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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

November 13, 1998

FAX Received NOV 13 1998

William Bullard, Jr., Executive Director
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

VIA FACSIMILE – 605-773-3809

Re: In The Matter Of The Proposed Adoption Of New Rules By The Public Utilities Commission Of The State Of South Dakota

Dear Mr. Bullard:

Please find enclosed the Comments Of U S West Communications, Inc. with Appendix A. The original and ten copies are being mailed to you today.

Sincerely yours,

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

Thomas J. Welk

TJW/vjj
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cc: John Lovald
Richard Coit
Donald Low
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James Gallegos
Colleen Sevold
Dennis Warner

BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PROPOSED ADOPTION
OF NEW RULES BY THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF SOUTH DAKOTA

COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") submits the following comments on the proposed rules ("Rules") of the Public Utilities Commission of South Dakota's ("Commission") General principles that U S WEST believes are important are discussed in this document. Specific proposals for revisions are set out in Appendix A (attached). To the extent the Commission has delineated revisions to existing rules using redline and ~~strikeout~~, U S WEST has underlined its additions. Because Chapter 20:10:33 is a new chapter which contains no Commission revisions, U S WEST has used **bold** to indicate its proposed additions and ~~strikeout~~ to indicate proposed deletions. Any new Rule proposed by U S WEST is printed in **bold**.

U S WEST commends the Commission and Staff for their efforts in drafting the Rules. U S WEST has suggested a number of changes to the Rules that are designed to meet the needs of both providers and customers. In addition, U S WEST has proposed two additional rules. The first rule clarifies the procedure for filing motions with the Commission (20:10:01:22.02). The second rule provides for cost recovery (20:10:33:33). U S WEST is pleased to have the opportunity to participate in the promulgation of these important rules.

GENERAL PRINCIPLES

Several broad principles operate to define the nature and direction of U S WEST's comments. The Rules must recognize the character of the existing telecommunications network as a network that was designed and engineered to be a voice grade network, treat all providers equally, and provide for

cost recovery. Finally, adopting unnecessary rules should be avoided and every attempt should be made to limit the rules whenever it is reasonable to do so.

The Rules must recognize the character of the existing network.

U S WEST opposes any service quality standard that would make data grade standards applicable to the telecommunications network generally. The network has been engineered and built to voice grade standards. Universal Service requirements are met by voice grade service. The embedded loop base is a voice grade base that is capable of data transmission but at a variety of speeds because of the characteristics of the infrastructure in place. That variability cannot be eliminated without significant infrastructure investment.

Designing new infrastructure and redesigning and rebuilding existing infrastructure to ensure that data grade standards can be met would be a tremendously expensive undertaking. Meeting data grade standards cannot be accomplished without increases in the price of basic service or the establishment of a state universal service fund. Notwithstanding SDCL 49-31-76, none of the Rules address universal service financial support. Adopting data grade standards will thus force price increases upon a great majority of customers who want to purchase only voice grade service.

As the number of consumers who want data grade service increases, demand will drive upgrading the network to data standards on a broad basis over time and that is as it should be. Consumers should not be forced by Commission edict to bear the cost of a data grade network they do not demand and will not use.

The Rules must provide for nondiscriminatory treatment of providers.

Administrative rules promulgated pursuant to a statute cannot expand upon the statute they purport to implement. South Dakota Division of Human Rights v. Prudential Ins., 273 NW2d 111, 114 (SD 1978). SDCL 49-31-85 requires the Commission to establish service quality standards. In

so doing, the Commission must regulate telecommunications carriers in a nondiscriminatory manner. SDCL 49-31-85 provides that "[a]ny regulation of telecommunications service by the commission pursuant to chapters 49-13 and 49-31 shall be fair, reasonable, nondiscriminatory and applicable to all telecommunications carriers . . . ." (emphasis added). Under the statute, if the Commission grants a waiver to one telecommunications carrier, it must grant the same exemption to all other carriers. Failure to do so would violate the statute. In addition it would shortchange customers and place providers on an unequal competitive footing. The Rules must operate on a competitively neutral basis.

The Rules must provide for cost recovery.

The Commission cannot exceed its statutory authority. U S WEST Communications, Inc. v. Public Utilities Comm'n, 505 NW2d 115, 123 (SD 1993). SDCL 49-31-60 provides in relevant part:

> It is the intent of the Legislature that all of the future rules, policies, actions and decisions of the State of South Dakota . . . shall be made consistent with and further the purposes and directives of §§ 49-31-60 through 49-31-68, inclusive. Any rule, policy, action, decision or directive from a regulatory agency shall consider . . . a fair return on the investment made by facility providers to implement §§ 49-31-60 through 49-31-68, inclusive.

(emphasis added).

The mandates proposed by the Commission would require unprecedented multi-billion dollar investments by local exchange companies. U S WEST estimates it would cost in excess of $56 million dollars to provide an infrastructure capable of carrying a data stream of 14.4 Kbps for South Dakota U S WEST customers. The cost of Narrow Band deployment is estimated to exceed $1.7 billion dollars, while the cost of connecting each switch to a diversely routed, fully protected, survivable ring is estimated to cost another $17 million dollars. These costs do not include the costs independent telephone companies would incur to comply with the mandates, which are already part

of the record. Notwithstanding the magnitude of these costs, the Commission's proposed Rules make no provision for cost recovery. As such, they are contrary to SDCL 49-31-60 and exceed the scope of the Commission's statutory authority and would constitute a taking of U S WEST's property without just compensation in violation of the state and federal constitutional provisions.

The Rules must provide for cost recovery. U S WEST has drafted proposed Rule 20:10:33:33. It provides for cost recovery over a period not to exceed five years.

Unnecessary rules should be avoided.

Passage of the federal Telecommunications Act of 1996 evidences a determination by lawmakers that regulation of the telecommunications industry should be minimized. Consistent with this intent, rules should be avoided where the marketplace will drive the behavior of providers to provide adequate service. Rules should likewise be avoided when they do no more than require providers to act in their own best interest. The marketplace and the business interests of providers should be allowed to operate free of regulatory requirements whenever possible. The Commission should indulge a presumption that no rule is necessary and adopt rules only upon a showing that such rules are in fact needed.

Dated this 13th day of November, 1998.

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APPENDIX A

CHAPTER 20:10:01

GENERAL RULES OF PRACTICE

20:10:01:01.1. Definitions. Terms used in this chapter mean:

(4) "Party," a person by or against whom a proceeding is commenced or a person admitted by the commission or properly seeking and entitled as of right to be admitted as a party, including commission staff when representing the public interest. Commission staff is not required to intervene to be a party; and

COMMENT: Commission staff should be required to intervene in every proceeding in which it believes it has an interest just like any other party. There is no reason to single out commission staff for preferential treatment.

20:10:01:07.01 Contents of a complaint. A complaint shall be in writing and ~~an original and three copies shall be~~ filed with the commission ~~with as many additional copies as there are parties complained against~~. A complaint shall contain:

(6) A ~~verification for relief to which the complainant believes himself entitled.~~ An affirmation that the statement of facts are accurate to the best of the complainant's knowledge

COMMENT: As a matter of policy a complainant should be required to verify a complaint. Carriers are required to answer interrogatories and furnish other documents to the Commission under oath. Complainants should similarly be required to verify their complaints before a notary public.

U S WEST proposes the following new rule:

20:10:01:22.02 Motions. Unless otherwise ordered by the commission, a party responding to a motion shall have five days from receipt of the motion to file and serve a response. The movant shall have three business days from receipt of a response to file and serve an optional reply. The computation of time shall be in accordance with SDCL 15-6-6(a). Facsimile service shall be allowed with respect to the filing of any pleadings pursuant *to the commission*'s rules unless a party objects or facsimile service is unavailable.

COMMENT: The proposed rule is designed to clarify the procedure for filing, service and hearing of motions.

CHAPTER 20:10:24

INTEREXCHANGE CARRIER AND CLASSIFICATION RULES

20:10:24:01. **Definitions.** Terms defined in SDCL 49-31-1 have the same meaning in this chapter. In addition, terms used in this chapter and SDCL 49-31 mean:

(7) "Extended area service (EAS)," a telecommunications service that expands a local calling area to include another ~~adjacent~~ local exchange area;

> COMMENT: U S WEST objects to the removal of the word "adjacent" from the definition of EAS. As a matter of policy, the Commission should only order EAS between contiguous exchanges. Additional rules should be developed to address EAS cost recovery.

20:10:24:02. **Certificate of authority for interexchange service -- Application requirements.** Telecommunications companies required to apply for a certificate of authority with the commission pursuant to SDCL 49-31-3 for interexchange service shall provide the following information ~~for the initial certification~~ with their application unless the commission grants a waiver to omit a specific item of information:

(11) A detailed description of how the applicant intends to market its services, the qualifications of its marketing sales personnel, its target market, and whether the applicant engages in any multilevel marketing, ~~copies of any company brochures used to assist in the sale of services, and all telemarketing scripts used by the applicant and its third party verifier; and~~

> COMMENT: U S WEST proposes that this section be stricken. The information which the Commission requests is confidential and proprietary. In addition, see comments to Chapter 20:10:34 infra.

(12) ~~Cost support for rates shown in the company's tariff for all noncompetitive or emerging competitive services.~~ A statement that the rates charged by the applicant cover cost and are not anti-competitive.

> COMMENT: The Commission should only require that the company make a statement that its rates are not anti-competitive and cover cost. It should not require that the company file cost studies, as such a requirement imposes costs upon providers which, in turn, increases costs to provide the service.

20:10:24:04.04. Procedure for suspension or revocation hearing. Upon the filing of a notice of hearing for suspension or revocation of a certificate of authority, the commission shall issue and serve an order to show cause upon the named holder of the certificate of authority. The order shall be served at least ten days before the hearing unless otherwise ordered. The order shall include a notice of the time and place of the hearing. The order shall require the person complained of to appear at the time and place fixed in the notice and to show cause why the proposed action should not be taken. The order shall refer to an attached copy of a verified complaint or other notice, affidavit, or official document in such a way as to inform the party of the charge or violation upon which the order is based and issued. At the hearing, the commission

staff or complainant shall present evidence of the alleged violation. The telecommunications company shall then be allowed an opportunity to respond to the evidence. **The commission staff has the burden of proving by clear and convincing evidence that the allegations contained in the order to show cause exist, and such allegations warrant the revocation of a certificate of authority.**

COMMENT: U S WEST recommends that the proposed sentence be adopted based upon procedural due process grounds. Because such proceedings involve the potential suspension or revocation of a license, see SDCL 1-26-1(4), the higher clear and convincing standard of proof applies. In re Zar, 434 NW2d 598, 602 (SD 1989). Before the Commission can take any action, there must be a sufficient showing that the allegations in fact exist, and that they warrant revocation; otherwise, the due process clauses of the United States and South Dakota Constitutions will be violated. Consequently, before the Commission can revoke a certificate of authority, there must be sufficient cause that establishes that such action is appropriate.

After the hearing the commission shall enter its decision either dismissing the complaint or entering an order directing the action specified in the order to show cause. If the commission revokes a certificate of authority, the named holder of the certificate of authority may not reapply for a certificate of authority for at least one year after the date of revocation **unless the Commission determines that other action is more appropriate.**

COMMENT: U S WEST recommends that the last sentence be amended so the Commission has authority to order appropriate remedies. The paragraph, as written by the Commission, would restrict the Commission's ability to order a penalty other than revocation for at least one year.

20:10:24:04.05. **Performance bonds.** If in the public interest, the commission may require an applicant, as a condition precedent to granting a certificate of authority, to file with the commission a bond in such sum as the commission may require and be of a duration set by the commission. Such bond shall be filed with the commission and be for the benefit of other telecommunications companies providing access to the local exchange networks for the applicant or any other customer of the applicant.

The Commission may, for good cause shown, require such increases in the amount of such bond, from time to time, as it may deem necessary for the protection of the public. The surety on such bond must be a corporate surety company holding a certificate with the Department of Insurance of the State of South Dakota authorizing it to execute the same~~.~~ **or such other security as the commission may require.**

COMMENT: U S WEST proposes that the Commission articulate standards which comprise the 'public interest' for when a performance bond will be required. Due process requires that before a taking occurs of an individual's or company's property, regardless whether it is permanent or temporary, that such individual or company be given notice and an opportunity to be heard. If the Commission does not articulate standards, then any action it takes regarding requiring a performance bond is subject to legal attack. In addition, it will protect the Commission from attack that its actions are arbitrary and capricious.

CHAPTER 20:10:32

LOCAL EXCHANGE SERVICE COMPETITION

20:10:32:02. **Certificate of authority required to provide local exchange service.** A certificate of authority for local exchange service obtained pursuant to this chapter applies only to the service area designated in the application for certification, subject to any further limitations that may be imposed by the commission pursuant to statute or this chapter. A telecommunications company may not provide local exchange service in an area for which it does not have a valid certificate of authority without first obtaining an amended certificate of authority from the commission applicable to the area into which the company proposes to expand. A certificate of authority to provide local exchange services may include authority to provide such services through the resale of a local exchange carrier's services, the purchase of a local exchange carrier's network elements, or the use of the applicant's own facilities, or any combination of the above listed methods.

COMMENT: U S WEST requests that the Commission adopt the proposed change because some providers will provide service using a combination of resale, unbundled elements, or through the use of their own facilities.

20:10:32:03. **Certificate of authority for local exchange service -- Application requirements.** Telecommunications companies required to apply for a certificate of authority for local exchange services from the commission shall submit a written application including the following information:

(9) A service area map and narrative description indicating with particularity the geographic area proposed to be served by the applicant and a narrative delineating specifically the areas where the applicant is prepared to provide service in the near future, and a timeframe by which the applicant intends to provide such service in the described areas;

COMMENT: U S WEST proposes the inclusion of the above language so the Commission can determine who, where and when the applicant will be providing service.

(21) Information concerning the applicant's policies relating to solicitation of new customers, ~~including all telemarketing scripts used by the applicant and its third party verifier~~, and a description of the efforts that will be made to prevent unauthorized switching of local service customers by the applicant, its employees, or agents;

COMMENT: U S WEST proposes that this section be stricken. The information the Commission requests is confidential and proprietary. In addition, see comments to Chapter 20:10:34 infra.

20:10:32:21. **Request for negotiations.** ~~An incumbent local exchange carrier that receives a request for negotiations pursuant to SDCL 49-31-81 shall~~ A local exchange provider that requests negotiation of an agreement for interconnection in South Dakota shall pursuant to the federal Telecommunications Act of 1996, notify the commission in writing of the request. The notice must identify the party requesting negotiations and the date of the request.

COMMENT: U S WEST recommends that the provider requesting negotiations be required to inform the Commission of its request. U S WEST receives requests from many providers for negotiations under the federal Telecommunications Act of 1996. U S WEST has entered into negotiations with many providers. To provide the Commission with notice each time it receives a request would be unduly burdensome. Consequently, U S WEST requests that the Commission gain such information from the provider making the request. In addition, placing this burden on the requesting provider is similar to the proposed rule regarding requests to become an eligible telecommunications provider.

20:10:32:27. **Mediation conducted by commission staff.** If a party requests mediation, the commission staff members will conduct the mediation. Any commission staff members acting as mediators will not participate in any subsequent arbitration or approval process for the same agreement unless all parties to the negotiations consent. The commission staff member acting as mediators, or involved with the mediation, shall not communicate any information received during mediation to any other commission staff which will be involved in the subsequent arbitration or approval process.

COMMENT: U S WEST proposes that this section be adopted to ensure candor during the mediation. If the parties are not ensured that the information provided during mediation will not affect the subsequent arbitration, they may not be forthcoming during the mediation.

20:10:32:29. **Confidentiality of mediation -- Settlement proposals.** Commission staff mediators shall keep confidential all information and records obtained in conducting the mediation. After the mediation, commission staff mediators and the parties shall return any information exchanged during the mediation to the owner of such property or information. Only the parties to the negotiation may attend the mediation session unless all parties consent to the presence of others. Commission staff mediators may not impose a settlement, but may offer proposals for settlement.

COMMENT: U S WEST proposes this comment to ensure that the parties' confidentiality concerns are met. It will ensure candor in providing any information during the mediation.

20:10:32:30. **Petition for arbitration -- Response to petition.** Any party to negotiations requested pursuant to SDCL 49-31-81 may petition the commission to arbitrate any unresolved issues. The petition for arbitration must include the following:

(4) ~~A list of the issues resolved by the parties, including,~~ a copy of any proposed contract language that reflect the resolution of those issues;

COMMENT: U S WEST proposes that the parties need not provide "a list of issues resolved by the parties." The parties during negotiations resolve hundreds of issues. Such a list would be extremely difficult to create and provide. In addition, resolved issues generally will not impact issues to be resolved by the Commission.

20:10:32:31. **Response to petition for arbitration.** A non-petitioning party may respond to the petition for arbitration and provide additional information within 25 days after the ~~commission receives the petition~~ petition is filed with the commission. The party requesting arbitration shall serve the opposing party by overnight mail.

COMMENT: U S WEST proposes that the filing be used to calculate timeframes in the arbitration versus when the Commission receives the petition. In addition, the service requirement will ensure that the opposing party has sufficient time to respond.

20:10:32:34. **Commission approval of arbitrated agreement.** An arbitrated agreement shall be submitted to the commission for approval within ~~30~~60 days after the issuance of the commission's decision on the petition for arbitration, unless good cause is shown to extend the ~~30~~60 day time period, or unless the commission orders otherwise. The request for approval of an arbitrated agreement must set forth each party's position as to whether the agreement should be adopted or modified and contain a separate explanation by each party of whether the agreement meets each of the specific requirements of 47 U.S.C. §§ 251 and 252 (September 10, 1998).

COMMENT: U S WEST requests that the Commission adopt a 60 day standard instead of a 30 day standard. This standard is more realistic, especially, if the items arbitrated are numerous. The proposed language also provides the Commission with flexibility with regard to when the parties must submit the agreement.

20:10:32:51. **Monitoring of competitive local exchange services.** The commission shall monitor the effectiveness of the regulatory requirements prescribed in this chapter to ensure that local service competition occurs in a manner that is consistent with preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of affected consumers. The commission reserves the right to impose additional requirements by order or rulemaking, which shall be imposed in a nondiscriminatory manner, that may be necessary to meet these objectives.

COMMENT: South Dakota law and constitutional principles (Due Process and Equal Protection) require that legal requirements/obligations be imposed in a nondiscriminatory manner. SDCL 49-31-85 similarly requires that the regulation of telecommunications services be "fair, reasonable, nondiscriminatory and applicable to all telecommunications carriers . . . ."

CHAPTER 20:10:33

SERVICE STANDARDS FOR TELECOMMUNICATIONS COMPANIES

20:10:33:01. Definitions. Terms defined in SDCL 49-31-1 have the same meaning in this chapter. In addition, terms used in this chapter mean:

(4) "Decibel Above Reference Noise Level Using C-Message Weighting" ("dBrnC"), the reference noise level of one picowatt is defined as 0 dBrnC. C-message weighting is used to account for the frequency characteristics of a typical telephone set by specific weighting of

the noise signal at various frequencies to determine the composite average noise signal value. [A] ratio expressed in decibels above reference noise;

COMMENT: The proposed revisions reflect a more complete definition of the term.

20:10:33:02. Level of service provided by local exchange companies. A local exchange company shall furnish and maintain adequate and reliable plant, equipment, and facilities to provide satisfactory transmission and reception of **voice grade** telecommunications services among users in its service area.

COMMENT: The rule, as proposed by the Commission, is unduly economically burdensome if it applies to more than voice grade telecommunications services. The existing network has been engineered and built to voice grade standards. Universal Service requirements defined by the Federal Communications Commission ("FCC") are met by voice grade service. FCC 97-420, Fourth Order on Reconsideration in CC Docket No. 96-45 ¶ 15 (Dec. 30, 1997). Any rules adopted by the Commission should be consistent with Universal Service requirements. To the extent that the Commission imposes more stringent Universal Service requirements, it must provide a means for cost recovery. 47 USCA § 254(f).

20:10:33:03. Level of service applicable to all subscribers within an exchange. Local exchange access line service furnished by means of line concentrators or subscriber carrier equipment in a given exchange shall be ~~substantially equivalent in technical performance to that furnished to other subscribers in that exchange served by means of normal physical loops.~~ **consistent with Universal Service requirements.** ~~--~~

COMMENT: The proposed rule is overly broad and vague in failing to describe how "substantially equivalent" service will be determined and is unduly economically burdensome. If all subscribers have voice grade access to the public switched network, local usage, dual tone multi-frequency signaling (touch-tone), access to interexchange service, access to operator services, directory assistance and emergency services, such service should be deemed to be "substantially equivalent."

If the Commission adopts the rule as written, it must allow carriers to recover the costs incurred in order to meet the rule. Failure to provide for such cost recovery would violate Art. VI, § 13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution and would be contrary to SDCL 49-31-60.

20:10:33:04. Minimum transmission levels for local exchange service. A local exchange company's subscriber loops shall meet the following minimum transmission levels from the subscriber network interface or demarcation point:

(2) Loop current shall be above 20 milliamperes, **allowing a maximum design value of 430 ohms for customer premises equipment**;

~~(5) The minimum data rate shall be 14,400 bps;~~

(6) ~~The frequency response range shall be 300 Hertz to 3,000 Hertz with an amplitude deviation not to exceed four dB~~; **Attenuation distortion requirements should have a value of -2.5 dB/+11.5 dB across the frequency range of 304 hertz to 3004 hertz.**

COMMENT: The proposed change to (2) is consistent with the limit established by the industry in "An American National Standard, IEEE Standard, Telephone Loop Performance Characteristics," dated March 1984. Telecommunications engineers need this standard in order to design a network with some known quantity of customer equipment at the other end.

Subsection (5) is unduly economically burdensome and is in excess of statutory authority. The existing network has been engineered and built to voice grade standards. Universal service requirements are met by voice grade service. The embedded loop base is a voice grade base that is capable of data transmission but at a variety of speeds because of the characteristics of the infrastructure in place. That variability cannot be eliminated without significant infrastructure investment.

U S WEST cannot guarantee a 14.4 Kbps modem connect rate. A connect rate is the modem to modem connection speed in kilobits per second on a dial up connection. While end to end connect rates cannot be guaranteed, infrastructure capable of carrying a given connect rate can be deployed. The total new capital requirement to provide an infrastructure capable of carrying a data stream of 14.4 Kbps is $56,140,000 for South Dakota U S WEST customers whose loops are not currently capable of 14.4 Kbps. To require U S WEST to upgrade its facilities to allow for a minimum data rate of 14,400 bps without providing for cost recovery would violate Art. VI, § 13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution. In addition, the proposed rule fails to consider SDCL 49-31-60 and, thus, is in excess of the Commission's statutory authority.

It should be noted that the existing legislation requiring Narrow Band infrastructure would also meet or exceed the 14.4 Kbps data speed requirement. The cost of Narrow Band deployment for U S WEST would be $1.7 billion. This amount accounts for those customers who already have loop facilities capable of providing ISDN/Narrow Band services. Here again, cost recovery needs to accompany any mandatory rule.

The proposed requirement of four dB in (6) would be a stringent requirement even for specially designed data circuits. The recommended distortion requirement proposed by U S WEST is consistent with Bellcore document SR-4255, which is an existing industry standard.

20:10:33:05. Minimum requirements for new, upgraded, or replaced facilities. ~~Outside plant, including subscriber loops, constructed, upgraded, or replaced after January 1, 1999, shall be able to provide, as built or with additional equipment, transmission and reception of data at a rate no lower than 1 Mbps.~~ New or replacement switching systems installed after January 1, 1999, shall be capable of providing custom calling features. At a minimum, custom calling features must include call waiting, call forwarding, abbreviated dialing, caller identification, and three-way calling. New or replacement switching systems installed after January 1, 1999, shall also be capable of providing enhanced 911 service.

COMMENT: The proposed rule fails to provide for cost recovery and, as such, violates Art. VI, § 13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution and is in violation of SDCL 49-31-60. Basic telephone service has historically been and is currently engineered to voice grade. Voice access lines, by definition, are not conditioned for data access. Universal Service requirements defined by the FCC are met by voice grade service. Any rules adopted by the Commission should be consistent with Universal Service or must, pursuant to federal law, include a cost recovery mechanism, if enhanced. 49 USCA §254(f).

As a matter of policy, upgrades in the existing network to achieve a 1Mbps data grade of service for customers should properly be made in response to marketplace demand. It is inappropriate to use the rulemaking process as a mechanism for requiring providers to invest in ubiquitous network upgrades because such an approach imposes significant costs on customers who neither need nor want to pay for 1Mbps data grade service.

The proper solution to the problem created by the conflicting desires of customers who want data grade service and those that do not want and do not want to pay for data grade service is to let the market operate. Where demand for data grade service exists, providers will create and provide services targeted to customers who require such services. The alternative is to impose the cost of enhancement only on those requesting the service.

In the event the Commission adopts the proposed rule, it should clarify that the rule requires only that outside plant placed after January 1, 1999 be "capable" of achieving a 1 Mbps data grade of service with enhancements. The cost of any enhancements necessary to achieve 1 Mbps must be borne by the customer. One Mbps data speed requires deployment of a technology beyond ISDN/Narrow Band, which as stated earlier, would cost U S WEST approximately $1.7 billion to deploy. This proposed rule and all of the proposed rules fail to consider a fair return on investment as required by SDCL 49-31-60.

20:10:33:09. Requirement for sufficient equipment and adequate personnel. Each telecommunications company shall employ prudent management and engineering practices ~~so that sufficient equipment and adequate personnel are available at all times, including busy hours,~~ **consistent with industry standards for normal hours of operation**.

COMMENT: The proposed rule is overly broad and vague in failing to describe the terms "sufficient" and "adequate." To require a telecommunications company to have equipment and personnel ready at all times and in all circumstances would be unduly economically burdensome. Such a requirement would be the equivalent of requiring the Department of Transportation to have a snowplow waiting at every curve and hill.

20:10:33:10. ~~Required documentation to show sufficient equipment and adequate personnel. Each telecommunications company shall conduct traffic studies, employ reasonable procedures for forecasting future service demand, and maintain records necessary to demonstrate to the commission that sufficient equipment is in use and that an adequate operating workforce is provided. However, average schedule companies are not required to conduct traffic studies. The records shall be available for review by the commission upon request.~~

COMMENT: U S WEST supports what the Commission is trying to accomplish. The Commission already has authority, however, to conduct investigations and inspect records. SDCL 49-31-7 and 49-31-7.1. How providers chose to achieve compliance with Commission regulations is a decision that should properly be left to providers. The proposed rule represents an attempt to micro manage providers. Finally, to the extent the proposed rule singles out average schedule companies it is contrary to SDCL 49-31-85, which requires that any regulation of telecommunications service be "fair, reasonable, nondiscriminatory and applicable to all telecommunications carriers . . . ."

20:10:33:11. ~~Assignment of facilities. Each telecommunications company shall employ adequate procedures for assignment of facilities. The assignment records shall be kept up to date and checked periodically to determine if adjustments are necessary to maintain proper balance in all trunk and equipment groups. The records shall be available for review by the commission upon request.~~

COMMENT: See Comment to 20:10:33:10 supra.

20:10:33:14. Provisioning of adequate and reliable facilities. Each local exchange company shall employ prudent management planning practices, including budgeting and prioritization of resource utilization ~~so that adequate and reliable facilities are in place to supply service to prospective customers in its service territory~~.

COMMENT: The proposed rule is overly broad and vague and would be unduly economically burdensome. To require U S WEST to have a technician at every doorstep and a cable pair ready for every prospective customer would be cost prohibitive. U S WEST will take necessary steps to assure compliance with the Commission's service quality requirements. How carriers choose to achieve compliance is not a matter the Commission should dictate through its rules. To the extent the Commission seeks to require provisioning in excess of existing facilities, it must provide for cost recovery. Failure to so provide would violate Art. VI, §13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution.

20:10:33:15. ~~Survivable networks. All telecommunications interexchange facility networks, with the exception of extended area service routes, must be based upon a fully integrated backbone of interconnected, switched survivable rings. Each switch must be directly connected to a diversely routed, fully protected, survivable ring. Each telecommunications company shall offer diverse routing of all of its dedicated interexchange telecommunications traffic. These requirements shall be met by July 1, 2002.~~

COMMENT: The proposed rule fails to provide for cost recovery and, as such, would violate Art. VI, § 13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution. In order to satisfy the proposed rule, 981 interoffice facility miles would need to be funded.[1] This would include 60 fiber nodes of varying sizes

[1] The following routes would need new construction and/or augmentation to complete the remaining fourteen rings: Lead to Hill City (40 miles/$950k), Lead to Whitewood (15 miles/$300k), Belle Fourche to Pierre (250 miles/$6,400k), Black Hawk to Ellsworth AFB (8 miles/$250k), Miller to Redfield (50 miles/$1,600k), Aberdeen to Sisseton (100 miles/$2,000k), Sisseton to Millbank (50 miles/$1,000k), Watertown to South Shore (20

(OC3, 12 & 48) and supporting fiber infrastructure. U S WEST estimates that this would cost in excess of $17 million. Moreover, interexchange facility networks handle predominantly interstate traffic, over which the Commission has no jurisdiction and involve fully competitive services, i.e., private line. Requiring a survivable network would also discourage facilities-based competition.

The issue of survivable networks is an issue that should be resolved in the marketplace. The marketplace is already driving such changes. Black Hills Corporation recently announced plans to provide a survivable network for the communities it plans to serve. South Dakota Network has also announced similar plans. This type of competition is precisely what the Telecommunications Act was intended to accomplish.

20:10:33:25. Records of access line service interruptions. Each local exchange company shall keep a record of all access line service interruptions or acute irregularities of access line service **that affect 200 or more customers** whenever reported to it or whenever the duration of a found access line service interruption exceeds 24 hours **from the time the outage or irregularity was first reported to the company**. The record shall include ~~appropriate identification of the customer or access line service affected and~~ the date, time, duration, extent, ~~and~~ cause of the interruption, **and the number of customers affected**. The local exchange company shall furnish reports to the commission upon request and shall inform the commission ~~as soon as possible of any occurrence of an unusual nature which apparently will result in over four hours of interruption of access line service to 50 or more customers.~~ **as provided in rule 20:10:33:30.**

COMMENT: U S WEST does not generally have the capability to generate a report in the format requested. To generate such a report would require developing a report program that would touch every customer record within U S WEST's systems. U S WEST cannot, without incurring significant cost to develop and deploy such a report generator, provide a report that would give the Commission a list of all customer who would be impacted by an outage. To the extent the Commission imposes such a requirement, it must provide for cost recovery. Finally, the proposed rule is overly broad and vague in failing to describe the term "irregularities."

20:10:33:29. Reporting requirements when 911 service is disrupted or impaired. Each local exchange company shall, immediately upon discovery, report to each 911 public safety answering point serving the affected local service areas ~~to the local area news media service the affected local service areas~~, and to the commission pertinent information concerning any specific occurrence or development which disrupts or impairs customer access to the 911 service within a given 911 system. In addition, each local exchange company shall provide the public safety answering point ~~the local area news media~~ and the commission with a time estimation on when the repair to the 911 system will be completed and the 911 service restored.

COMMENT: The proposed rule presumes 911 service refers to telephone provided service as opposed to service provided by the public safety answering point ("PSAP"), e.g., computer system failure, etc. PSAPs already have a system in place to notify the local area news media in the event of a disruption of 911 service. To require local

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miles/$400k), Volga to Flandreau (35 miles/$940k), Tea to Canton (25 miles/$620k), Canton to Elk Point (60 miles/$1,560k), Belle Fourche to Morristown (180 miles/$5,200k), McIntosh to Firesteel (50 miles/$1,000k) and Timber Lake to Gettysburg (98 miles/$1,960).

exchange companies to contact the media as well would be redundant and potentially confusing to the public.

~~20:10:33:30. Reporting of service disruption or impairment. Each local exchange company shall, within one hour of discovery, report to the local area news media serving the affected local serving areas and to the commission, pertinent information concerning any specific occurrence or development which disrupts or impairs the telecommunications service of a substantial number of the local service area's subscribers (the smaller of 25 percent or 2,000 of the local serving area's access lines) for a time period in excess of one hour.~~

U S WEST proposes the following:

20:10:33:30. Each local exchange company shall, within two hours of discovery, report to the local area news media, if available, and to the commission, during normal business hours, pertinent information concerning any specific occurrence or development which the company determines will disrupt local, toll and/or 911 service for 750 or more of the local area's subscribers for more than one hour. Notification is required for: (1) complete switching system failures; (2) isolation of remote switching modules from their host; (3) major service affecting interoffice failures; and (4) local cable outages affecting 750 or more local subscribers.

COMMENT: As a practical matter real time reporting should only be required for major service disruptions. In most instances, reporting will involve network personnel who are directly involved in responding to the disruption. To require real time reporting for all disruptions would unnecessarily divert attention away from fixing the problem to reporting it. Finally, local exchange companies should only be required to place a single call to the Commission at a number where a message can be left after hours.

~~20:10:33:32. Petition for waiver -- Granting of wavier. Upon petition of a telecommunications company, the commission may grant a waiver of any service standard contained in this chapter. In determining whether to grant a waiver, the commission may consider technical feasibility, whether the standard is unduly economically burdensome, whether the company plans to meet the standard within the near future, and other economic, technical, and public interest considerations.~~

COMMENT: The proposed regulation is contrary to South Dakota law. SDCL 49-31-85 requires that any regulation of telecommunications service by the Commission be "fair, reasonable, nondiscriminatory and applicable to all telecommunications carriers . . . ."

U S WEST proposes the following new rule for cost recovery:

20:10:33:33. Cost Recovery. Local exchange companies required to invest additional capital in order to comply with the commission's regulations and any implementation of SDCL 49-31-60 through SDCL 49-31-68, inclusive, shall be entitled to recover such investment plus the category C rate of interest as defined in SDCL 54-3-16 over a period not to exceed five years from their local exchange customers.

COMMENT: Cost recovery is necessary to prevent the taking of private property without compensation in violation of Art VI, § 13 of the South Dakota and the Fifth Amendment to the United States Constitution. In addition, SDCL 49-31-60 requires that the Commission consider a fair return on investment made by facility providers to implement §§ 49-31-60 through 49-31-68.

CHAPTER 20:10:34

PROHIBITION AGAINST UNAUTHORIZED SWITCHING OF CARRIERS AND CHARGING FOR UNAUTHORIZED SERVICES

COMMENT: U S WEST commends the Commission on adopting rules to address the problem of slamming. However, U S WEST recommends that the Commission approach the Federal Communications Commission ("FCC") to ensure that the rules it is adopting will not be preempted. This concern arises because the FCC in a letter dated August 12, 1998, informed the Wisconsin Attorney General that the FCC believes that it has exclusive jurisdiction under Section 258 of the federal Telecommunications Act of 1996 ("Act") regarding "verification procedures" for changing a presubscribed customer's carrier. The letter suggests that state legislative regulatory activity directed toward "verification" procedures (matters such as requiring a written document or third party verification before a change in carrier can be submitted for either interstate or intrastate services or regulations dealing with the effectuation of a PIC freeze or withdrawal of such a freeze) would pose more significant and substantive problems from a preemption perspective. The letter specifies that a state can adopt rules to deter slamming through regulation of marketing rather than through verification procedures. A copy of the letter is attached as Exhibit 1.

Section 258(a) of the Act provides that:

> No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the [Federal Communications] Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

47 U.S.C.A. § 258(a) The FCC is currently involved in a rulemaking to implement Section 258(a) of the Act.. The FCC is considering adopting new rules in response to the comments it received in its' pending docket. U S WEST proposes that it approach the FCC as indicated above. In the alternative, U S WEST proposes that the Commission, at this time, not adopt any rules regarding changing a carrier's presubscribed carrier until the FCC has finalized its current rulemaking. Alternatively, U S WEST proposes that if the Commission does want to adopt rules, that it adopt the current rules of the FCC regarding this issue found at CFR §64.1100. In addition, U S WEST recommends that the Commission adopt these rules as interim rules pending the adoption of rules by the FCC in its pending rulemaking. The Michigan Public Service Commission on September

23, 1998 adopted this recommendation. Consequently, U S WEST recommends that Sections 20:10:34:01 through 20:10:34:08 be deleted at this time.

20:10:34:10. **Authorized products or services.** Any products or services listed on a subscriber's bill must be authorized by the subscriber, unless such service or product is offered at a promotion at no charge to the subscriber. Prior to changing any rate, term, or condition of service that results in an increase in charges to the subscriber, a telecommunications company shall notify the subscriber of the change unless the subscriber has previously agreed, in writing, that no notification is necessary.

COMMENT: U S WEST proposes the above addition because it will allow the subscriber to take advantage of any promotion which is offered at no charge to the subscriber. In addition, the subscriber will benefit from any decrease in rates to his service.

20:10:34:11. **Refund of unauthorized charges.** A telecommunications company which increased charges for a product or service without authorization from the subscriber shall issue to the subscriber a full credit or refund the entire amount of such unauthorized charges. The appropriate credit or refund must be issued within a period not to exceed 60 days from the date it is determined that the charge was unauthorized.

COMMENT: U S WEST makes the above addition so that it is consistent with 20:10:34:10.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Lawrence E. Strickling

August 12, 1998

DA 98-1583

David J. Gilles, Esq.
Assistant Attorney General
State of Wisconsin
Office of Consumer Protection
123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

RE: *State of Wisconsin v. Minimum Rate Pricing, Inc. and Thomas N. Salzano*, Case No. 98-CV-1228.

Dear Mr. Gilles:

This is in response to your May 13, 1998 letter requesting an informal staff opinion regarding the preemptive effect of the provisions of the Communications Act (Act)[1] and related federal regulations on the State of Wisconsin's above-captioned suit against Minimum Rate Pricing (MRP). The State alleges that MRP has used deceptive and misleading oral representations to induce prospective customers to agree to change presubscribed long distance providers. The complaint charges that the defendants have violated various state consumer protection statutes and regulations in the course of telemarketing sales efforts directed at Wisconsin residents. We interpret your letter as seeking an informal staff ruling regarding only the preemptive effect of the Commission's regulations and Section 258 of the Act[2] on the state laws at issue in your proceeding. For the reasons discussed below, and subject to the limitations noted, we conclude that the Act and the Commission's rules do not appear to have any preemptive effect on these state statutes.

Background

The Commission has rules in place to prevent unauthorized changes in primary interexchange carriers (PICs), a practice commonly known as "slamming." Commission rules and orders require, *inter alia*, that interexchange carriers (IXCs) verify changes of subscribers' long distance service carriers. IXCs must either obtain a signed letter of agency (LOA) or, if using telemarketing, undertake one of four telemarketing verification procedures before submitting PIC-

[1] 47 U.S.C. § 151, *et seq.*

[2] 47 U.S.C. § 258.

EXHIBIT
1

change requests to local exchange carriers (LECs) on behalf of consumers.[1] The telemarketing verification options are: (1) obtaining an LOA from the subscriber; (2) receiving confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming change orders electronically; (3) using an independent third party to verify the subscriber's order; or (4) mailing an information package, also known as the "welcome package," that includes a postage-paid postcard which the subscriber can use to deny, cancel, or confirm a service order, and waiting 14 days after mailing the packet before submitting the PIC change order.[2]

In July 1997, the Commission proposed rules and sought comment on the implementation of Section 258, which was added to the Act as part of the Telecommunications Act of 1996.[3] Section 258 makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[4] The section further provides that a telecommunications carrier that violates the Commission's verification procedures and that collects charges for telephone service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation.[5] The Commission is currently considering the adoption of new rules in response to the comments received.

The Commission thus has taken substantial steps to protect consumers and legitimate competition from slamming by regulating carriers' PIC change practices. These actions, however, have not been intended to displace complementary state efforts. In fact, as a general proposition, the Commission welcomes state efforts to prevent slamming.[6] In general, the Commission will make a formal determination about whether specific state laws are preempted only after the development of an adequate record that clearly describes the specific state law to be preempted and precisely how that state law conflicts with federal law or obstructs federal objectives.[7]

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[1] See 47 C.F.R. §§ 64.1100, 64.1150.

[2] See 47 C.F.R. § 64.1100.

[3] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10,674 (1997) (*FNPRM*).

[4] 47 U.S.C. § 258(a).

[5] 47 U.S.C. § 258(b).

[6] *See Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers*, 10 FCC Rcd 9560, 9583 (1995) *(LOA Order)* (declining to preempt state laws regarding slamming because state action appeared to be consistent with that of the Commission).

[7] *See, e.g., id.* (stating that specific preemption questions would be determined on a case-by-case basis since state action regarding slamming appeared to be consistent with that of the Commission); *Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers*, Memorandum Opinion and Order, 12 FCC Rcd 13987, 13991 (1997); Letter from Mary Beth Richards, Deputy Chief, Common Carrier Bureau, to Elliot Burg, Assistant

Because you have requested an informal staff opinion regarding federal preemption, however, we next consider the Wisconsin state laws at issue in your complaint against MRP.

The Complaint

The State filed its complaint in Dane County Circuit Court, State of Wisconsin. In the complaint, dated May 15, 1998, and attached to your letter to the Commission, the state alleges that MRP has utilized untrue, deceptive, or misleading oral telemarketing in order to induce Wisconsin consumers to agree to subscribe to MRP's long distance service. The first claim for relief in the complaint alleges that MRP's sales statements and practices are in violation of Wisconsin's Telecommunications Sales Law.[10] The second claim for relief in the complaint alleges that MRP's telemarketing sales program is in violation of Wisconsin's Home Solicitation Selling Law.[11] The third claim for relief in the complaint alleges that MRP's failure to obtain affirmative orders for telecommunications services before billing for such services is in violation of Wisconsin's Telecommunications Sales Law.[12]

Analysis

State law may be preempted by Congress through the proper exercise of its legislative powers, or by a federal agency acting pursuant to its congressionally delegated authority.[13] Preemption may occur where state law conflicts with federal law or obstructs federal objectives, or where compliance with both federal and state law is physically impossible.[14] Our interpretation of the Commission's regulations leads us to conclude that the state laws at issue in Wisconsin's complaint against MRP do not appear to conflict with the Commission's rules. The Commission's rules deter slamming by imposing specific verification requirements on interexchange carriers who submit orders to change consumers' long distance carriers. It appears that the Wisconsin laws at issue seek to deter slamming and other harmful actions through the regulation of marketing rather than through verification procedures. Therefore, based upon the information that you have provided, we find nothing in the language of any of the state law provisions named in the complaint that imposes specific verification requirements on carriers or otherwise contradicts Commission regulations.

Attorney General, State of Vermont, 11 FCC Rcd 1839 (1995); *cf. California Payphone Association Petition for Preemption of Ordinance No. 578 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd. 14191 (1997) (Commission denied petition for preemption under Section 253 because petitioner failed to present sufficient record demonstrating barrier to entry); *TCI Cablevision of Oakland County, Inc.*, 9 Comm. Reg. (P&F) 730 (1967) (petitioner seeking preemption under Section 253 bears burden of proof to demonstrate that it is entitled to such relief).

[10] Wis. Stat. § 100.207 (1993).

[11] Wis. Admin. Code § ATCP 127 *et seq.* (1993).

[12] Wis. Stat. § 100.207 (1993).

[13] *See Louisiana PSC v. FCC*, 476 U.S. 355, 368-69 (1986).

[14] *Id.*

The first and third claims for relief in the complaint are based on Wisconsin's Telecommunications Sales Law. In the first claim for relief, Wisconsin alleges that MRP's sales statements and practices are in violation of Sections 100.207(2), 100.207(3)(a), and 100.207(4)(b) of Wisconsin's Telecommunications Sales Law. In the third claim for relief, Wisconsin alleges that MRP's failure to obtain affirmative orders for telecommunications services before billing for such services is in violation of Section 100.207(3)(a) of Wisconsin's Telecommunications Sales Law.

Wisconsin's Telecommunications Sales Law prohibits unfair and deceptive practices generally with regard to the provision of telecommunications service.[15] Section 100.207(2) of the Wisconsin Telecommunications Sales Law is entitled "Advertising and Sales Representations" and states in pertinent part: "[a] person may not make . . . any statement or representation with regard to the provision of telecommunications service . . . which is false, misleading or deceptive, or which omits to state material information with respect to the provision of telecommunications service that is necessary to make the statement not false, misleading, or deceptive."[16] Section 100.207(3)(a) is entitled "Sales Practices" and states in pertinent part: "[a] person may not bill a customer for any telecommunications service that the customer did not affirmatively order unless that service is required to be provided by law, the Federal Communications Commission or the public service commission."[17] Section 100.207(4)(b) is entitled "Collection Practices" and states in pertinent part: "[a] person may not unreasonably refuse to provide a detailed listing of the charges for telecommunications service upon request of a customer."[18] Because these provisions of the Wisconsin law regulate marketing practices rather than impose verification requirements, compliance with both state and federal law is not impossible and there is no basis for federal preemption of the Wisconsin Telecommunications Sales Law.

The Wisconsin Home Solicitation Selling Law, specifically Sections ATCP 127.02(1), ATCP 127.03(2)(b), and ATCP 127.03(3), is the basis for the second claim for relief in the complaint. Wisconsin's Home Solicitation Selling Law regulates generally the manner in which goods or services are sold at the residence or place of business of the buyer.[19] Section ATCP 127.02(1) states in pertinent part: "[i]n a home solicitation sale every seller shall, at the time of initial contact or communication with the buyer, clearly and expressly disclose the seller's individual name, the name of the business firm or organization he or she represents, and the identity or kind of goods or services he or she offers to sell."[20] Section ATCP 127.03(2)(b) states in pertinent part: "[n]o seller engaged in making a home solicitation sale shall misrepresent . .

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[15] Wis. Stat. § 100.207 (1993).

[16] *Id.* at § 100.207(2).

[17] *Id.* at § 100.207(3)(a).

[18] *Id.* at § 100.207(4)(b).

[19] Wis. Admin. Code § ATCP (Agriculture, Trade, and Consumer Protection) 127 *et seq.* (1993).

[20] *Id.* at § ATCP 127.02(1).

. [t]he savings which will be accorded or made available to the buyer."[21] Section ATCP 127.03(3) states in pertinent part: "[n]o seller engaged in making a home solicitation sale shall use any false, deceptive or misleading representations to induce a sale, or use any plan . . . which misrepresents the true status or mission of the person making the call . . ."[22] The above-mentioned provisions place restrictions on the manner in which home solicitations are conducted, and do not appear to impose verification requirements, which, under Section 258, are within the authority of the Commission to promulgate. Because the state law provisions do not conflict with federal law, and compliance with both federal and state law is not impossible, preemption of the Wisconsin Home Solicitation Selling Law would not appear to be warranted.

Furthermore, the Wisconsin statutes at issue do not obstruct the Commission's objectives. The State has alleged that, due to the defendants' oral statements and policies, the defendants have misled customers into switching their long distance carriers. As described above, the Commission's rules prohibit switching consumers' long distance carriers without proper authorization. Both state and federal law in this case have the effect of preventing slamming and, while utilizing different means to do so, are not incompatible. Therefore, these state statutes appear to promote rather than frustrate Commission objectives.

Preemption may also occur when Congress, in enacting a federal statute, expresses a clear intent to preempt state law.[23] Section 258 of the Act states that "[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[24] Section 258, however, does not express intent to preempt all state laws with regard to slamming. Section 258 states merely that, "[n]othing in this section shall preclude any State Commission from enforcing [the Commission's verification] procedures with respect to intrastate services,"[25] and does not, by its terms, appear to address the efforts of states to regulate the marketing of intrastate services. We conclude that the language of Section 258 does not preempt state efforts to prevent unfair and deceptive marketing practices that also have the effect of preventing or deterring slamming.

Conclusion

In sum, the staff's informal view is that the Commission's slamming rules do not appear to conflict with these Wisconsin laws that are designed to protect consumers from potentially deceptive practices relating to the marketing of telecommunications services, nor does Section 258 itself express an intent to preempt such laws. Accordingly, based on the information provided, we see no apparent justification for preemption of the state laws forming the basis of Wisconsin's suit against MRP.

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[21] *Id.* at ATCP 127.03(2)(b).

[22] *Id.* at ATCP 127.03(3).

[23] *Louisiana PSC v. FCC*, 476 U.S. 355, 368-69 (1986).

[24] 47 U.S.C. § 258(a).

[25] 47 U.S.C. § 258(a).

I hope this information is helpful and thank you for your interest in this matter. Please let us know if we can be of further assistance.

Sincerely,

Lawrence E. Strickling

Lawrence E. Strickling
Deputy Chief
Common Carrier Bureau