "pick and choose" rules that permit requesting carriers to "opt in" to interconnection, unbundled element, and resale arrangements in subsequently approved interconnection agreements. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). The Supreme Court did not consider or discuss the ability of requesting carriers to "opt in" to tariffs.

3. Both 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 govern only a requesting carrier's ability to opt into interconnection agreements entered into under the Act. Section 252(i) provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided *under an agreement approved under this section* [Section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided *in the agreement.*

47 U.S.C. § 252(i) (emphasis added). A tariff is not "an agreement approved under" Section 252. Indeed, a tariff is not even part of the Section 252 negotiation and arbitration process.

4. FCC Rule 809 also allows requesting carriers only to opt in to other agreements approved by the state commission:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting carrier any individual interconnection, service, or network element arrangement *contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act,* upon the same rates, terms, and conditions as those provided *in the agreement.*

47 C.F.R. § 51.809(a) (emphasis added).

5. The statute and FCC rules do not permit a requesting carrier to opt into tariff provisions.

6. The Court finds that allowing a CLEC that has executed an interconnection agreement to use a tariff to supplement or supplant any term, condition, or price that is covered by the agreement VIOLATES the Act. That is because such a provision would eviscerate the provisions of 251 and 252 of the Act which require that the parties negotiate the terms of an interconnection agreement and arbitrate those terms that they are not able to agree to. As one court stated the issue, "permitting CLECs to incorporate non-negotiated tariff provisions into their interconnection agreements "bypasses the Act entirely and ignores the procedures and standards that Congress has established." MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1178 (D. Ore. 1999).

7. The Act not only encourages parties to negotiate amongst themselves the terms of interconnection agreements, it imposes an affirmative "duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements . . . ." 47 U.S.C. § 251(c)(2). To facilitate this duty, parties can voluntarily negotiate interconnection agreements "without regard" to the standards in Sections 251(b) and (c). 47 U.S.C. § 252(a). Tariff provisions, however, are not entirely voluntary; rather, the state commission must approve them and can impose terms. See Colo. Rev. Stat. § 40-3-102. Thus, permitting a CLEC to opt into

tariff provisions is much different than permitting them to opt into another interconnection agreement which the incumbent LEC had the opportunity to negotiate. Indeed, there is little incentive for carriers to negotiate if they can simply opt into a more favorable tariff than the state commission imposes.

8. Furthermore, permitting CLECs to "pick and choose" from tariff provisions may undermine federal court review of interconnection obligations under the Telco Act. The CPUC in other proceedings in this Court, U S WEST Communications, Inc. v. ICG Telecom Group, Inc., Civil Action No. 99-D-1827, has taken the position that interconnection agreements and the approval or rejection of same are the only thing subject to review in federal court under 47 U.S.C. § 252(e)(6). If the CPUC's argument were accepted, the CPUC and/or other carriers could not be sued in federal court for review of interconnection tariffs that were opted into by a CLEC, essentially eviscerating federal court review of interconnection obligations under the Act. The CPUC could simply purport to apply the Act in a tariff and/or the CLECs could opt into more favorable provisions in a tariff to avoid the exclusive federal court review Congress envisioned.

9. MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157 (D. Or. 1999) supports the Court's holding. In that case, the court decided that the state commission's requirement that GTE file a tariff listing elements that the state commission had decided must be unbundled and the prices the commission had fixed for those elements conflicted with the Act and was preempted. The Court stated:

> [T]he court . . . agrees with GTE that the tariff – as presently structured – conflicts with the Act and is preempted. The record reflects that the PUC has not merely adopted a short-form interconnection agreement, along with a list of resale and unbundled element prices that will be incorporated in those agreements. Rather, the PUC has dispensed with the interconnection agreement altogether and is allowing CLECs to order services "off the rack" without an interconnection agreement . . . .
>
> The distinction is an important one. 47 U.S.C. § 251(d)(3) preserves the PUC's right to enforce state regulations or policies that establish access and interconnection obligations of local exchange carriers, are consistent with the requirements of § 251, and do not substantially prevent implementation of either the requirements of § 251 or the purposes of "this part" (i.e., 47 U.S.C. §§ 251 through 261).
>
> Here, however, the state has done more than simply enforce additional state requirements. It has required GTE to sell unbundled elements or services for resale, to CLECs, via a procedure that bypasses the Act entirely and ignores the procedures and standards that Congress has established.
>
> The PUC may take steps to expedite the interconnection process, but it must do so within the overall framework established by the Act. Before purchasing finished services or unbundled elements from an ILEC, each CLEC must enter into an interconnection agreement. GTE must have the right to ask the CLEC, and the PUC, to include additional or different terms in a particular agreement if GTE believes special circumstances exist. With the exception of negotiated deviations as provided in § 252(a)(1), the agreement must comply with the substantive standards established by the Act (and by the FCC, where appropriate). Finally, GTE must have the right to seek judicial review of any agreement by the federal court pursuant to § 252(e)(6).

Id. at 1177-78.

10. The CLECs have argued that the non-discrimination provisions of 47 U.S.C. § 202(a) require that they have the right to select any provision in a tariff. That provision of the 1934 Act, however, generally governs interstate, not intrastate, service. Also, Sea-Land Service, Inc. v. ICC, 738 F.2d 1311, 1317 (D.C. Cir. 1984), held that contract rates approved under appropriate commission procedures do not "inherently conflict with a common carrier's duty of nondiscrimination." See also Competitive Telecom Assn. v. Fed. Communications Comm'n, 998 F.2d 1058, 1063 (D.C. Cir. 1993).

11. To the extent the CLECs are concerned that they should have the option to have available to them a generally-available set of terms and conditions governing the provision of services by USWC, the Act provides this to them in the form of a Statement of Generally Available Terms ("SGAT") under 47 U.S.C. § 252(f). Moreover, if the CLECS wish to have a tariff term incorporated into the interconnection agreements, they are free to seek an amendment of the interconnection agreement.

12. Accordingly, the Court holds that the MFN or pick and choose provisions of the interconnection agreements, to the extent they permit CLECs to incorporate tariff provisions into their interconnection agreements, VIOLATE the Act and are VACATED. Judgment shall be entered in favor of USWC and against AT&T, MCI, Sprint and ICG on the Second Claim for Relief in Civil Action Numbers 97-D-152, 97-D-1667 and 97-D-2096 to the extent that the claim seeks relief on this issue.

VII. MCI's CLAIM REGARDING SELECTION OF PROVISIONS FROM OTHER CARRIERS' AGREEMENTS WITH USWC

A. Findings of Fact

1. MCI challenges the CPUC's decision striking the term in its Interconnection Agreement allowing MCI to choose individual provisions from USWC's Agreements with other new entrants for incorporation into the MCI Agreement. Specifically, MCI challenges part A, § 20.1 of its Agreement, which originally provided:

> The provisions of Section 252(i) of the Act shall apply to this Agreement, including state and federal interpretive regulations in effect from time to time. In the event any governmental authority or agency permits [US West], via tariff **or agreement**, to provide any service covered by this Agreement in accordance with any terms or conditions that individually differ from one or more corresponding terms or conditions of this Agreements, [MCI] may elect to amend this Agreement to reflect any such differing terms or conditions contained in such tariff **or agreement**, with effect from the date [MCI] makes such election and for the remainder of the term of this Agreement.

J.A. Vol. 13, Tab 128, at R. 26160-26161 (emphasis added).

2. After initially ordering that the MCI Agreement include the words "or agreement" as set forth in bold and underline above, the CPUC later reversed that decision and ordered that those words be stricken from the Agreement. In re Petition of MCIMetro Access Transmission Services, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S West Communications, Inc., Docket No. 96A-366T, Decision No. C97-858 at 8, App. A at 1 (Colo. PUC Aug. 20, 1997) (J.A. Vol. 10, Tab 105, at R. 26130, 26135) ("MCI Modification Order").

3. When the CPUC initially ruled that the interconnection agreement must permit MCI to choose individual provisions from other agreements, the FCC's Rule 809, 47 C.F.R. § 51.809, was in effect. Rule 809 interpreted § 252(i) of the Act to require incumbents such as USWC to allow new entrants to choose individual provisions from other agreements. After the CPUC issued its initial order, the Eighth Circuit vacated Rule 809. Iowa Utils. Bd. v. Fed. Communications Comm'n, 120 F.3d 753, 801 (8th Cir. 1997). Relying on that decision, the CPUC reversed its initial ruling and struck the words "or agreement" from the MCI-USWC Agreement. Since MCI brought this action challenging that ruling, the Supreme Court has now reversed the Eighth Circuit's decision and reinstated Rule 809. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 396 (1999).

B. **Conclusions of Law**

1. The CPUC's interpretation of the Act is a question of law subject to this Court's de novo review. U S West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997).

2. The CPUC erred as a matter of law when it eliminated MCI's right to choose individual provisions from USWC's agreements with other carriers.

3. Section 252(i) of the Act, referred to as the "most favored nation" or "pick and choose" provision, requires that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in

the agreement." 47 U.S.C. § 252(i). In the Local Competition Order and Rule 809, the FCC interpreted § 252(i) to require incumbents to make available "without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to § 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement." 47 C.F.R. § 51.809(a); Local Competition Order ¶ 1314. Rule 809 provides two exceptions to that general provision, where the incumbent can prove: (1) that the costs of providing a particular interconnection, service, or element to the requesting new entrant are greater than the costs of providing it to the new entrant that originally negotiated the agreement; or (2) that provisioning the requested interconnection, service, or element is not technically feasible. 47 C.F.R. § 51.809(b).

4. The Eighth Circuit vacated Rule 809, finding that allowing new entrants to choose a favorable provision of an existing interconnection agreement without accepting the corresponding concessions made to the incumbent by the new entrant who negotiated that favorable provision would discourage "the give and take process that is essential to successful negotiations." Iowa Utils. Bd., 120 F.3d at 801 (8th Cir. 1997). The Supreme Court reversed the Eighth Circuit's decision and reinstated Rule 809, holding that the rule "tracks the pertinent statutory language almost exactly." AT&T Corp., 525 U.S. at 396. Indeed, the Supreme Court concluded that Rule 809 "is more generous to incumbent [carriers] than § 252(i) itself." Id. In the wake of the Supreme Court's decision, at least one other district court has held that an

interconnection agreement must contain a "most favored nation" provision. U S West Commun., Inc. v. Jennings, 46 F. Supp. 2d 1004, 1027 (D. Ariz. 1999).

5. This Court must follow the Supreme Court's decision and apply the FCC regulations reinstated by that Court. See MCI Telecommunications Corp. v. U S. West Commun., Inc., 204 F.3d 1262, 1268 (9th Cir. Mar. 2, 2000); AT&T Communications Systems v. Pacific Bell, 203 F.3d 1183, 1187-88 (9th Cir. 2000); GTE South, Inc. v. Morrison, 199 F.3d 733, 740-41 (4th Cir. 1999); Bell Atlantic-Delaware, Inc. v. McMahon, 80 F. Supp. 2d 218, 235-36 (D. Del. 2000); MCI Telecomms. Corp. v. Michigan Bell Tel. Co., 79 F. Supp. 2d 768, 788 (E.D. Mich. 1999); MCI Telecomms. Corp v. Bell Atlantic-Pennsylvania, Inc., No. 97-1857, Magistrate's Report & Recommendation at 32-33 (M.D. Pa. Sept. 16, 1999); AT&T Commun. of the Southwest, Inc. v. Southwestern Bell Tel. Co., No. 97-1573-CV-W-5, 1999 WL 1128466, at *11 (W.D. Mo. Aug. 31, 1999); U S West Commun., Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 51 (S.D. Iowa Apr. 19, 1999); MCI Telecomms. Corp. v. US West Commun., Inc., No. 97-CV-919, slip op. at 11-12 (D. Minn. Mar. 30, 1999); AT&T Commun. of the Midwest, Inc. v. US West Commun., Inc., No. 97-CV-917, slip op. at 10-11 (D. Minn. Mar. 30, 1999).

6. USWC asserts that MCI's challenge should be rejected because Section 20.1 of the Agreement simply incorporates 47 U.S.C. § 252(i) and any FCC pronouncements. The Court does not agree. By taking out the word "agreement" in that section, the "pick and choose" provision of the MCI Agreement as approved by the CPUC is inconsistent with § 252(i) and Rule 809. As originally approved by the CPUC,

prior to the Eighth Circuit's decision, that provision complied with federal law.

7. Therefore, judgment shall be entered in favor of MCI on Count XII of its Complaint in Civil Action 97-D-2047, and this issue shall be REMANDED to the CPUC. The CPUC is directed to reform Section 20.1 of the interconnection agreement to conform with the original language approved by the CPUC which gave MCI the right to choose individual provisions from USWC's agreements with other carriers.

VIII. CONCLUSION

Based upon the foregoing, it is

ORDERED that USWC's Notice of Withdrawal of Moot Claims filed April 5, 2000, is **GRANTED IN PART AND DENIED IN PART** consistent with this Order. It is

FURTHER ORDERED that the Second Claim for Relief in Civil Action Numbers 97-D-152, 97-D-1667 and 97-D-2096 is **DISMISSED IN PART** to the extent that it asserted that the CLECs should not be allowed to "pick and choose" provisions in other CLECs' interconnection agreements. It is

FURTHER ORDERED that **JUDGMENT SHALL BE ENTERED** in favor of Plaintiff USWC and against Defendants AT&T, MCI, Sprint and ICG on the remaining portion of the Second Claim for Relief in Civil Action Numbers 97-D-152, 97-D-1667 and 97-D-2096 that allows the CLECs to pick and choose and incorporate tariff provisions into the interconnection agreements. It is

FURTHER ORDERED that **JUDGMENT SHALL BE ENTERED** in favor of MCI on Count Twelve of its Complaint in Civil Action 97-D-2047 and against USWC. The Clerk of Court is directed to **REMAND** this issue to the CPUC, who is directed to reform

Section 20.1 of the MCI-USWC interconnection agreement to conform with the original language approved by the CPUC which gave MCI the right to choose individual provisions from USWC's agreements with other carriers. It is

FURTHER ORDERED that the Third Claim for Relief in 97-D-152, 97-D-1667 and 97-D-2096 is **DISMISSED IN PART** to the extent that it challenges provisions requiring USWC to resell services already subject to wholesale discounts. It is

FURTHER ORDERED that the Seventh Claim for Relief in 97-D-152, the Fifth Claim for Relief in 97-D-1667, and the Sixth Claim for Relief in 97-D-2096 are **DISMISSED IN PART** to the extent they challenge the interconnection agreements requirement to sell unregulated and deregulated services. It is

FURTHER ORDERED that **JUDGMENT SHALL BE ENTERED** in favor of Plaintiff USWC and against Defendants AT&T, MCI, Sprint and MFS/WorldCom on the remaining portions of the Third and Seventh Claims for Relief in 97-D-152, the Fifth Claim for Relief in 97-D-1667, and the Third and Sixth Claims for Relief in 97-D-2096 that require USWC to provide "telecommunications services" in the form of "enhanced" or "informational" services, such as voice mail and inside wire maintenance. It is

FURTHER ORDERED that **JUDGMENT SHALL BE ENTERED** in favor of AT&T on Count One of its Cross Claim and Counterclaim in Civil Action No. 97-D-2096 and against USWC. The Clerk of Court is directed to **REMAND** this issue to the Colorado Public Utilities Commission, who is directed to modify the USWC-AT&T Agreement to require USWC to offer to AT&T contract service arrangements for resale at a wholesale discount. It is

FURTHER ORDERED that **JUDGMENT SHALL BE ENTERED** in favor of AT&T on Count Two of its Cross Claim and Counterclaim in Civil Action No. 97-D-2096 and against USWC. The Clerk of Court is directed to **REMAND** this issue to the Colorado Public Utilities Commission, who is directed to modify the USWC-AT&T Agreement to permit AT&T to obtain promotional offerings of 90 days or less at the retail rate specified in the Local Competition Order. It is

FURTHER ORDERED that the Sixth Claim for Relief in 97-D-152 and the Fifth Claim for Relief in 97-D-2096 are **DISMISSED IN PART** to the extent that they challenge provisions of the interconnection agreements that require USWC to permit collocation at USWC's "premises." It is

FURTHER ORDERED that **JUDGMENT SHALL BE ENTERED** against Plaintiff USWC and in favor of the Defendants AT&T, MCI and TCG on the remaining portions of the Sixth Claim for Relief in 97-D-152 and the Fifth Claim for Relief in 97-D-2096 that allege collocation issues. It is

FURTHER ORDERED that the Tenth Claim for Relief in 97-D-152 relating to "bill and keep" mechanism for recovery of transport and termination costs is **DISMISSED IN ITS ENTIRETY**. It is

FURTHER ORDERED that the Eleventh Claim for Relief in 97-D-152 and Seventh Claim for Relief in 97-D-1667 relating to the division of access charges are **DISMISSED IN THEIR ENTIRETY**. It is

FURTHER ORDERED that the Twelfth Claim for Relief in 97-D-152, Eighth Claim for Relief in 97-D-1667 and Fourteenth Claim for Relief in 97-D-2096 relating to denial of due process are **DISMISSED IN THEIR ENTIRETY**. Finally, it is

ORDERED that the Twelfth Claim for Relief in 97-D-2096 is **DISMISSED IN PART** to the extent that it relates to unbundling of vertical switching features.

DATED this 23rd day of June, 2000.

BY THE COURT:

Wiley Y. Daniel
U. S. District Judge

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
APR 14 2000
JAMES R. MANSPEAKER
CLERK
BY _____ DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. **97 - D - 152 (Consolidated with Civil Action Nos. 97-D-387, 97-D-1667, 97-D-2047, 97-D-2096 and 98-D-934)**

US WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

ROBERT J. HIX, et al.,

Defendants.

FINDINGS OF FACT & CONCLUSIONS OF LAW IN CONNECTION WITH DARK FIBER ISSUE HEARD AT HEARING ON DECEMBER 21, 1998

This case involves the Plaintiff, US West Communications, Inc. ("USWC"), and the other parties' efforts to challenge certain interconnection agreements approved by the Colorado Public Utilities Commission ("CPUC") pursuant to the Telecommunications Act of 1996 (hereinafter "Telco Act"). The Telco Act fundamentally restructured local telephone markets, ending the monopolies that States historically granted to local exchange carriers ("LECs") and subjected incumbent LECs to an array of duties intended to facilitate market entry, including the obligation under 47 U.S.C. § 251(c) to share their market with competitors. The other telecommunication parties to this action are competitive local exchange carriers ("CLECs") that seek to compete in the local telephone market that has been historically controlled by US West ("USWC").

Under the Telco Act, when the parties were unable to reach agreement as to the

provisions of interconnection agreements, the CPUC became empowered to function as an arbitrator and to decide the terms and conditions of interconnection agreements or those portions thereof where the parties disagreed. Pursuant to 47 U.S.C. § 252(e)(6), a law suit was duly filed in this Court which asked the Court to determine if the CPUC's decisions were consistent with the Telco Act.

The current action before the Court arises from USWC's challenge to the requirement of unbundling of dark fiber as a facility that does not qualify as a network element; from MCI and AT&T's challenges to the requirements that they submit a detailed bona fide request ("BFR") each time they seek access to dark fiber from USWC at a particular point; and from MCI's challenge to the requirement that it provide reciprocal access to its dark fiber to USWC. The Court heard oral argument on this matter on December 21, 1998 and, being fully advised in the premises, hereby issues its Findings of Fact and Conclusions of Law in regard to this issue.[1]

I. Findings of Fact

1. Dark fiber is optic cable that connects parts of USWC's network. Dark fiber is "dark" in the sense that USWC has not currently attached the electronic equipment needed to power or "light" the fiber. Thus, it is spare fiber optic cable ready to be activated for use in USWC's network. When dark fiber is activated by combining it with electronic equipment at both ends, it is used to transmit telecommunications.

2. In its Twelfth Claim for Relief, USWC challenges the CPUC's requirement

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[1]The recognizes that USWC filed a notice of withdrawal of the dark fiber claim on April 3, 2000. As the Court had reached a decision on this issue prior to USWC's attempted withdrawal of the claim, however, the Court will address the merits of this issue.

that USWC unbundle dark fiber. Section 251(c)(3) of the Act requires ILECs to provide access to "network elements" on an unbundled basis. Specifically, USWC argues that dark fiber does not qualify as a network element under the Act.

3. According to USWC, nothing in the Act or the FCC's Order requires or even allows unbundling of dark fiber. The demand by AT&T/MCI for dark fiber boils down to a request for exclusive use of network capacity that USWC forecast and built to meet its own needs. USWC contends that forcing it to make this capacity available to competitors will constrain its ability to fulfill its statutory obligation as a carrier of last resort.

4. USWC argues that the provision requiring it to reveal the location and availability of its dark fiber also violates the Telco Act. By revealing the location, US West would be revealing its business strategy concerning where it intends to expand its operations. This is proprietary information. AT&T/MCI did not demonstrate that their ability to compete would be "significantly impaired or thwarted" as required in order to obtain access to this information. Thus, all of the provisions in section 4 of the AT&T/MCI Agreement (Attachment 6) relating to dark fiber must be stricken.

5. In Count Six of its Complaint, MCI contends that the CPUC erred as a matter of law when it refused to unbundle USWC's dark fiber on a standardized basis. MCI argues that dark fiber is a network element and that MCI will be impaired without access to USWC's dark fiber. Thus, MCI asserts that it is entitled to immediate access to USWC's dark fiber under Section 251(c) of the Telco Act. Additionally, MCI, in Count Six of its Complaint, and AT&T, in Count Five of its Counter Claims and Cross Claims, challenge the terms in their respective Interconnection Agreements with USWC

requiring MCI/AT&T to provide reciprocal access to their dark fiber to USWC.

6. Specifically, MCI and AT&T challenge Attachment 6, § 4.2.1 of their Agreements, which provides as follows:[2]

> Pursuant to the BFR process described in this Agreement, or until such time as dark fiber is required to be offered as an Unbundled Network Element, in those instances where excess reserve of fiber capacity exists, USWC shall make available Unused Transmission Media in Colorado to MCI under a lease agreement or other arrangement provided, however, that in the event that MCI has excessive reserves, if any, of Unused Transmission Media it shall make such excess reserves available to USWC on the conditions included in this Section and in previously referenced BFR process. However, MCI is not required to make available any Unused Transmission Media until it first receives access to such media under the provisions of this Section.

7. Rather than require the immediate unbundling of dark fiber, the CPUC ordered MCI and AT&T, under their respective Agreements' bona fide request ("BFR") process, to submit a detailed written request each time they seek access to dark fiber at a particular point. USWC then has 21 days to provide MCI or AT&T with a preliminary analysis of the request. If USWC concludes that MCI or AT&T's request is technically feasible, USWC has an additional 60 days to provide MCI or AT&T with terms for providing the dark fiber.

8. On Tuesday, January 18, 2000, based upon the Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), the FCC issued a revision of its Rules specifying the portion of the Nation's local telephone network that ILECs must make available to competitors. The FCC requires ILECs to provide unbundled access to the local loop. See Revision of the Commission's Rules Specifying the Portion of the Nation's Local Telephone Networks that Incumbent Local

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[2]The MCI and AT&T Interconnection Agreements, and thus this provision in each, are identical.

Telephone Companies Must Make Available to Competitors, 65 Fed. Reg. 2542, 2543 (2000) (to be codified in 47 C.F.R. pt. 51). In its Third Report and Order, the Commission, recognizing that its previous definition of "loop" contained in its First Report and Order did not specify whether dark fiber fell within the definition of the loop, explicitly stated that "[t]he Third [Report and Order] defines the loop network element to include all features, functions and capabilities of the transmission facilities, including dark fiber . . . ." Id. Consequently, FCC Rule 319 was revised to explicitly include dark fiber as one of the network elements that ILECs are required to unbundle. 47 C.F.R. § 51.319(a)(1). The requirements in this section relating to dark fiber are not effective until May 17, 2000.

II. Conclusions of Law

A. Dark Fiber as a Network Element

1. As stated in more detail above, USWC argues that dark fiber does not qualify as a network element under the Act. Because this issue involves the Commission's compliance with the Act and the FCC's implementing regulations, the Court reviews this issue de novo. See U S West Communications, Inc. v. Hix, 986 F Supp. 13, 19 (D. Colo. 1997) (following Amisum (PSL), Inc. v. Colorado Dep't of Social Servs., 879 F.2d 789 (10th Cir. 1989)).

2. The Telco Act defines "network elements" as "facilit[ies] or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153 (29). As previously noted, FCC Rule 319 was revised to explicitly include dark fiber as one of the network elements that ILECs are required to unbundle. 47 C.F.R. § 51.319(a)(1).

"[U]nbundled access to dark fiber is now not only consistent with the Act but affirmatively required by it . . . ." MCI Telecommunications Corp. v. US West Communications, 2000 WL 232273, at *5 (9th Cir. Mar. 2, 2000). Thus, I find that USWC's position is now without merit and that MCI and AT&T are entitled to access to USWC's dark fiber under Section 251(c) of the Telco Act once the provisions in Section 319(a) relating to dark fiber become effective on May 17, 2000.

3. The Court also notes that even before the FCC revised its rule regarding dark fiber, the vast majority of federal district courts faced with this issue have found that dark fiber is a network element. Indeed, of the federal district courts that have decided the issue, only one has found that dark fiber is not a network element. See MCI Telecommunications Corp. v. Pacific Bell, No. C 97-0670 SI, 1998 U.S. Dist. LEXIS 17556 (N.D. Cal. Sept. 29, 1998) (JA 57). In contrast, the majority view is that dark fiber is a network element. MCI Telecommunications Corp. v. Michigan Bell Telephone Co., 79 F. Supp.2d 768, 783-84 (E.D. Mich. 1999); US West Comm., Inc. v. Jennings, No. CV 97-26-PHX-RGS-OMP, 1999 WL 284888, at *15 (D. Ariz. May 4, 1999); US West Communications Inc. v. AT & T Communications of the Pacific Northwest, Inc., 46 F. Supp.2d 1068, 1080-1081 (D. Or. 1999); US West Comm., Inc. v. Garvey, No. 97-913, at *26 (D. Minn. Mar. 30, 1999); MCI Telecomm. Corp. v. BellSouth Telecomm., Inc., 40 F. Supp.2d 416, 428-29 (E.D. Ky. 1999); MCI v. Bell-Atlantic, 36 F. Supp.2d 419, 423 (D.D.C. 1999); US West v. Thoms, 1997 WL 880744 No. 4-97-CV-70082, at *40 (S.D. Iowa Jan.25, 1999); US West Comm., Inc. v. AT & T Corp., No. A1-97-085, at *15- 16 (D.N.D. Jan. 8, 1999); Southwestern Bell Telephone Co. v. AT & T Comm. of the Southwest, Inc., No. 97CA132SS, 1999 WL

657717, at *6 (W.D. Tex. Aug.31, 1998); US West v. AT & T, No. C97-1320R, at *14-16 (W.D. Wash. July 21, 1998); MCI Telecomm. Corp. v. U.S. West Comm., Inc., No. C97-1508R, at *14-15 (W.D. Wash. July 21, 1998); MCI Metro Access Trans. Servs., Inc. v. GTE Northwest, Inc., No. C-97-742WD, 1009 U.S. Dist. Lexis 11335, at *13-14 (W.D. Wash. July 7, 1998); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 7 F. Supp.2d 674, 680 (E.D.N.C. 1998); MCI v. Bell Atlantic-Virginia, Inc., No. 3:97CV629, 1998 U.S. Dist. Lexis 17558, at *20-21 (E.D. Va July 1, 1998). I find the majority view persuasive, especially since the FCC has adopted this approach in the revised rules.

4. Based upon the foregoing, the CPUC properly rejected USWC's dark fiber argument. The CPUC recognized that dark fiber was a network element and, accordingly, that USWC was required to unbundle dark fiber.

5. Accordingly, the Court DENIES USWC's relief to the extent that it argues, in its Twelfth Claim for Relief, that dark fiber is not a network element. The Court also AFFIRMS all of the provisions in section 4 of the AT&T/MCI Agreement (Attachment 6) relating to dark fiber challenged by USWC that require the unbundling of dark fiber as a network element.

B. The BFR Process Requirement

6. As the revised Rule 319 requires USWC to provide access to dark fiber, the CPUC's decision requiring MCI to request dark fiber through a BFR process violates the Act and FCC regulations. MCI Telecommunications Corp. v. Illinois Bell Tel. Co., No. 97-C-2225, 1999 U.S. Dist. LEXIS 11418, at *17-*18 (N.D. Ill. June 22, 1999) ("To force MCI to undertake a *bona fide* request would unjustifiably delay MCI's access to [a

network element]. Delaying access to a network element to which MCI is clearly entitled is inconsistent with the basic purpose of the Act.") (emphasis in original).[3]

7. Accordingly, the Court holds that the CPUC decision requiring MCI to request dark fiber through a BFR process violates the Act and FCC regulations. Thus, the Court REJECTS Attachment 6, § 4.2.1 of the MCI/AT&T Agreements to the extent that those provisions make this finding.

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[3]In its Updated Proposed Findings of Fact and Conclusions of Law filed April 5, 2000, USWC argues that the FCC recognized that allowing CLECs to have access upon demand to any and all dark fiber in an ILEC's network may interfere with the incumbent's ability to satisfy its carrier of last resort obligations. Updated Proposed Findings of Fact and Conclusions of Law of US West Communications, Inc. on Issues Under Advisement, at 17, ¶ 1. Consequently, USWC asserts that the CPUC struck an appropriate balance when it ruled that USWC was required to make its dark fiber available pursuant to a BFR process, on the condition that AT&T and MCI likewise make their dark fiber available toe USWC pursuant to a BFR process. Id. The FCC, however, did no such thing. In fact, the FCC merely recognized that an ILEC put forth that argument, and quickly discounted it. In In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 1999 WL 1008985 (November 5, 1999), the FCC stated the following:

> [W]e note that GTE argues that it must maintain control of its dark fiber reserves because, as a carrier of last resort, it is obliged to provide service to any and all customers as the need arises. . . . *We find that technological solutions . . . largely address GTE's concern that unbundled access to dark fiber may adversely affect its ability to provide service.* In addition, however, if incumbent LECs are able to demonstrate to a state commission that unbundling dark fiber threatens their ability to provide service as a "carrier of last resort," states have the flexibility to establish reasonable limitations and technical parameters for dark fiber unbundling. We conclude, however, that for a limitation on dark fiber to be reasonable, it must relate to a likely and foreseeable threat to an incumbent LEC's ability to provide service as a carrier of last resort.

Id. ¶ 352 (emphasis added). I find that, although it has stated so, USWC has not demonstrated that unbundling dark fiber threatens their ability to provide service as a carrier of last resort. There is no evidence of a likely and foreseeable threat to USWC's ability to provide service as a carrier of last resort. Consequently, USWC's position is without merit.

C. Providing Dark Fiber on a Reciprocal Basis

8. The Telco Act specifically excludes new entrants from the duty to provide access to unbundled network elements. Compare 47 U.S.C. § 251(b) (stating duties of all local exchange carriers) with 47 U.S.C. § 251(c)(3) (requiring only incumbent carriers to unbundle network elements). Consequently, MCI and AT&T do not have a duty to provide access to their dark fiber to USWC on a reciprocal basis.

9. Pursuant to Section 251(b)(4), each local carrier has the duty to afford access to the rights-of-way of such carrier to competing telecommunications carriers on rates, terms, and conditions that are consistent with section 224 of the Telco Act. 47 U.S.C. § 251(b)(4) (1999). As a result, USWC claims that the rights-of-way provisions of the Telco Act support the CPUC's decision to require reciprocal access to dark fiber. Section 224(a)(5) of the Telco Act, however, expressly excludes ILEC's from the definition of telecommunications carrier. See 47 U.S.C. § 224(a)(5) (1999) ("For purposes of this section, the term 'telecommunications carrier' . . . does not include any incumbent local exchange carrier as defined in section 251(h) of this title."). USWC is an ILEC as defined in Section 251(h). Thus, MCI and AT&T are not obligated to provide reciprocal access. See MCI Telecommunications Corp. v. US West Communications, Inc., No. C97-1508R, 1998 U.S. Dist. LEXIS 21585 (W.D. Wash. July 21, 1998), aff'd in part, rev'd in part on other grounds, 2000 WL 232273 (9th Cir. Mar. 2, 2000); US West Communications, Inc. v. AT&T Telecommunications of the Pacific Northwest, Inc., No. C97-1320R, 1998 U.S. Dist. LEXIS 22361 (W.D. Wash. July 21, 1998), aff'd in part, rev'd in part on other grounds, 2000 WL 249692 (9th Cir. Mar. 3, 2000) (unpublished decision). Consequently, USWC's position is without merit.

10. Accordingly, the Court also holds that the CPUC decision requiring MCI and AT&T to offer their dark fiber to USWC on a reciprocal basis was wrong as a matter of law. Thus, the Court REJECTS Attachment 6, § 4.2.1 of the MCI/AT&T Agreements to the extent that those provisions make this finding and enter judgment in favor of MCI on Count Six in its' Complaint and in favor of AT&T on Count Five of its' Counter Claims and Cross Claims.

DATED this 14th day of April, 2000.

BY THE COURT:

Wiley Y. Daniel
U. S. District Judge

DC 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 97-D-152 (Consolidated with Case Nos. 97-D-387, 97-D-2047, 97-D-2096, 97-D-1667, and 98-D-934)

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

ROBERT J. HIX, et al.,

Defendants.

FILED
UNITED STATES DISTRICT COURT
DENVER COLORADO
JUN 23 2001
JAMES R. MANSPEAKER
CLERK

ORDER GRANTING MCI RELIEF ON COUNT NINE OF ITS COMPLAINT IN CASE NO. 97-D-2047

This case involves the efforts of Plaintiff-Defendant, U S West Communications, Inc. ("USWC"), and Plaintiff-Defendants MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. ("MCI") to challenge certain interconnection agreements approved by the Colorado Public Utilities Commission ("CPUC") pursuant to the Telecommunications Act of 1996 (hereinafter "Telco Act"). The Telco Act fundamentally restructured local telephone markets, ending the monopolies that States historically granted to incumbent local exchange carriers ("ILECs") and subjected the ILECs to an array of duties intended to facilitate market entry, including the obligation under 47 U.S.C. § 251(c) to interconnect their networks with competitors' networks. MCI is a competitive local exchange carrier ("CLEC") that seeks to compete in the local telephone market that has been historically controlled by USWC.

Count Nine of MCI's Complaint against USWC in Case No. 97-D-2047 challenges the CPUC's decision requiring MCI to establish a point of interconnection in each local calling area where MCI intends to deliver or receive local traffic. The Court heard oral argument on this matter on April 20, 2000, and hereby issues its Order granting MCI relief. Accordingly, it is hereby ORDERED:

1. In Count Nine of its Complaint, MCI challenges the CPUC's requirement that "MCI shall establish a IP in each local calling area in which it is delivering and receiving local traffic." Interconnection Agreement, Attachment 4, § 2.2 (J.A. XIII, Tab 128, R. 26273). A point of interconnection ("IP") is the point of demarcation where the networks of USWC and MCI interconnect for the exchange of traffic. During the arbitration before the CPUC, MCI had requested that it be allowed to interconnect with USWC at one point in each Local Access Transport Area ("LATA") in Colorado.[1] MCI argues that the CPUC ignored the requirements of the Telco Act and the FCC's regulations and based its decision to require a point of interconnection in each local calling area on USWC's financial concerns. See CPUC Reconsideration Order at J.A. X, Tab 104, R. 11625-27.

2. MCI argued that the majority of courts to consider the issue have held that a state commission must limit its determination of the location and number of interconnection points to a consideration of technical feasibility, and that, if technically feasible, a CLEC has the right to establish a single point of interconnection in each LATA. See, e.g., MCI Telecom. Corp. v. Bell Atlantic-Pennsylvania, Inc., No. 97-1857, slip op. at 34-38 (M.D. Pa. Sept. 16, 1999); U S West Commun., Inc. v. MFS Intelenet, Inc., No. CV-

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1/ A local access transport area is one of 196 geographic areas in the United States established as a result of the AT&T divestiture and within which a RBOC may offer telecommunications services.

222WD, 1998 WL 350588, at *4 (W.D. Wash. Jan. 7, 1998), aff'd, U S West Commun., v. MFS Intelenet, Inc., 193 F.3d 1112, 1124 (9th Cir. 1999); MCI v. U S West, C97-1508R, 1998 U.S. Dist. LEXIS 21585, at *24-25 (W.D. Wash. July 21, 1998) (Rothstein, J.), aff'd in part and rev'd in part on other grounds, Nos. 98-35619 et al., 2000 WL 232273 (9th Cir. Mar. 2, 2000); U S West v. AT&T, C97-1320R, 1998 U.S. Dist. LEXIS 22331, at *26-27 (W.D. Wash. July 21, 1998); U S West Commun., Inc. v. Garvey, Civ. No. 97-213 ADM/AJB, slip op. at 31-34 (D. Minn. Mar. 31, 1999).

3. This issue involves the CPUC's compliance with the Telco Act and the FCC's implementing regulations and thus the Court will review this issue de novo. See US West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997) (following Amsuss (PSL), Inc. v. Colorado Dep't of Social Servs., 879 F.2d 789 (10th Cir. 1989)).

4. The Court holds that the Telco Act requires an ILEC like USWC to interconnect with a CLEC "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). The FCC, in turn, has determined that "interconnection . . . shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns . . . ." 47 C.F.R. § 51.5. Moreover, the Court holds that it is the CLEC's choice, subject to technical feasibility, to determine the most efficient number of interconnection points, and the location of those points. See 47 U.S.C. § 251(c)(2).

5. Therefore, the Court holds that the CPUC decision requiring MCI to establish a point of interconnection in each local calling area violates the Telco Act and the

FCC's regulations because it was based on considerations of US West's costs rather than on issues of technical feasibility. Thus, the Court rejects that portion of Attachment 4, § 2.2 (J.A. XIII, Tab 128, R. 26273) of MCI's interconnection agreement with USWC that requires MCI to "establish a IP in each local calling area in which it is delivering and receiving local traffic." MCI's Count Nine is GRANTED and the interconnection agreement should be reformed to strike the sentence "MCI shall establish a IP in each local calling area in which it is delivering and receiving local traffic" from Attachment 4, § 2.2.

Dated this 23rd day of June, 2000

BY THE COURT:

Wiley Y. Daniel
U.S. District Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of MCI for Declaratory Ruling	)	CCBPol 97-4
that New Entrants Need Not Obtain	)	
Separate License or Right-to-use Agreements	)	
Before Purchasing Unbundled Elements	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 2000 Released: April 27, 2000

By the Commission:

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I. INTRODUCTION

1. MCI filed a petition for declaratory ruling relating to intellectual property rights. Specifically, it asked the Commission to declare that any requirement that a requesting telecommunications carrier obtain separate license or right-to-use agreements before it may obtain access to unbundled network elements violates sections 251 and 253 of the Communications Act of 1934, as amended (the Act).[1] MCI also asks the Commission to issue a declaratory ruling that the Act's nondiscrimination requirement requires an incumbent LEC to provide requesting telecommunications carriers the same rights to intellectual property that the incumbent LEC enjoys.[2] In addition, MCI requests that the Commission hold that intellectual property rights of third parties are not implicated in the sale of unbundled network elements.[3]

2. For the reasons set forth below, we grant MCI's petition to the extent that it requests that we declare that section 251(c)(3) of the Telecommunications Act of 1996 (1996 Act) requires an incumbent local exchange carrier ("LEC") to use its best efforts to obtain coextensive intellectual property rights from the vendor on terms and conditions that are equal in quality to the terms and conditions under which the incumbent LEC has obtained these rights.[4] We deny, however, MCI's petition to the extent that it requests that the Commission hold that intellectual property rights of third parties are not implicated in the sale of unbundled network elements. In reaching this conclusion, we also respond to a primary jurisdiction referral of the United States District Court for the Western District of Texas ("Texas District Court").[5] Although

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[1] Petition of MCI for Declaratory Ruling, CC Docket No. 96-98, CCB Pol. 97-1 (filed Mar. 11, 1997) ("Petition"). On March 14, 1997, the Common Carrier Bureau issued a Public Notice requesting interested parties to file comments concerning MCI's Petition. *See* Public Notice, Common Carrier Bureau, DA 97-537 (rel. Mar 14, 1997). A list of commenters appears in the Appendix to this Order. In an *ex parte* dated March 4, 1998, MCI withdrew the section 253 preemption portion of its petition. *See* Letter from Frank L. Sear, Senior Counsel for Competitive Strategies, Federal Law and Public Policy, MCI to Michelle M. Carey, FCC (Mar. 4, 1998).

[2] Petition at 2.

[3] *Id.* at 7.

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934.

[5] On August 17, 1998, the Texas District Court issued an order referring the intellectual property dispute to this Commission. AT&T sought review before the Texas District Court seeking judicial review of an interconnection agreement that was arbitrated and approved by the Texas Commission. The court found that "the relationship of [section] 251(c)(3) to the intellectual property rights of third parties who have licensed their intellectual property to incumbent LECs for use in the LECs' physical facilities is precisely the type of issue within the FCC's special competence." *See AT&T v. Southwestern Bell Telephone Company*, No. A-97-CA-326 SS, slip op. at 6 (W.D. Tex. filed Aug. 17, 1998) ("*Texas Court Referral*").

we do not believe that this issue is currently preventing competing carriers from being able to enter the local exchange and exchange access markets. We seek to ensure that there are no barriers to entry in the local exchange and exchange access markets.

II. BACKGROUND

3. In the 1996 Act, Congress moved to restructure the local telecommunications market so as to remove legal and economic impediments to market entry that had previously existed. A key aspect of this restructuring is to require incumbent LECs to offer to requesting telecommunications carriers, among other things, access to network elements on an unbundled basis. By permitting competing carriers to enter local markets through the acquisition of unbundled network elements, the 1996 Act sought to increase the opportunities for competitive entry and reduce the existing competitive advantages of incumbent local exchange carriers. Section 3(29) of the Communications Act defines the term "network element" to mean both "a facility or equipment used in the provision of a telecommunications service" and "features, functions, and capabilities that are provided by means of such facility or equipment."[6] Section 251(c)(3) of the Act requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

4. On January 25, 1999, the United States Supreme Court ("Supreme Court") released an opinion in *AT&T Corp. v. Iowa Utilities Board* in which it vacated section 51.319 of the Commission's rules.[7] Section 51.319, which was adopted in the *Local Competition First Report and Order*, set forth the minimum number of network elements that incumbent LECs must make available on an unbundled basis to requesting carriers pursuant to section 251(c)(3). The Supreme Court found that the Commission, in determining which network elements must be unbundled pursuant to section 251(c)(3), had not adequately considered the "necessary" and "impair" standard of section 251(d)(2).[8] In a *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, we addressed the issues of which particular elements are "proprietary," and whether any of these elements must be unbundled in light of the "necessary" and "impair" standards of section 251(d)(2).[9] We found that a proprietary network element is "necessary"

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[6] The Supreme Court has affirmed our application of the term "network element" to include such "features, functions, and capabilities" as operator services and directory assistance, operational support systems ("OSS"), and vertical switching functions such as caller I.D., call forwarding, and call waiting. *See AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 733-734 (1999) ("*Iowa Utilities Board*").

[7] *Iowa Utilities Board*, 119 S.Ct. 721 (1999).

[8] *Iowa Utilities Board*, 119 S.Ct. at 733-36.

[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC

within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative element outside the incumbent's network, lack of access to an element would, as a practical, economic and operational matter, preclude a requesting carrier from providing the services it seeks to offer.[10] We clarify at the outset, that the instant order is limited to our interpretation of section 251(c)(3) and the obligations that this section imposes on incumbent LECs with respect to the intellectual property rights associated with network elements that they are required to unbundle for requesting carriers pursuant to section 251(d)(2).[11]

5. In its petition, MCI asserts that certain incumbent LECs have insisted that carriers requesting access to unbundled network elements ("competing carriers" or "requesting carriers") obtain licenses or right-to-use agreements associated with every network element to which the carrier requests access.[12] According to MCI, at the time it filed its petition in 1997, at least one incumbent LEC, Southwestern Bell Telephone Company ("SWBT"), had inserted this requirement

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Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand*).

[10] In the *UNE Remand*, we adopted a definition of proprietary network elements that reach the intellectual property categories of patent, copyright and trade secret law. *See UNE Remand* at para. 34.

[11] In the instant Order we determine that section 251 imposes certain obligations on incumbent LECs in connection with the intellectual property rights of third parties. Concurrently today, by an *Order on Reconsideration* in CC Docket No. 96-237, we determine that different obligations affecting third party intellectual property rights are imposed on incumbent LECs by section 259. *See* Order on Reconsideration, CC Docket No. 96-237, FCC No. 00-140, (rel. April 27, 2000)("*Infrastructure Sharing Reconsideration Order*"). This dissimilar treatment is mandated by the different requirements and operational contexts of the two statutory provisions. Section 251 governs interconnection and unbundled access requests, including requests made by carriers competing with the incumbent LEC. Pursuant to section 251(c), incumbent LECs must provide interconnection and unbundled access, *inter alia*, on a non-discriminatory basis. *See* 47 U.S.C. §§ 251(c)(2)(D), (c)(3). Construing this non-discrimination requirement, we find that incumbent LECs must exercise "best efforts" to obtain for extensive rights on behalf of competing LECs obtaining unbundled access pursuant to section 251 where such access implicates third party intellectual property rights. We do not adopt the same "best efforts" standard in section 259 cases because section 259 applies only where *non-competing* carriers share access to an incumbent LEC's "public switched network infrastructure, technology, information, and telecommunications facilities and functions." 47 U.S.C. § 259(a). As the Commission recognized in the *Infrastructure Sharing Order*, incumbent LECs in section 259 cases have less incentive to deny non-competing carriers the full benefit of infrastructure sharing agreements than they would competing carrier interconnection requests made pursuant to section 251. *See Infrastructure Sharing Order*, 12 FCC Rcd at 5528, 5530-31, ¶ 116. Also in contrast to section 251, section 259 contains no explicit non-discrimination requirement. Given these differences, we see no compelling reason to impose upon incumbent LECs in section 259 sharing cases the same "best efforts" requirement that we find is necessary in the very different context of section 251. We note also that pursuant to section 251, incumbent LECs are under a continuing and rigorous obligation to negotiate in good faith.

[12] MCI Petition at 3.

in its Statements of Generally Available Terms, and has included this as an issue in the arbitration and negotiation process.[13] MCI further states that the Texas Public Utility Commission ("Texas Commission") has adopted a requirement that SWBT provide a list of all known and necessary license or right-to-use agreements applicable to an unbundled network element requested by a competing carrier, and a requirement that the competing carrier obtain any license or right-to-use agreement associated with a network element purchased from SWBT.[14] Pursuant to this provision, SWBT, in response to a request by AT&T, identified 78 different contracts with approximately 42 different vendors.[15]

III. DISCUSSION

A. Jurisdiction

6. As an initial matter, we reject the argument, made by certain commenters, that we lack jurisdiction in the present matter because we have no jurisdiction over state decisions regarding statements of generally available terms and conditions or arbitration decisions.[16] The Supreme Court held that "the FCC has rulemaking authority to carry out the 'provisions of [the Communications Act],' which include §§ 251 and 252, added by the Telecommunications Act of 1996"[17] Our holding below requires us only to interpret section 251(c)(3) and section 251(c)(1) pursuant to our general rulemaking authority. Moreover, as noted above, the Texas District Court has referred primary jurisdiction to this Commission to resolve this matter.

B. Implication of Intellectual Property Rights

7. We deny MCI's petition to the extent it requests that we declare generally that intellectual property rights are never implicated in the purchase of unbundled network elements.[18] Determining whether intellectual property rights are implicated in the purchase of a particular unbundled network element must be determined on an individual case basis and depends upon a number of factors including: the scope of the use restrictions placed on the intellectual property by

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13 *Id.* at 4.

14 *Id.*

15 *Id.* at 5.

16 *See* Bell Atlantic Comments at 1; BellSouth Comments at 2-3; GTE Comments at 1-2; Texas Commission Comments at 1-2.

17 *Iowa Utilities Board*, 119 S.Ct. at 729.

18 MCI Petition at 6.

the vendor upon sale of equipment or licensing of software; the nature of the access and use contemplated by the requesting carrier when it purchases access to the element; the nature of the intellectual property included in the network element; and the applicable intellectual property or contract law.[19] We, therefore, agree with commenters that contend that physical control of network elements is irrelevant to the question of whether intellectual property rights are implicated.[20] Moreover, we agree with those commenters asserting that nothing in the 1996 Act permits us to nullify patent or other intellectual property rights.[21] Because the determination of whether intellectual property rights are implicated can vary greatly depending upon the individual contract terms negotiated by the vendor and incumbent LEC, we decline to make the comprehensive declaration requested by MCI.[22]

8. At the same time, however, we expect that, in nearly all cases, requesting carriers will be able to access unbundled network elements without the need for additional licenses. For example, many parties, including large equipment vendors such as Lucent and Nortel state that, generally, no additional licenses or fees should be required when a competing carrier obtains access to unbundled network elements under current contracts for a use that is within the scope of the original license.[23] Even BellSouth acknowledges that the "magnitude of occurrences of the need for direct licenses is much more nominal" than other commenters suggest.[24] Similarly, Sprint observes that, where these intellectual property rights are implicated, the issue will be the scope of the rights granted in the original software license.[25] Some commenters opine that this structure may explain why certain incumbent LECs have not raised the issue of third party intellectual property rights.[26] We are optimistic, therefore, that incumbent LECs will not raise the issue of intellectual property as a barrier to entry. In the unlikely event that this should become an issue, however, we seek to clarify incumbent LECs' obligations under section 251(c)(3) to provide nondiscriminatory access to network elements.

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19 *See* Lucent Comments at 3; Lucent Reply Comments at 2; *see also* ITA Reply Comments at 2.

20 *See* BellSouth at 4-5; BellCore at 2-3; SWBT Comments at 9-10.

21 BellCore Comments at 3; SWBT Comments at 16.

22 Likewise, we reject LCI's suggestion that we declare that intellectual property rights are not implicated unless an incumbent LEC proves by clear and convincing evidence that they are implicated. *See* LCI Comments at 1.

23 Lucent Comments at 2, 5-6; Nortel Comments at 6-7.

24 BellSouth Reply Comments at 8.

25 *See* Sprint Comments at 4-5.

26 *See* MCI Petition at 7; AT&T Comments at 2-6, 16-26; Competitive Telecommunications Association ("CompTel") Comments at 4.

C. Incumbent LEC Obligations Under Section 251(c)(3)

9. We conclude that the "nondiscriminatory access" obligation in section 251(c)(3) requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights that are necessary for the requesting carrier to use the network element in the same manner as the incumbent LEC. In particular, incumbent LECs must exercise their best efforts to obtain co-extensive rights for competing carriers purchasing unbundled network elements. We further find that the nondiscriminatory access obligation requires incumbent LECs to allocate any costs associated with acquiring the necessary intellectual property rights among all requesting carriers including themselves.[27] We do not mandate a particular method of satisfying these obligations. In fact, we believe that, through negotiation, third party vendors, incumbent LECs and requesting carriers can best determine how to ensure that an incumbent LEC lawfully provides access to unbundled network elements to requesting carriers without infringing upon the rights of third party vendors. As noted above, in most cases, the incumbent LEC's contract with a vendor already permits it to provide access to competing carriers, but in others, it may be necessary to negotiate for additional licenses.

10. We reach this conclusion in view of the fact that incumbent LECs control the choice of third party vendors, the scope of contracts with those vendors, and, along with the vendors, are well-situated to interpret ambiguous portions of those contracts. Given this, they are in the best position to determine whether existing contracts permit requesting carriers to use unbundled elements without modifying the contract to permit an extension of the right to use the intellectual property, to renegotiate the existing contracts if an extension is required, and to negotiate future contracts to ensure that competing carriers' use of intellectual property present in an element is contemplated. If incumbent LECs were not required to obtain the rights for requesting carriers to use the network elements, they would likely have an incentive to interpret their licenses with these providers as narrowly as possible to make it more difficult for requesting carriers to obtain access to the elements. Confidentiality agreements precluding the disclosure of the terms of these contracts exacerbate the incentives of incumbents to interpret contractual provisions to exclude use by requesting carriers. Requesting carriers, without access to the actual contracts, would be unable to determine which additional rights need to be obtained.[28] Moreover, the record suggests that, because incumbent LECs have pre-existing relationships with the

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[27] The costs allocated to intellectual property rights will be considered with all the other costs that go into determining the unbundled network price.

[28] MCI notes that even SWBT recognizes that "determining whether there is potential infringement requires a close examination of the particular patents at issue and the nature of the use." MCI Reply Comments at 8 (citing SWBT Comments at 5).

vendors, they typically have more bargaining power with these parties.[29]

11. We further conclude that incumbent LECs must recover the reasonable cost associated with renegotiating and extending rights to use intellectual property rights among all requesting carriers, including themselves.[30] We thus disagree with commenters that suggest that costs should be recovered entirely from the competing carriers under cost causation principles.[31] Section 251(c)(3) imposes an obligation on incumbent LECs to provide access to unbundled network elements on terms and conditions that are "just, reasonable, and nondiscriminatory." Moreover, section 252(d)(1)(A) requires that rates for unbundled network elements be based on the cost of providing the network element. These sections reflect Congress' intent to ensure that competing carriers are able to share in the economies of scale and economies of scope of the incumbent. As the Commission stated in the *Local Competition First Report and Order*, incumbent LECs' rates for network elements must recover costs in a manner that reflects the way they are incurred, and therefore, prices should be based on costs similar to those incurred by the incumbents.[32] Moreover, the Commission stated that, "[t]he costs of shared facilities . . . should be recovered in a manner that efficiently apportions costs among users."[33] We find that the cost of co-extensive intellectual property rights is analogous to the shared use of network elements, and thus, must be shared by the incumbent and competitors, ensuring that all parties bear the same proportionate and reasonable costs associated with unbundled network elements.[34] We note that the price of an unbundled network element already includes the cost of the license for the

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29 *See, e.g.*, TRA Comments at 9; AT&T Comments at 1-3, 13. *But see* Ad Hoc Comments at 4; BellSouth Comments at 6; SWBT Comments at 28.

30 The Supreme Court has affirmed our jurisdiction to design pricing methodology according to the provisions of the 1996 Act. *See Iowa Utilities Board*, 119 S.Ct. 721, 730 (1999).

31 *See* Ad Hoc Comments at 4; Bell Atlantic Comments at 4; GTE Reply Comments at 5-6; US West Reply Comments at 15.

32 *Local Competition First Report and Order* at para. 741.

33 *Local Competition First Report and Order* at para. 555.

34 *See* AT&T Comments at 12. *But cf. Implementation of the Infrastructure Sharing Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 97-36, 12 FCC Rcd 5469 (1997) (addressing carrier use of shared network infrastructure pursuant to section 259 of the Act), *recon. pending*. Qualifying carriers that request sharing pursuant to section 259 may not, pursuant to section 259(b)(4), use an incumbent LEC's facilities to compete in the incumbent LEC's telephone exchange area. The Commission, therefore, concluded that incumbents in section 259 sharing cases lack incentives to deny otherwise valid sharing requests pursuant to the terms of section 259. Based on these unique circumstances, the Commission allowed the parties to section 259 sharing arrangements to negotiate the terms for such sharing arrangements without monitoring, for example, pricing guidelines or specific requirements controlling how requesting carriers would share in the economies of scale and scope of the incumbent. *Id.* at ¶¶ 95, 116. Such an approach is unique to section 259 cases.

incumbent to use it. Accordingly, charging the entire cost of any license extension to requesting carriers, without the incumbent sharing in that cost, results in an overcharge to the requesting carriers.

12. This holding best satisfies the "nondiscriminatory access" requirement of section 251(c)(3). Specifically, we find that this holding reflects Congress' intent in drafting the 1996 Act, and is consistent with the text, structure, history, and purpose of that legislation.[35] The Commission has previously determined that the 1996 Act's goal of promoting local competition would not be achieved if the quality of the access to unbundled elements provided by incumbent LECs to new entrants were lower than what the incumbent LECs provide to themselves. Thus, the Commission determined that the phrase "nondiscriminatory access" means at least two things: "first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself."[36] Moreover we note that this holding is consistent with a recent decision of the United States Court of Appeals for the Fourth Circuit wherein the court held that section 251(c)(3) imposes an obligation on incumbent LECs to use their best efforts to renegotiate modifications to intellectual property licenses to provide nondiscriminatory access to network elements on the same terms and conditions that an incumbent LEC enjoys.[37]

13. Several commenters have questioned the soundness of a policy that would penalize incumbent LECs for an unregulated vendor's refusal to extend an existing contract to a competing carrier.[38] Although we expect that incumbent LECs will obtain any necessary intellectual property rights for competing carriers in keeping with their statutory obligation under section 251(c)(3), we do not in this order specify the means by which they must do so.[39] Rather, we expect that

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35 The language of the statute indicates that Congress recognized that incumbent LECs enjoy such overwhelming economies of scale and scope due to their historic monopolies that, to ensure competition, competitors must be permitted to share the benefits of these economies. *See Local Competition First Report and Order* at para. 11, 316; MCI Petition at 8; AT&T Comments at 13.

36 *See Local Competition First Report and Order* at para. 312.

37 *See AT&T v. Bell Atlantic*, Nos. 98-2131, 98-2147, 98-2196 (decided December 15, 1998) (1998 WL 1186253 (4th Cir. Va.)).

38 *See, e.g.*, Sprint Comments at 10; Bell Atlantic Comments at 4-5; GTE Comments at 8.

39 The Fourth Circuit reached the same conclusion when it held that "we recognize that negotiations might not be successful in every instance. If negotiations fail, we do not interpret § 251(c)(3) to impose an absolute duty to provide identical licensing terms in the case of existing agreements. [footnote omitted] Still, there must be a duty to negotiate. Otherwise, the Act's goal – competition in local telephone markets – would be ignored." *See AT&T v. Bell Atlantic*, at 9[illegible].

incumbent LECs will exercise their best efforts to obtain, at the lowest reasonable cost, licensing for requesting carriers on the terms that it has obtained for itself to ensure that competing carriers obtain nondiscriminatory access to unbundled network elements. We are highly skeptical that incumbent LECs will not succeed in meeting their nondiscrimination obligations pursuant to section 251(c)(3) through the use of their best efforts.

14. We find that, by including the necessary intellectual property license associated with an unbundled network element, an incumbent LEC can fulfill the requirement of section 251(c)(3) of allowing a requesting carrier to provide telecommunications services.[40] To conclude otherwise would be inconsistent with the intent of Congress to diminish significant economic and legal barriers to competition. Specifically, requiring a competing carrier to negotiate intellectual property licenses individually with multiple vendors with whom they may have no other business relationship could potentially pose a significant economic barrier to competition. For example, competing carriers could incur tremendous transaction costs and delays in attempting to obtain licenses as preconditions of entry. Such a requirement would disproportionately threaten smaller carriers whose participation in the local exchange market Congress sought to encourage.

15. We recognize, as Ameritech maintains, that incumbent LECs cannot unilaterally extend third-party intellectual property rights to competing carriers.[41] Furthermore, we agree with Ameritech and other commenters that we do not have jurisdiction to alter the intellectual property rights of third-party vendors.[42] Our decision does not infringe upon the rights of these third parties. Rather, it requires incumbent LECs to use their best efforts to ensure that their intellectual property rights are lawfully extended to competing carriers. We are not convinced by claims that section 251(c)(3)'s "nondiscriminatory access" requirement applies only to incumbent LECs' property and not to property that they do not own, such as intellectual property.[43] We find no basis in the statute for this distinction, and we are concerned that reading such a distinction into our rules would be difficult, if not impossible, to administer as incumbents could engage in lease-back arrangements designed solely to evade the obligations imposed by the Act.

16. Moreover, we are not persuaded that incumbent LECs' lack of knowledge about a requesting carrier's intended use of the unbundled element justifies requiring new entrants themselves to obtain intellectual property rights from third-party vendors. Section 251(c)(3) requires only that the intellectual property rights provided to a requesting carrier will enable that

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40 *See* MCI Petition at 8; AT&T Comments at 9; CompTel Comments at 2-3.

41 *See* Ameritech Comments at 3-6.

42 *See* Ameritech Comments at 4-5; BellSouth Comments at 2-3; SWBT Comments at 2.

43 *See* Ad Hoc Coalition Comments at 3; BellSouth Reply Comments at 5.

carrier to use the element for the same uses as the incumbent LEC. To the extent the requesting carrier intends to use the element in a different manner (e.g., in combination with some other element not contemplated by the incumbent LEC's particular license), the requesting carrier is solely responsible for obtaining this right from the vendor.[44]

17. Nevertheless, we recognize that, in order to limit its use to that contemplated by the contract, a competing carrier will need to know the extent to which the incumbent LEC is entitled to use a particular element. At a minimum, we believe that incumbent LECs should detail the name of specific third-party vendors, the subject intellectual property, and the relevant contracts which govern the providing incumbent LEC's use of that intellectual property. Failure of an incumbent LEC to satisfy these minimal requirements could constitute a violation of section 251(c)(3) as well as section 251(c)(1), which requires incumbent LECs to negotiate in good faith. We also recognize that many of these contracts are subject to non-disclosure provisions. Although the extension of rights to competing carriers will necessitate that competing carriers review these contracts to determine which uses are contemplated, we leave to the parties to negotiate a reasonable means of conveying this information in a manner that does not violate the terms of the confidentiality agreement.[45] For example, the vendor and the incumbent LEC will have to determine which provisions in the contract are entitled to confidentiality. Because there are certain terms, such as the cost of the intellectual property, that a competing carrier will have no need to examine, we expect that a redacted version of the contract could be made available to competing carriers in order to assist them in ascertaining the permissible uses of the elements at issue.

18. We reiterate that throughout the process of evaluating the intellectual property rights of third parties, incumbent LECs are under a rigorous and continuing obligation to negotiate in good faith with requesting carriers seeking access to unbundled network elements pursuant to section 251(c)(1). For example, an incumbent LEC's obligation to negotiate in good faith is violated if the incumbent LECs uses confidentiality provisions in vendor contracts in an anticompetitive manner or otherwise frustrates the ability of a requesting carrier to obtain co-extensive rights to use unbundled network elements. Incumbent LEC confidentiality provisions that impair the ability of a requesting carrier to obtain nondiscriminatory access to unbundled

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[44] *See* Lucent Comments at 6 ("Clearly in situations where a CLEC's use ... is beyond the scope of the original license or causes the originally intended license restrictions to be violated, or expanded so separate license would be required"); *see also* Lucent Reply Comments at 10; Nortel Comments at 6; SWBT Comments at 11.

[45] TRA Comments at 6; AT&T Reply Comments at 9-13. We note that at least one vendor, Lucent, indicates that it stands ready to work with incumbent LECs to identify, pursuant to reasonable non-disclosure terms, the portions of agreements which may be necessary for competing carriers to assess their extent of intellectual property rights. Lucent Comments at 13.

network elements could constitute a violation of the requirements of section 251(c)(1) and (c)(3). We intend to ensure that the renegotiation process, where necessary, does not unreasonably delay a requesting carrier's access to unbundled network elements.

19. We emphasize that in this Order we are not extending our rules to regulate third-party vendors. We recognize that intellectual property rights are among the most valuable assets these companies own.[46] We agree with commenters that Congress did not intend to open the local telecommunications market by trampling the intellectual property rights of third parties, and nothing in section 251(c)(3) requires a third party to grant a compulsory, royalty-free license to its intellectual property.[47] As the Texas Commission noted, the challenge posed by this issue is to interpret the statute in a manner that promotes competition in local telecommunications markets, while at the same time preserves the rights of third parties.[48] We have thus endeavored to ensure that our action preserves vendors' rights in their intellectual property.[49] Protecting a vendor's rights to its intellectual property is vital to the encouragement of innovation that can advance telecommunications services to all consumers. We are confident that the goal of promoting local competition can be achieved while simultaneously protecting a vendor's rights to its intellectual property.

20. Although our holding requires incumbent LECs to use their best efforts to ensure that a competing carrier purchasing unbundled network elements is able to obtain co-extensive intellectual property rights, third party vendors are nevertheless entitled to privity of contract with a requesting carrier.[50] Because we do not regulate these parties, we conclude that we may not limit their ability to require such an arrangement. We do not expect, however, that in those instances where an intellectual property holder seeks to establish privity with a requesting carrier, this will erect a significant barrier to providing the services a requesting carrier seek to offer. We expect that privity could be established with straightforward amendments to incumbent LEC license agreements and requesting carrier intellectual property licenses.

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46 Lucent Comments at 1.

47 *See* Texas Commission Comments at 3; BellCore Comments at 2.

48 Texas Commission Comments at 3.

49 Northern Telecom ("Nortel") Comments at 2; Telecommunications Industry Association ("TIA") Reply Comments at 2; Lucent Comments at 2.

50 Several commenters contend that third party vendors must be able to enjoy privity of contract with individual carriers. *See* BellCore Comments at 3; SWBT Comments at 28; *but see* Nortel at 4 n.1 (Nortel takes no position regarding whether the Commission should mandate that the agreements be established directly between the vendor and the requesting telecommunications carrier or between the requesting carrier and the [incumbent LEC] in accordance with the rights granted by the vendor to the [incumbent LEC]").

21. We disagree with GTE's contention that our holding is inconsistent with the Commission's treatment of proprietary network information in the *Local Competition Second Report and Order*.[51] We agree with AT&T that this interpretation "distorts the Commission's reasoning and thus obscures the fundamental distinction between the situation here and the issues *[the Local Competition Second Report]* order resolved."[52] In that proceeding, the Commission found that in interpreting the section 251(c)(5) network disclosure requirement, there may be instances in which incumbent LECs are permitted to refer requesting carriers to negotiate with third parties for the release of any necessary proprietary information associated with the incumbent LEC's network disclosure obligations.[53] That is not the situation at hand here. In the instant proceeding we are clarifying incumbent LECs' obligations under section 251(c)(3) to provide "nondiscriminatory access" to unbundled network elements. Given this standard, we find it is reasonable to require incumbent LECs to use their best efforts to obtain coextensive intellectual property rights from the vendor on terms and conditions that are equal in quality to the terms and conditions under which the incumbent LEC has obtained these rights. Moreover, GTE's selective discussion omits the Commission's statement two paragraphs later which clarified that "incumbent LECs are required [under section 251(c)(5)] to provide adequate access to even proprietary information if a competing service provider needs that information to . . . maintain interconnection and interoperation."[54]

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51 *See* GTE Comments at 7; citing *Second Report and Order and Memorandum Opinion and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("*Local Competition Second Report and Order*").

52 AT&T Reply Comments at 13.

53 *Local Competition Second Report and Order* at para. 257.

54 *Id.* at para. 259.

IV. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED pursuant to sections 1, 3, 4, 251(c)(1), 251(c)(3) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 251(c)(1), 251(c)(3), 303(r), 47 C.F.R. § 1.2 that the Petition for Declaratory ruling filed by MCI IS GRANTED IN PART and IS DENIED IN PART to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

FILED
JUN 01 2000
U.S. DISTRICT COURT

SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Plaintiff,	)	
v.	)	CIV-97-1507-A consolidated with CIV-97-1514-A
ED APPLE, et al.,	)	
Defendants.	)	

DOCKETED

ORDER

Before the Court are Southwestern Bell Telephone Company's ("SWBT") notice to the Court of the Federal Communications Commission's ("FCC") decision regarding intellectual property in relation to Count V of AT&T Communications of the Southwest, Inc.'s ("AT&T") motion for summary judgment, and AT&T's response. SWBT stipulates that to the extent AT&T's motion sought modification of the Interconnection Agreement paragraph 7.3.2, reflecting an obligation by SWBT to use its best efforts to acquire any necessary licenses or agreements and to recover the cost of such efforts from all carriers including SWBT, AT&T's motion should be granted. SWBT argues that in all other respects, Count V of AT&T's motion should be denied. This Court ordered the parties to either submit agreed language or specify their ongoing disagreement. AT&T responded stating that the parties cannot agree on the appropriate language because SWBT seeks a limitation on its obligations under 47 U.S.C. §251(c)(3). SWBT indicates that it is not obligated, despite the FCC's ruling in *In the matter of Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before*

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Purchasing Unbundled Elements, CC Docket No. 96-98 (April 27, 2000), to provide access to intellectual property prior to the acquisition of any necessary licenses or agreements or to modify the negotiation and cooperation obligations provided under the Interconnection Agreement. In light of the FCC's recent ruling, SWBT's requested limitations are unsupported. Count V of AT&T's motion for summary judgment is GRANTED. Paragraph 7.3.2 of the Interconnection Agreement is REMANDED to the Oklahoma Corporation Commission for modification in light of the FCC's and this Court's ruling. SWBT is directed to immediately begin using its best efforts to obtain necessary licensing in compliance with the FCC's ruling.

IT IS SO ORDERED this 1 day of June, 2000.

WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

FILED
JUL 19 2000

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, and AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa Corporation, Defendants.	)	CIV. 99-5024 ORDER TO ADMIT NONRESIDENT ATTORNEY

RECEIVED
JUL 17 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Defendant AT&T Communications of the Midwest, Inc., has filed a motion to allow nonresident attorney, Michael J. Hunseder, to participate in all proceedings in the above case. The Court has reviewed the file and good cause appearing, it is hereby

ORDERED that Michael J. Hunseder is hereby admitted to participate in all proceedings of this case pursuant to the Rules of Practice of the United States District Court of the District of South Dakota.

Dated July 10, 2000.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY
The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 7/11/00
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

JUL 18 2000

CLERK

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	)	CIV. 99-5024 ORDER DISMISSING CASE

The Court has been advised that the above-entitled action has been settled. Therefore, it is hereby

ORDERED that this action is hereby dismissed with prejudice.

Dated this 18 day of July, 2000.

BY THE COURT:

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY

The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 7/18/00.

CLERK

RECEIVED

JUL 19 2000

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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July 21, 2000

The Honorable Richard H. Battey
United States Senior District Judge
515 9th Street, #318
Rapid City, SD 57701

RE: U S West Communications, Inc. v. James A. Burg, Pam Nelson and Laska Schoenfelder, Commissioners of the Public Utilities Commission of the State of South Dakota and AT&T Communications of the Midwest (Civ. No. 99-5024)

Dear Judge Battey:

Please find enclosed the original Stipulation and Notice of Dismissal in the above matter. I apologize for the delay in sending the Stipulation to you but for some inexplicable reason one of the signature pages arrived only today after it had been sent by counsel on July 17, 2000.

Please note that the enclosed dismissal is without prejudice. The Order Dismissing Case you entered dated July 18, 2000 was with prejudice. Would you please vacate your earlier order in view of the enclosed?

Sincerely yours,

BOYCE, MURPHY, MCDOWELL
& GREENFIELD, L.L.P.

COPY
Thomas J. Welk

TJW/vjj
Enclosure
cc: Phillip Douglass
Kara Sacilotto
John Lovald
Maria Arias-Chapleau
Michael D. Warden
Rolayne Ailts Wiest
Bonnie Ulrich
David Zaring

RECEIVED
JUL 24 2000
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff,

v.

JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., a Iowa corporation,

Defendants.

Civ. No. 99-5024

STIPULATION AND NOTICE OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41(a), the parties, by and through their attorneys of record, do hereby stipulate and agree to the dismissal of this action, each party to bear its own costs.

Dated: July 21, 2000

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JUL 24 2000
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Dated: July 19, 2000

Rolayne Ailts Wiest

Rolayne Ailts Wiest, General Counsel
S.D. Public Utilities Commission
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Attorney for James Burg, Pam Nelson and Laska Schoenfelder

Dated: July 14, 2000

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Dated: July 18, 2000

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Attorneys for the United States Government

FILED
JUL 25 2000
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, vs. JAMES A. BURG, PAM NELSON, LASKA SCHOENFELDER, Commissioners of the Public Utilities Commission of the State of South Dakota, AT&T COMMUNICATIONS OF THE MIDWEST, INC., an Iowa corporation, Defendants.	CIV. 99-5024 AMENDED ORDER DISMISSING CASE

Pursuant to the Stipulation and Notice of Dismissal filed by the parties, it is hereby

ORDERED that this action is hereby dismissed without prejudice.

Dated this 25th day of July, 2000.

BY THE COURT:

Richard H. Battey

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

RECEIVED
JUL 26 2000
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

NOTICE OF ENTRY
The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 7-25-00
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