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BEFORE THE PUBLIC UTILITIES COMMISSION SOUTH DAKOTA PUBLIC
OF THE STATE OF SOUTH DAKOTA UTILITIES COMMISSION

IN THE MATTER OF THE ESTABLISHMENT) TC 96-107
OF SWITCHED ACCESS RATES FOR U S) TELECOMMUNICATIONS
WEST COMMUNICATIONS, INC.) ACTION GROUP'S (TAG)
REBUTTAL BRIEF ON
REMAND

Pursuant to Order of the South Dakota Public Utilities Commission, Telecommunications Action Group (TAG) hereby submits this rebuttal brief in response to the Brief on Remand submitted by U.S. West on August 5, 1998.

ARGUMENT AND AUTHORITIES

1. EXHIBIT 160, WHICH RELATES TO THE PERCENTAGE OF INTERSTATE USAGE (PIU) OF CERTAIN TELECOMMUNICATIONS COMPANIES OPERATING IN SOUTH DAKOTA, DOES NOT ELIMINATE "RATE SHOCK", NOR DOES IT SHOW THAT THE SWITCHED ACCESS RATE PRICE SOUGHT BY U.S. WEST IS AFFORDABLE.

In its Brief, U.S. West argues that the switched access rate proposed does not constitute "rate shock" for most resellers. (U.S. West Brief, hereinafter U.S.W., p. 2-3) Initially it should be noted that U.S. West neglects to consider all of the factors set forth in SDCL 49-31-1.4 which include whether the price is fair and reasonable and 1) the price of alternative services, 2) the overall market for the service, 3) affordability of the price for this service in the market it is offered and 4) impact of the price of the service on commitment to preserve affordable universal service. Rather, U.S. West inappropriately limits its argument on Exhibit 160 to the question of rate shock. This Commission previously found that the increase proposed was neither affordable nor in the public interest and would constitute rate shock. (Finding of Fact No.

IX(r)). That Finding considers certain of the elements raised by SDCL 49-31-1.4, and the portion of it relating to rate shock is not negated by U.S. West's argument relative to Exhibit 160.

U.S. West's own witness, Barbara M. Wilcox, testified in prefiled testimony and in oral testimony before the Commission during the hearing, that 13% of the small carriers she reviewed had PIU's of less than 50%. (Exhibit 41, prefiled testimony, p. 6, lines 5 and 6, and transcript p. 609). U.S. West argues, however, because so few carriers have PIU's less than 50%, that the increase is not rate shock because interstate rates decreased during a similar time frame. (U.S.W. p. 3-4) This argument presupposes that the resellers and interexchange carriers retained the reduced interstate access costs, however, as set out clearly in Sprint's Brief on Remand, there was no evidence that the long distance providers retained the reduced interstate access costs as opposed to reducing rates to their end users. (See, e.g. Sprint's Brief on Remand, p. 3)

It is also interesting to observe that during her testimony, Ms. Wilcox stated that she had no specific knowledge about how the change in the federal interstate access rate might have impacted smaller carriers. (TR p. 578)

Sprint also made good argument in its Brief that U.S. West did not urge the Commission to consider the overall rate for access charges because the lower interstate access rates would certainly show the doubling of intrastate rates to be non-affordable as compared to other rates in the market. (Sprint,

Id.)

Furthermore, nowhere in its Brief does U.S. West explain why an immediate 107% increase in intrastate switched access rates would not constitute "rate shock" under the definition previously developed by this Commission in Finding of Fact IX(h).

Lastly, despite any contentions by U.S. West to the contrary, it is clear that TAG member companies are particularly disadvantaged by the intrastate switched access rate increases. They are most admittedly pressured on one side by national carriers who can spread out their costs among many large markets, and on the other side by the discounted retail products U.S. West offers. (See, TR p. 494) Accordingly, the customers they serve are similarly disadvantaged. A monthly increase to an average business customer of \$50.00 to \$75.00 cannot be considered fair and reasonable. (TR p. 301 and Finding of Fact IX(c)).

2. EXHIBIT 154 REFLECTING THE SWITCHED ACCESS RATES BY COMPANIES SERVING OTHER SOUTH DAKOTA AREAS IS OF LITTLE SIGNIFICANCE.

U.S. West has submitted no significant argument on this issue. TAG suggests that it is clear there was adequate evidence supporting the Commission's prior decision. Finding of Fact VIII might easily be modified to specifically state that the approved switched access rates of all LEC's have been considered and the evidence supports the Commission's decision to implement a graduated rate increase.

CONCLUSION

This Commission had discretion to find that a 107% increase is not affordable nor fair and reasonable, even considering Exhibits 154 and 160. Such a finding would be accurate even if the impact of the increase might vary amongst different access service customers. Affordability for some certainly would not mean adequate affordability for the entire market place. Doubling of intrastate access rates on companies such as the TAG members would cause significant adverse financial effects, not only upon the member companies but also upon the ultimate consumers. Such a reduction in competition is not healthy for the industry. The prior decision of the Commission should be affirmed with only minor modifications to the Findings as previously suggested by Sprint and AT&T.

Respectfully submitted this 19th day of August, 1998.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

AUG 07 1998

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION
TC96-107

IN THE MATTER OF THE ESTABLISHMENT)
OF SWITCHED ACCESS RATES FOR U S WEST)
COMMUNICATIONS, INC.)

FAX Received AUG 05 1998

U S WEST'S BRIEF ON REMAND

U S WEST Communications, Inc. ("U S WEST") submits the following Brief on Remand.

BACKGROUND

This case has a lengthy procedural history. U S WEST filed its 1995 switched cost access study with the Public Utilities Commission of South Dakota ("the Commission") on June 24, 1996. Following a hearing and subsequent motion by AT&T Communications of the Midwest, Inc., the Commission denied any rate increase and closed the docket on January 31, 1997.

U S WEST appealed the Commission's decision and the Circuit Court reversed and remanded. In so doing, it ordered the Commission to determine "forthwith a fair and reasonable switched access rate . . . and render a written decision specifically setting out the rate and prepare a record of its proceedings and findings." Amended Order of Remand, U S WEST Communications, Inc. v. Public Utilities Comm'n of South Dakota, Civ. No. 97-50 (May 29, 1997).

On remand, the Commission ordered Staff to investigate U S WEST's cost study. Staff subsequently launched the "most rigorous" examination ever conducted in a switched access docket. A second hearing was held on September 10, 1997, at which time Staff recommended a switched access rate of 6.1 cents per minute.

The Commission issued its second switched access decision on November 24, 1997. The second decision implicitly adopted Staff's rate but ordered that it be phased in over a two and a half year period to avoid "rate shock." Finding of Fact XIV, Conclusion of Law X. In reaching its decision, the Commission applied the factors set out in SDCL 49-31-12.4.

U S WEST again appealed. Following oral argument, the Court issued a bench decision affirming the Commission's decision but remanding for reconsideration on two evidentiary issues: (1) the presentation of evidence contained in Exhibit 160 and any response to such evidence; and (2) the presentation of evidence contained in Exhibit 54 and any response to such evidence. Order of Affirmance and Remand at 2.

The parties subsequently stipulated to reconsideration without further hearing but reserved the right to make oral or written arguments to the Commission. The parties further stipulated that Exhibits 154 and 160 can be considered as confidential information under the Commission's administrative rules.

ARGUMENT

1. The switched access rate proposed by Staff does not constitute "rate shock" for most resellers.

As Judge Zinter noted at oral argument, Exhibit 160 is "extremely relevant and

pertinent" with respect to the issue of rate shock. Transcript of Oral Argument at 76. It demonstrates that contrary to the Commission's earlier findings,¹ rate shock is **not** an issue for most resellers.

Intrastate long distance service makes up only a portion of the service provided by interexchange carriers operating in the state of South Dakota. Interexchange carriers also offer interstate long distance service. One way to measure the breakdown of these services is to look at the percent interstate usage ("PIU"). Transcript of Sept. 10, 1997 Hearing at 577. Exhibit 160 lists the PIU for all carriers (excluding U S WEST) participating in this docket. There is a substantial difference in range between the highest and lowest PIU. The lowest PIU is forty-percent. The next highest is eighty-percent (80%) ranging all the way up to ninety-seven-percent (97%).

The average PIU is eighty-one-percent (81%). This means that more than four out of five minutes of switched access traffic is interstate traffic. Because the proposed increase would only affect **intrastate** traffic, its affect would be minimal. To the extent any carriers claim otherwise there are but two explanations: (a) their complaints are unfounded or (b) the

¹ The Commission previously found that:

[T]he switched access rate as proposed by either U S WEST or by Commission staff . . . is not affordable by the resellers, that its immediate implementation would constitute rate shock, that to immediately implement such a rate as proposed by either U S WEST or Commission staff is not in the public interest, and that to immediately implement it would constitute an unjust and unfair burden upon switched access customers who subscribe to U S WEST's switched access services and, in turn, their customers.

Finding of Fact IX (r).

information they have furnished is inaccurate.²

Exhibit 160 demonstrates that Staff's rate is affordable for most resellers and does **not** constitute rate shock. Finding of Fact IX(r) is clearly erroneous and must be changed in light of Exhibit 160.

2. The rate proposed by Staff is lower than the rates charged by other carriers.

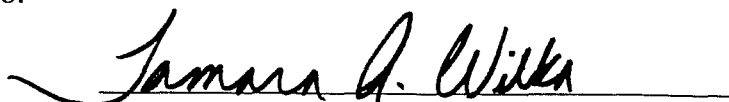
Although U S WEST does not believe the Commission should apply SDCL 49-31-1.4, two of the factors to be considered in determining a fair and reasonable price are the overall market for the service and the affordability of the price for the service in the market in which it is offered. Exhibit 154 demonstrates that the intrastate switched access rate proposed by Staff is lower than the access rates charged by other carriers. Thus, it is both consistent with the overall market for intrastate switched access service and affordable.

CONCLUSION

For all of the reasons stated above (and for those reasons previously argued to the Commission), U S WEST requests that the Commission amend its earlier decision to immediately implement Staff's rate.

² PIU is self-reported by interexchange carriers to U S WEST. *Id.* at 579.

Dated this 5th day of August , 1998.

A handwritten signature in cursive script, reading "Tamara A. Wilka", is written over a horizontal line. The signature is positioned to the right of the date and above the typed name.

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BEFORE THE PUBLIC UTILITIES COMMISSION
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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE ESTABLISHMENT)
OF SWITCHED ACCESS RATES FOR U S)
WEST COMMUNICATIONS, INC.)
)
)

BRIEF OF AT&T
TC 96-107

Pursuant to the Order issued by the South Dakota Public Utilities Commission ("The Commission"), AT&T Communications of the Midwest, Inc. ("AT&T") submits the following Brief:

PRELIMINARY STATEMENT

Circuit Court Judge Steven Zinter in his review of the Commission's initial decision and Findings of Fact and Conclusions of Law remanded this case for the specific purpose of allowing the Commission to consider Exhibits 154 and 160, which at the initial hearing were refused admission.

ARGUMENT

A. EXHIBIT 160

Exhibit 160 is a compilation of the percentage of interstate use ("PIU") relating to the other parties in this docket which had been gathered by U S West Communications, Inc., ("U S West"). The information was offered to rebut impact testimony presented by several of the parties to this proceeding.

AT&T speaks only to the PIU Exhibit as it relates to AT&T, as AT&T has not sought to view the confidential information pertaining to the other parties.

AT&T submits that the PIU information concerning AT&T is irrelevant to the Commission's decision. AT&T did not present impact testimony concerning the effect of an increase in switched access rates upon AT&T. Therefore the use of this information concerning AT&T's PIU is irrelevant. The exchange between the Court and counsel for AT&T at page 15 of the transcript of the Court's remand decision affirms this fact. (See attached).

AT&T believes that the other parties to this docket are uniquely positioned to deal with this issue on a company by company basis and would defer to the comments of the non-U S West parties concerning the particular impact of this Exhibit.

B. EXHIBIT 154

Exhibit 154 was the offer of proof by U S West requesting the Commission to take official notice of all dockets filed from 1990 through 1997 where other local exchange companies sought approval of switched access rates under the Commission's Switched Access Administrative Rules.

While this information is now officially before the Commission, it is clear from the Commission's original Findings of Fact and Conclusions of Law that it has already been considered. Finding of Fact VIII specifically recited some of the higher switched access rates approved by the Commission for some of the smaller local exchange carriers over the past years. It is clear in reviewing Finding of Fact VIII that the Commission was cognizant of those rates and considered them in issuing the original decision. The Circuit Court observed that this issue alone, absent the Court's action on Exhibit 160, probably would not have resulted in a remand. (TRp11).

As the Commission is well aware, following the adoption of the Commission's Switched Access Rules, the smaller local exchange carriers immediately filed cost studies and obtained approval of switched access rates based strictly upon the results of the Commission Computer Cost Model. In contrast, U S West, after initially urging that the Commission not adopt the Computer Cost Model, sought permission of the Commission with the stipulation of AT&T and others, to construct its switched access rates on a rate which mirrored the interstate rate.

The Commission has already approved the U S West Cost Study based upon the Commission's Computer Cost Model with adjustments. The only Commission action that U S West complains about is the Commission's decision to implement the U S West cost in a series of steps. It is clear that Judge Zinter felt that there was more than adequate evidence supporting the Commission's decision to implement the rate in steps. The issue before the Commission is whether officially noticing all LEC approved rates should cause the Commission to amend its original decision.

The answer is obvious that it should not. U S West's actions, which were entirely voluntary in the years following the adoption of the Computer Cost Model, set U S West apart from the other local exchange carriers. Now that U S West has changed its position, and has sought to implement a rate based upon the Computer Cost Model, it is only fair and reasonable for the Commission to:

1. Consider the impact upon other carriers and the public of an immediate implementation of the full rate; and
2. Implement the switched access cost in the series of steps that the Commission determined was appropriate.

AT&T suggests that the Commission amend Finding of Fact VIII to specifically reflect that the Commission has considered the approved switched access rates of all LECs in addition to those that were specifically recited.

CONCLUSION

Neither of the two exhibits that the Commission is now considering should have any material bearing upon the Commission's original decision. Therefore, AT&T urges that the Commission amends its findings to clarify that the exhibits have been given their proper weight, and then affirm its original decision.

Dated this 27th day of August, 1998.

Respectfully submitted,

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE ESTABLISHMENT
OF SWITCHED ACCESS RATES FOR U S
WEST COMMUNICATIONS, INC.**

)
)
) **CERTIFICATE OF**
) **SERVICE**
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I HEREBY CERTIFY that I have served a true and correct copy of the **BRIEF OF AT&T**, upon the following:

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

August 4, 1998

VIA FEDERAL EXPRESS

Mr. William Bullard, Jr.
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue, State Capitol
Pierre, SD 57501

Re: Docket No. TC96-107

Dear Mr. Bullard:

Enclosed for filing, are the original and 11 copies of Sprint's Brief on Remand in the above-referenced docket. Please return one file-stamped copy in the enclosed envelope.

Thank you for your assistance. Please call me if you have any questions.

Very truly yours,

Donald A. Low

DAL/kmm
Enclosures

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE ESTABLISHMENT)	TC 96-107
OF SWITCHED ACCESS RATES FOR)	SPRINT'S
US WEST COMMUNICATIONS, INC.)	BRIEF ON REMAND

Sprint Communications Company L.P. (Sprint) submits the following as its Supplemental Brief with regard to Exhibits 154 and 160, pursuant to the Commission's July 6, 1998, Order.

1. *Exhibit 154.* U S WEST's Exhibit 154 simply updated the access charges charged by other local exchange companies in South Dakota. U S WEST apparently introduced the exhibit to reflect prices in the overall South Dakota switched access market. The Commission's November 24, 1997, "Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order," (hereinafter "November Decision") did address the access rates of other South Dakota LECs in paragraph VIII, regarding the overall market for switched access service.¹ Sprint does not believe that the overall conclusions in the PUC's November Decision need to be altered to reflect those updated prices. However, the Commission may wish to make a few revisions to more completely address the significance of other LEC's access rates. In addition to revising the rates contained in subparagraph "a," the Commission may wish to revise subparagraphs "a" and "g" as follows to reflect the different circumstances of U S WEST and other South Dakota LECs with regard to establishment of switched access rates.

¹ The Commission correctly did not discuss the access rates of other LEC's under paragraph VII, the price of alternative services, since access services of other LECs are not an alternative for origination and termination of traffic in U S WEST territory.

Add to end of "a:"

The above local exchange companies in South Dakota, unlike U S WEST, have not elected to subject their access services to price regulation pursuant to SDCL 49-31-1.4. Consequently, establishment of their access rates is not subject to Commission consideration of the four statutory factors besides fully allocated cost.

Revise subparagraph "g" to insert a phrase:

Based on the foregoing and as summarized, the Commission finds that the market for switched access varies depending upon geographical location of the provider of the service, the company providing the service, whether the providing company has elected price regulation of the service, the presence of customers of sufficient means to by-pass U S WEST's switches and what U S WEST has indicated it was willing to charge for switched access service.

2. *Exhibit 160.* This U S WEST exhibit apparently contains proprietary information concerning the percent interstate usage (PIU) factors of the long distance providers that are parties to this proceeding. Exhibit 160 presumably shows which carriers have greater and which have lesser PIU's than the statewide average of 81%. U S WEST has argued that the individual PIU's are relevant to the issue of affordability of its proposed increase in intrastate access rates inasmuch as that more than 100% increase was offset by the 20% decrease in interstate rates that occurred earlier in 1997.

The Commission's November Decision did not directly address U S WEST's arguments in its discussion of affordability and should be revised to do so in light of the Court remand. Sprint believes that U S WEST's arguments concerning the implications of the PIU's are specious and do not require a change in the Commission's ultimate conclusions.

As a threshold matter, Sprint suggests that in considering the question of affordability, the Commission should confine itself to the intrastate jurisdiction. SDCL 49-31-1.4 requires consideration of "the affordability of the price for the service in the market it is offered."

Although the precise definition of a “market” was not an issue in the hearing, it is apparent that the focus was on the intrastate access market. For example, U S WEST’s evidence on the overall market for access services did not include the interstate market. Obviously U S WEST did not want the Commission to consider the lower interstate access rates when considering one statutory factor-overall market - but does want to use those lower rates to address another factor - affordability. U S WEST cannot have it both ways. Clearly, the PUC has authority only over intrastate rates and not interstate rates. It would be inappropriate for the Commission to consider in this context the actions of the Federal Communications Commission in setting interstate rates.

However, even if the South Dakota PUC were to consider the implications of interstate access rates on the “affordability” of the U S WEST doubling of intrastate rates, there is no basis in the record for the conclusions desired by U S WEST. U S WEST has overlooked a significant aspect of the decrease in interstate access rates which occurred in 1997. U S WEST did not present any evidence as to whether the long distance providers were required, by competitive pressures or regulatory mandate, to flow-through the reduction in access rates to their end-user rates. Without a showing that the IXCs and resellers were able to retain the reduced interstate access costs, there is no sound basis to suggest that the interstate reductions would offset the intrastate increases and make the latter financially more “affordable” for the long distance service providers.

Furthermore, even if the Commission could assume, without evidentiary basis, that the reduced interstate access rates could offset the increase in intrastate rates for companies with high PIU’s, the Commission should still find that the more than 100% increase desired by U S WEST was unaffordable. Although Sprint has not seen the proprietary PIU information, it appears that some carriers have PIU’s less than 50% and therefore would not have the significant

offset postulated by U S WEST. The PUC has the discretion to find that a 100% increase in access rate is not affordable, even if the impact varies among the access service customers. In other words, just because the increase might be affordable for some does mean that it is affordable for all and there is ample evidence in the record that the increase is not affordable for some of the providers. In contrast to the unsupported general assumptions made by U S WEST, TAG presented testimony concerning the specific adverse financial effects of the requested doubling of intrastate access rates on its individual members.

Thus, Sprint believes that the Commission's ultimate conclusions regarding affordability should not be changed in light of Exhibit 160. Although the PUC may wish to revise the findings of fact contained in the November Decision, Sprint will not offer suggested changes until it has reviewed U S WEST's specific arguments.

IN CONCLUSION, the Commission's ultimate conclusions in this matter should not be changed in light of Exhibits 154 and 160 although the findings of fact should be revised to address those exhibits.

Dated: August 4, 1998

Respectfully submitted,

Sprint Communications Company L.P.



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Certificate of Service

The undersigned hereby certifies that the foregoing was served by mailing a copy, postage prepaid, on this 4~~th~~ day of August, 1998 to the persons on the attached service list.

A handwritten signature in black ink, appearing to be "Richard Tieszen", is written over a horizontal line.

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT) TC96-107
OF SWITCHED ACCESS RATES FOR)
U S WEST COMMUNICATIONS, INC.,)

MCI'S BRIEF ON REMANDED ISSUES

By its May 12, 1998, order, the Circuit Court, Honorable Steven L. Zinter presiding, remanded this docket to the Commission for the consideration of evidentiary issues involving Exhibits 154 and 160. Aside from these remanded issues involving the presentation of evidence contained in the exhibits and any response to the evidence, the Court affirmed the Commission. This brief is submitted in compliance with the Commission's July 6, 1998, procedural order.

SUMMARY OF ARGUMENT

Neither Exhibit 154 nor Exhibit 160 represented primary evidence of an essential element of U S WEST's case. At best, the evidence was only marginally relevant, and at worst it was either irrelevant or unduly repetitious. Had the evidence been admitted, it would not have affected the outcome of the case.

ARGUMENT AND AUTHORITIES

Exhibit 154 represented U S WEST's request that the Commission take official notice, as provided in the administrative rules, of all switched access rate dockets between 1990 and 1997 of other

local exchange companies. The information set forth on this exhibit was simply cumulative of similar evidence admitted in the first hearing of the docket in October of 1996. SDCL § 1-26-19(1) provides that the rules of evidence applicable to circuit courts also apply in administrative proceedings, provided that certain evidence not otherwise admissible can be admitted ". . . to ascertain facts not reasonably susceptible of proof under those rules" Nonetheless, the statute goes on to state that irrelevant, incompetent, immaterial or unduly repetitious evidence *shall* be excluded.

U S WEST is price regulated. As provided in SDCL § 49-31-1.4, in determining whether a price for a noncompetitive service is fair and reasonable, the Commission "shall" determine and consider (1) the price of alternative services, (2) the overall market for the service, (3) the affordability of the price for the service in the market it is offered, and (4) the impact of the price of the service on the commitment to preserve affordable universal service. Additionally, the Commission "shall also consider" the fully allocated cost of providing the service. The proffered evidence is not relevant to the price of alternative services, is cumulative to the Commission's market survey reflected in finding of fact VIII, is irrelevant to the affordability of the price in the market in which it is offered and has no relevance to affordable universal service. Finally, the proffered evidence has nothing to do with

U S WEST's fully allocated cost of providing the service. Whether on the basis that the evidence was unduly cumulative, or that it was irrelevant, it was properly excluded.

However, the bottom line is whether, assuming the evidence to be relevant, its admission would have changed the Commission's ultimate decision. Clearly, other evidence in the record dealt with the same subject, and the evidence would not have changed the Commission's ultimate decision.

Exhibit 160 dealt with confidential information which U S WEST sought to introduce. The apparent purpose of the evidence was to show by percentage of interstate use that one or more of the resellers would not go broke as fast as the others. U S WEST contends this was because the high access rates being paid for intrastate traffic would be offset, to a greater or lesser degree depending upon the interstate traffic of the particular reseller, by lower existing rates in the interstate market.

This evidence has no relevance to the issues framed by SDCL § 49-31-1.4 and the Commission's order. The Commission's jurisdiction encompasses rates within the state of South Dakota, not interstate traffic. The point of a proceeding under SDCL § 49-31-1.4, is whether the rate is too high in the South Dakota market. None of the enumerated factors in SDCL § 49-31-1.4 requires a carrier to be able to show that it will go broke for the price to be too high. The Commission is simply to use its best judgment and expertise to determine whether the proposed price is

fair and reasonable. In the context of the South Dakota market, the proffered evidence was irrelevant, except perhaps to the commission imposed consideration of the effect of the increase upon resellers. In any event, U S WEST was able to make its point through hypothetical examples provided by witness Wilcox, whose testimony was being given when the exhibit was disallowed.

Again, the bottom line is whether the Commission's decision would have been different had this evidence, assuming its relevance, been admitted. Clearly, the evidence would not have changed the Commission's decision. Simply put, the five statutory considerations, plus public interest, rate shock and the effect on resellers were already covered in the record, and this evidence simply was cumulative. Also, the evidence in another form, by way of hypothetical example from witness Wilcox, was presented to the Commission. Exhibit 160 sought to make the same point yet again in a slightly different manner.


MCI does not believe modifications to the Commission's Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order subject to the appeal are necessary. That decision can stand on its own. The Commission should simply enter an order affirming its decision to exclude the evidence, and making an explicit finding that the exhibits, even if admitted into evidence, would not have changed the Commission's decision.

CONCLUSION

The Commission should enter an order declaring that the evidence was properly excluded, and in any event, upon due consideration of the evidence, it would not have changed the Commission's decision in this docket. Considering the totality of the evidence, the two exhibits offered nothing particularly new for the Commission to consider in deciding the issues before it.

Dated this 4 day of August, 1998.

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 4 day of August, 1998, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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RECEIVED

JUL 31 1998

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE ESTABLISHMENT) TC 96-107
OF SWITCHED ACCESS RATES FOR U S) BRIEF OF TELECOMMUNICATIONS
WEST COMMUNICATIONS, INC.) ACTION GROUP

COMES NOW, the Telecommunications Action Group (TAG) and submits this Brief for consideration by the Public Utilities Commission on the issues remanded to it. Those issues as indicated by Judge Zinter's Order relate to Exhibits 154 and 160 and what impact those exhibits may have, if any, upon the previous Findings of Fact and Conclusions of Law and Order of the Public Utilities Commission.

ARGUMENT AND AUTHORITIES

1. Exhibit 160, which relates to the percentage of interstate usage (PIU) of the various telecommunications companies operating in South Dakota, does not eliminate 'rate shock' nor does it show that the access rate price sought by U.S. West is affordable.

In its prior Findings, the Public Utilities Commission found that the increase proposed by U.S. West was neither affordable nor in the public interest and that it would constitute rate shock. (Finding of Fact IX(r)) That conclusion was in large part in recognition of the current full service telecommunications availability in the United States.

The interstate rate is not established by the South Dakota Public Utilities Commission. Rather the intrastate rate is the one established, and the proper access charge element of that rate is the question presented herein. SDCL 49-31-1.4(3) prescribes in determining the appropriate price, among other

things, the "affordability" of the price must be considered. The increase sought by U.S. West was estimated to be a 107% increase in the switched access rate for intrastate usage. Finding of Fact IX(a).

Intrastate switched access is the single largest cost ingredient in the TAG member companies' retail Intralata toll product. (Transcript, Second Hearing, hereinafter TR, Susskind p. 487) Mr. Susskind had the opportunity to analyze the net income as a percent of revenue of TAG member companies, and the effect of the proposed rate increase upon them. See, p. 4, Exhibit 36. He suggested that the specific percentage of PIU is not pertinent standing alone. Rather, an analysis of that combined with other factors is what is important. (TR p. 496)

This is particularly true inasmuch as the testimony from Dr. Wilcox, U.S. West's witness, was that 13% of the carriers had less than a 50% PIU. As Exhibit 160 indicates, at least one of the carriers involved does significant intrastate business in South Dakota. While certain of the other companies did have a higher PIU, the weighted average was apparently 81%. (TR p. 609-610) Some of the carriers in that weighted 81% are located outside of South Dakota. Even Dr. Wilcox admitted that if rates are raised for intrastate switched access above the competition and companies thereby lose intrastate customers, they may also lose their ability to do business in the competitive interstate services market. (TR p. 598)

Regardless of what the PIU is for any particular

carrier, U.S. West is both the provider of the input and maintains the majority of the retail market for the service that uses the input. (TR p. 488) This position would well motivate establishment of a high price for the product. (TR p. 489)

Mr. Susskind testified that one particular TAG company was more of a pure play company in providing intrastate services. Although that company recognized the same percentage increase in intrastate switched access charges as all other companies, its "percentage decrease in net income is far more damaging than the group average," because of the particular PIU involved. (P. 491, lines 15-16) Its net income as a percent of revenues would be reduced from over 10% to a negative figure. Id.

Furthermore, while interstate rates may have been lowered, companies are foreclosed from offering just interstate services as this would create a difficult, if not impossible, selling proposition. (TR p. 493) TAG member companies are in a particular bind regardless of their PIU indicator. Most TAG member companies provide intralata tolls to small and medium business customers. As Mr. Susskind recognized, they are pressured on one side by national carriers and each other, and on the other side, by the discounted retail products that U.S. West offers. (TR p. 494)

Mr. Susskind testified that PIU's standing alone have little bearing on the question of whether or not the intrastate access rate sought by U.S. West was proper. He testified at length as to a situation where the PIU for a South Dakota company

was the same as the PIU for a nationwide company. One would assume that they would therefore be competing on an equal basis, however, with the South Dakota company, the PIU might apply to 60% of their business. The rate increase would therefore apply to a significant portion of their total costs, whereas with the nationwide company you would be considering a much less significant portion of costs. As Mr. Susskind testified: "The overall scale of business outside of the state of South Dakota that's not impacted by this issue is really what is important." (TR p. 497, at lines 21-23) Accordingly, the proposed increase has a disproportionate impact on carriers who predominantly operate in South Dakota.

Additionally, as Mr. Susskind testified:

Furthermore, I don't see what bearing the overall downward trend in interstate access charges has on saying that increasing the intrastate costs of carriers in South Dakota somehow evens out that it is equitable in the end. I don't see the relationship there. (TR p. 498, lines 18-23)

The Findings previously entered by the Commission, and evidenced by the testimony, also confirm that little weight should be given to Exhibit 160. The monthly increase to Midco's average business customer would be \$50.00 to \$75.00. Obviously, this considers the PIU question, yet it is a dramatic impact upon one South Dakota company. See, TR p. 301 and Finding of Fact IX(c). Furthermore, Staff testified that the proposed rate was very burdensome on resellers, and that opinion was not limited by any PIU issues. (See Rislov testimony, TR p. 236, Finding of Fact IX(g))

Also, the definition of rate shock as established by the Commission in Finding of Fact IX(h) was defined as "the effect on a utility's customers when a utility implements a significantly increased rate immediately or in a relatively short span time." The proposal by U.S. West would have immediately increased the rate by 107%. Whether that applied to 5% of the business of a company or 60% of the business of a company matters little as it is a significant increase imposed within a short period timespan.

TAG members suggest that the Public Utilities Commission should determine the weight to be given to the evidence. 29 Am. Jur. 2d, Evidence, §1431, p. 807. See also, Gross v. Sta-Rite Industries, Inc., 322 NW 2d 679 (N.D. 1982), wherein it was stated by our neighboring jurisdiction as follows:

The amount of weight given to any source of evidence is in the province of the trial court. P. 684.

A specific percentage of interstate usage standing alone carries little weight. It does not negate rate shock, nor does it show that the price for the service is affordable. Many other competitive factors, as suggested by Mr. Susskind and considered above, clearly show that such a price would not be affordable. Particularly as regards nationwide companies, it can place South Dakota based companies in a distinct competitive disadvantage, whether their PIU is 40% or 90%. The decreases they might receive in interstate rates are also received by large nationwide carriers who have a small percentage of their expenses attributable to South Dakota intrastate costs. Hence, giving

Exhibit 160 the weight to which it is entitled does not mandate any modifications in the Public Utilities Commission's prior Findings, Conclusions and Order.

2. Exhibit 154 reflecting the switched access rates by other South Dakota companies serving other South Dakota areas is of little significance.

In its prior Findings, the Public Utilities Commission considered switched access charges by other local exchange companies. See Findings of Fact No. VIII(a). Furthermore, that same Finding recognized that the national trend is for such rates to decrease. Findings of Fact No. VIII(c).

If certain of the other companies have rates higher than that sought by U.S. West, there is no mandate that U.S. West ought to charge the same rate, nor does it suggest that an immediate rate increase in the amount suggested by U.S. West is proper. In large part the Public Utilities Commission established a graduated increase in intrastate switched access prices to prevent rate shock.

Furthermore, there was no alternative switched access service in the particular market areas handled by U.S. West so as to come within the confines of SDCL 49-31-1.4(1). For the most part, other access providers do not compete in U.S. West's territory. Also, the service areas shown on Exhibit 154 involve significantly less traffic than found in U.S. West territories. Lastly, this Commission previously recognized that the access charges tend to be higher by companies other than U.S. West; however, even acknowledging that, this Commission entered

Findings and Conclusions mandating against an immediate increase such as sought by U.S. West.

CONCLUSION

Neither Exhibit 160, nor Exhibit 154 require any modifications in the Commission's prior Findings and Conclusions. The existence of any regulated intrastate access rate which reduces competition by placing interconnecting carriers in a price squeeze by virtue of a local exchange carrier's own retail prices is unacceptable. This is true regardless of jurisdiction or of the magnitude of the access service. In this era of full-serve telecom, carriers will provide all types of calling to end users. The distinction between interstate and intrastate long distance calling has certainly blurred in the consumer's eye. To create a situation where one carrier can profitably provide both interstate and intrastate calling, while all other carriers lose money on intrastate calls, results in a drastic reduction of the number of carriers able to offer full-service telecom. Such a reduction in competition harms consumers in the long run by encouraging monopoly market power to one carrier. The prior decision of the Commission should be affirmed in all regards.

Respectfully submitted this 31st day of July, 1998.

RITER, MAYER, HOEER, WATTIER
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By: 

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Action Group

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE
ESTABLISHMENT OF SWITCHED
ACCESS RATES FOR U S WEST
COMMUNICATIONS, INC.

Civ. 97-462

RECEIVED

JUN 19 1998

U S WEST COMMUNICATIONS, INC.

Petitioner,

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

AT&T COMMUNICATIONS OF THE
MIDWEST, INC., SPRINT
COMMUNICATIONS COMPANY, L.P.,
MCI TELECOMMUNICATIONS
CORPORATION,
TELECOMMUNICATIONS ACTION
GROUP AND DAKOTA
TELECOMMUNICATIONS GROUP,

STIPULATION AS TO WAIVER OF
HEARING ON REMAND


Intervenors,

ON APPEAL FROM THE SOUTH
DAKOTA PUBLIC UTILITIES
COMMISSION

The Circuit Court of Hughes County on the 12th day of May, 1998 entered an Order of Affirmance and Remand. The parties, through their undersigned attorneys, stipulate and agree that the Public Utilities Commission of the State of South Dakota ("Commission") may consider Exhibits 154 and 160 without further hearing. The parties do, however, reserve the right to make any oral or written arguments that the Commission desires to receive after consideration of these exhibits.

It is further stipulated and agreed that Exhibits 154 and 160 can be considered as confidential information under the Commission's administrative rules.

U S WEST Communications, Inc. ⁴

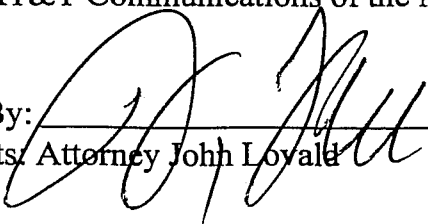
By: 

Its: Attorney Thomas J. Welk

AT&T Communications of the Midwest, Inc.

By: _____

Its Attorney John Loyala


A handwritten signature in black ink, appearing to read "John Loyala", is written over a horizontal line. The signature is cursive and somewhat stylized.

Sprint Communications Company, L.P.,

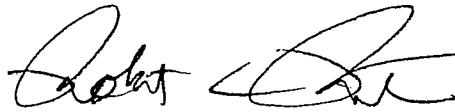
By: Thomas Harmon

Its: Attorney Thomas H. Harmon

MCI Telecommunications Corporation,

By:  6/11/98
Its: Attorney David A. Gerdes

Telecommunications Action Group

By:  _____

Its: Attorney Robert C. Riter

Dakota Telecommunications Group, Inc.

By: T. W. Hertz

Its: President Tom Hertz
CEO & Chairman,

South Dakota Public Utilities Commission Staff

By: Karen E. Cremer
Its: Attorney Karen E. Cremer