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BEFORE THE ARIZONA CORPORATION COMMISSION
AZ CORP COMMISSION

JIM IRVIN
COMMISSIONER-CHAIRMAN
TONY WEST
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

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IN THE MATTER OF U S WEST) DOCKET NO. T-00000B-97-0238
COMMUNICATIONS, INC.'S)
COMPLIANCE WITH § 271 OF THE) ELI'S RESPONSE TO
TELECOMMUNICATIONS ACT OF 1996) MOTION TO COMPEL

For the reasons set forth, the Commission should deny U S WEST's motion to compel and uphold ELI's objections to U S WEST's data requests. In addition to the facts and arguments presented in this response, ELI joins the responses of the various other CLECs in opposition to the motion to compel.

I. BRIEF STATEMENT OF THE RESPONSE.

With its motion to compel and data requests, U S WEST takes a "bombs away" discovery approach. In a "scorched earth" policy, ELI is being bombarded with overly broad, burdensome, unnecessary and irrelevant data requests. Enough is enough.

U S WEST's data requests can be separated into three general categories:

- **BEYOND THE SCOPE OF THIS § 271 CASE:** Generally, Data Requests 15-41 fit this category. Many of U S WEST's data requests exceed the proper scope of this § 271 case by focusing on ELI's performance, arrangements with other providers, internal capabilities and other similar issues. But, ELI's internal operations and dealings are not at issue. What matters is whether U S WEST currently meets the 14 point checklist in Arizona.
- **FISHING EXPEDITION:** Generally, Data Requests 1-14 fit this category. Many of U S WEST's data requests are nothing more than an attempt to impose onerous document search requirements and paint ELI into a corner by placing the burden on ELI to show that U S WEST shouldn't enter the

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1 long distance market. But U S WEST and only U S WEST has the burden
2 of proving § 271 compliance.

3 • PREMATURE, UNNECESSARY AND BURDENSOME: Almost all of
4 U S WEST's data requests fit this category. U S WEST's data requests are
5 unduly burdensome, oppressive, unnecessary and premature. The sheer
6 enormity of the manpower and resources required to respond to these data
7 requests and document production is staggering. Such burdens on ELI are
8 unjustified because U S WEST has all it needs to file its case in chief.
9 U S WEST's data requests aren't necessary for U S WEST to present its
10 case of § 271 compliance

11 As a matter of law, U S WEST applies the wrong analytical framework to its
12 discovery. This § 271 case involves one principal issue--does U S WEST currently provide equal
13 and non-discriminatory access to ELI and other CLECs in Arizona on the 14 checklist items as
14 compared to U S WEST itself? U S WEST has the burden to make that showing. By
15 propounding such broad data requests, however, U S WEST attempts to shift this burden of proof
16 to ELI.

17 U S WEST also ignores the procedural orders issued by the Commission in this
18 case. Recognizing the limited issues presented, the Commission has expressly restricted
19 U S WEST's discovery to that necessary to demonstrate it has met its § 271 requirements. That's
20 all. U S WEST isn't entitled to a fishing expedition to explore other carrier's operations. This
21 case will operate under a specific procedural framework: U S WEST files its case in chief, ELI
22 and other parties file their responses and U S WEST then submits its rebuttal case. That
23 framework determines what is proper discovery by limiting the fundamental issues presented at
24 each stage of the case. U S WEST subverts that process by claiming it is entitled to every tidbit of
25 data ELI possesses. U S WEST isn't entitled to conduct burdensome, unnecessary, premature and
26 oppressive discovery.

27 Finally, U S WEST's massive discovery requests are a thinly-veiled attempt to
drive away any opposition and limit the information this Commission receives. U S WEST's

1 requests are another way to wield its unparalleled market force. The Commission must stop
2 U S WEST in its tracks.

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4 **II. U S WEST'S MOTION TO COMPEL SHOULD BE DENIED.**

5 **A. U S WEST's Data Requests Are Unduly Burdensome, Oppressive, Premature**
6 **and Unnecessary.**

7 Without a doubt, U S WEST is the biggest kid on the block . ELI simply doesn't
8 have the market power, resources and/or manpower to equal U S WEST. Under the guise of
9 discovery, U S WEST flexes that muscle in an attempt to pummel ELI and other CLECs into
10 submission.

11 At this juncture, U S WEST has not even filed its case in chief. As the Hearing
12 Division concluded its March 2 Procedural Order, that failure violated this Commission's previous
13 orders. But U S WEST didn't hesitate to continue to press its barrage of data requests on ELI.
14 The 41 data requests to ELI cover anything and everything under the sun. U S WEST even spent a
15 full page defining what "documents" it seeks. See U S WEST First Set of Data Requests to ELI,
16 p. 2.

17
18 The information requested by U S WEST is incredibly difficult for ELI to identify
19 and gather. It simply doesn't compile data and information in the ways and by the categories
20 requested by U S WEST. To respond, ELI would have to conduct special studies and focus much
21 of its manpower on additional responses and document searches. The information requested by U
22 S WEST's is spread across many ELI employees, departments and representatives. ELI simply
23 can't afford to shut down operations and focus on U S WEST's data requests.

24
25 From ELI's perspective, the sheer enormity of manpower, resources and effort
26 necessary to respond to U S WEST's data requests is staggering. If U S WEST's motion to compel
27 is granted, ELI will be buried in an avalanche of discovery. U S WEST has all it needs to file its
case in chief. Its data requests aren't necessary for U S WEST to present its case of § 271

1 compliance. Granting U S WEST's motion to compel will unfairly burden ELI and give
2 U S WEST a strategic advantage not related nor necessary to the merits of its § 271 case.
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4 **B. U S WEST Violates This Commission's Procedural Orders And The § 271**
5 **Statutory Scheme.**

6 The motion to compel should be considered in the context of U S WEST's
7 disregard for this Commission's orders and § 271's framework. From the start, U S WEST has
8 flagrantly ignored both.

9 On May 27, 1997, this Commission issued Decision No. 60218 setting forth its
10 requirements for this case. See Decision No. 60218, Docket No. U-0000-97-238, pp. 1-3. The
11 Commission emphasized that "Section 271(c)(2)(B) sets forth a fourteen point competitive
12 checklist which specifies the access and interconnection [U S WEST]must provide to other
13 telecommunications carriers..." Id. at p. 1.

14 On June 16, 1998, the Commission issued its first procedural order. That order
15 addressed general discovery issues. Eventually, this Commission issued a more comprehensive
16 Procedural Order on March 2, 1999 and expressly limited U S WEST's discovery rights:
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- 18 • "The parties may begin general discovery regarding U S WEST's § 271
19 compliance, with more specific discovery to follow U S WEST's
20 supplemental filing. U S WEST will be allowed to pursue discovery to the
21 extent necessary to demonstrate that it has met § 271 requirements." See
22 March 2, 1999 Procedural Order, p. 3.
- 23 • "IT IS HEREBY ORDERED that U S WEST will be allowed to pursue
24 discovery to the extent necessary to demonstrate that it has met § 271
25 requirements." Id. at p. 4.

26 That is the fundamental standard by which U S WEST's data requests must be measured--are they
27 reasonable and necessary to show U S WEST's compliance with the § 271 checklist requirements?

28 The answer is NO. On that issue, this § 271 case went awry before the March 2
29 order. On February 19, 1999 U S WEST propounded its sweeping data requests to ELI.
30 Originally, ELI objected to those data requests as inconsistent with the procedural orders of the

1 Commission and unfair to ELI given U S WEST's refusal to file its full application under § 271.
2
3 See ELI's Objections to U S WEST's First Set of Data Requests dated February 26, 1999
4 (Exhibit A). These objections were sustained by the March 2 Procedural Order. In the wake of
5 that order, ELI requested that U S WEST rework its data requests. See March 9, 1999 letter from
6 Mr. Wiley to Mr. Steese (Exhibit B). U S WEST refused.

7 Instead, U S WEST reurged all of its data requests. That left ELI no choice but to
8 file specific objections. See March 12, 1999 letter from Mr. Grant to Mr. Steese (Exhibit C).
9 Without waiting to review the responses, U S WEST filed its motion to compel on
10 March 16, 1999. U S WEST attempted to confer with ELI only after filing the motion to compel.

11 **1. U S WEST subverts the § 271 framework.**

12 U S WEST treats this § 271 case as if it were a run-of-the-mill civil case. It is not.
13 U S WEST lodges discovery as it would in any other case. But § 271 proceedings are not a
14 discovery free-for-all. Section 271 cases are distinct and unique statutory creatures. They involve
15 limited material issues and specifically designed procedures.
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17 Under § 271, U S WEST must apply to the FCC for authorization to provide
18 interLATA services in Arizona. The FCC must issue a decision within 90-days and the FCC
19 must consult with this Commission regarding U S WEST's compliance with the competitive
20 checklist. This Commission's role in this § 271 case is limited to determining whether U S WEST
21 currently meets the 14-point checklist in Arizona. See 47 U.S.C. § 271(d)(2)(B). The
22 Commission is not charged with addressing generic competition issues and certainly has no role as
23 to U S WEST's compliance status in any state other than Arizona.
24

25 Therefore, § 271 cases before state commissions don't contemplate nor require full-
26 fledged, unlimited discovery. U S WEST first must submit its case in chief. CLECs then may file
27 objections and responses. Last, U S WEST may rebut those objections and responses. Consistent

1 with that, § 271 discovery should be limited to those discrete issues presented at each stage of the
2 process. This stage of the process revolves strictly around U S WEST's compliance with the 14-
3 point checklist. Nothing more, nothing less.
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5 **2. U S WEST's data requests exceed the scope of this § 271 case.**

6 A fundamental issue at stake in this § 271 proceeding is whether U S WEST
7 provides ELI and other CLECs "nondiscriminatory access to interconnection, transport and
8 termination, and unbundled network elements..." See Application of Ameritech, FCC Decision
9 No. 97-298, ¶ 12 (August 19, 1997). For example, ELI and other CLECs must "obtain the same
10 access to [U S WEST's] operation support systems that [U S WEST] or [its] affiliates enjoy." Id.
11

12 **a. It is U S WEST's burden of proof--not ELI's.**

13 U S WEST attempts to place the burden of proof on ELI and others to show
14 U S WEST should be excluded from the long distance market. But it's U S WEST's burden of
15 proof, not ELI's:

16 Section 271 places on [U S WEST] the burden of proving that all of the
17 requirements for authorization to provide in-region, interLATA services are
18 satisfied." Id. at ¶ 23. "The ultimate burden of proof with respect to factual issues
remains at all times with [U S WEST]...Id.

19 That governing principle dooms U S WEST's motion to compel because
20 U S WEST "must present a *prima facie* case in its application that all of the requirements of
21 Section 271 have been satisfied." Id. at ¶ 24. U S WEST must show it is "already in full
22 compliance with the requirements of Section 271 and submit with its application sufficient factual
23 evidence to demonstrate such compliance." Id. at ¶ 29. Once that happens, "opponents of
24 [U S WEST's] entry must... produce evidence and arguments necessary to show that
25 [U S WEST's] application does not satisfy the requirements of section 271..." Id. at ¶ 24.
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b. U S WEST's data requests must be limited to issues surrounding U S WEST's system only.

Ultimately, the § 271 case before this Commission is about U S WEST's system and ELI's access to it. In its motion to compel and supplemental memorandum, U S WEST concocts a laundry list of theories to attempt to support the relevancy of its data requests. U S WEST leaves no stone unturned. But, U S WEST inverts the statutory scheme and places on ELI and other CLECs the burden of producing U S WEST's case in chief. That's not the way it works--U S WEST must first prove its *prima facie* compliance with all checklist items. See Application of BellSouth for InterLATA Services in Louisiana dated October 13, 1998, CC Docket No. 98-121, ¶ 54 ("BellSouth II"). For each checklist item, U S WEST must demonstrate that it provides equal and non-discriminatory access to its network facilities on an equal footing with U S WEST itself. That's true for each and every checklist item:

1. Checklist Item #1 (Interconnection): U S WEST must allow ELI interconnection provided "at any technically feasible point with [U S WEST's] network...at least equal in quality to that provided by [U S WEST] to itself or...to any other party to which [U S WEST] provides interconnection..." Id. at ¶ 61. That means U S WEST "must provide interconnection to a competitor in a manner that is no less efficient than the way in which [U S WEST] provides the comparable function to itself." Id. at ¶ 64. In BellSouth II, the FCC "disagree[d] with BellSouth that the appropriate standard for evaluating its provisioning of collocation arrangements is other incumbent LECs' provisioning intervals." Id. at ¶ 72.
2. Checklist Item #2 (Unbundled Network Elements): "New entrants must be able to provide service to their customers at a quality level that matches the service provided by [U S WEST] to compete effectively in the local exchange market". Id. at ¶ 83.
3. Checklist Item #3 (Poles, Ducts, Conduits and Rights of Way): "[U S WEST] must provide competing telecommunications carriers with access to its poles, ducts, conduits and rights of way on reasonable terms and conditions comparable to those which it provides itself..." Id. at ¶ 176.
4. Checklist Item #4 (Unbundled Local Loops): "...competing carriers must have nondiscriminatory access to the various functions of [U S WEST's] OSS in

1 order to obtain unbundled loops in a timely and efficient manner...” *Id.* at
2 ¶ 186. In this context, non-discriminatory doesn’t mean as compared to ELI’s
3 system--it means as compared to what U S WEST provides itself. *Id.*

- 4 5. Checklist Item #5 (Unbundled Local Transport): U S WEST must make a
5 “prima facie showing that it provides nondiscriminatory access to OSS for the
6 ordering and provisioning of dedicated and shared transport facilities.” *Id.* at
7 ¶ 202.
- 8 6. Checklist Item #6 (Unbundled Local Switching): U S WEST must provide
9 “local switching as an unbundled network element” as “necessary to provide
10 access to shared transport functionality.” *Id.* at ¶¶ 207-209. That requires
11 U S WEST to provide equal and unabated unbundled local switching. *Id.*
- 12 7. Checklist Item #7 (911 and E911 Services): U S WEST must provide
13 nondiscriminatory access to 911 and E911 services “in the same manner that
14 [U S WEST] obtains such access...” *Id.* at ¶ 235. Specifically, U S WEST
15 must “maintain the 911 database entries for competing LECs with the same
16 accuracy and reliability that it maintains the database entries for its own
17 customers.” *Id.*
- 18 8. Checklist Item #8 (White Pages Directory Listings): U S WEST must show “it
19 provides nondiscriminatory appearance and integration of white pages listing to
20 customers of competitive LECs with the same accuracy and reliability that it
21 provides its own customers.” *Id.* at ¶ 253.
- 22 9. Checklist Item #9 (Numbering Administration): Likewise, U S WEST must
23 provide “nondiscriminatory” access to telephone numbers for assignment to
24 ELI and competing carriers. Such access “must be identical to the access that
25 [U S WEST] provides to itself.” *Id.* at ¶¶ 259-260.
- 26 10. Checklist Item #10 (Databases and Associated Signaling): U S WEST must
27 provide “nondiscriminatory access to databases and associated signaling
necessary for call routing and completion.” *Id.* at ¶ 266.
11. Checklist Item #11 (Number Portability): U S WEST must provide number
portability which requires “the ability of users of telecommunications services
to retain, at the same location, existing telecommunications numbers without
impairment of quality, reliability, or convenience...” *Id.* at ¶ 274.
12. Checklist Item #12 (Local Dialing Parity): U S WEST must show that
“customers of competing carriers are able to dial the same number of digits that
[U S WEST’s] customers dial to complete a local telephone call, and that these
customers otherwise do not suffer inferior quality...” *Id.* at ¶ 296.
13. Checklist Item #14 (Resale): On this item, U S WEST must show that “it offers
for resale at wholesale rates any telecommunications services that [U S WEST]
provides at retail to subscribers...and without unreasonable or discriminatory
conditions.” *Id.* at ¶ 309.

1 U S WEST's data requests must focus on these specific issues. It is patently obvious that its data
2 requests do not and its motion to compel should be denied.

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4 **3. In identical circumstances, these issues already have been decided**
5 **against U S WEST in Montana and New Mexico.**

6 This case isn't the first time U S WEST has tried to bludgeon CLECs into
7 submission. In Montana, U S WEST propounded 88 data requests on CLECS and, in New
8 Mexico, U S WEST served 87 data requests. In both states, U S WEST propounded the same far
9 reaching and excessive discovery as it does in Arizona. The New Mexico and Montana
10 Commissions prevented U S WEST from wielding discovery as a sword to (1) limit information
11 those Commissions could receive and (2) cut off CLEC participation.

12 In both states, U S WEST presented the same arguments as it does here to support
13 the need for and relevancy of its data requests. Both the Montana and New Mexico Commissions
14 rejected those arguments.

15
16 The New Mexico Commission started by stressing that "nondiscriminatory
17 treatment in the context of a Section 271 case review means proving that each CLEC is provided
18 at least the same access and treatment that the Bell Operating Company, in this case U S WEST,
19 provides to its own operations and customers." New Mexico Corporation Commission Order
20 dated September 21, 1998, Docket No. 97-106-TC, ¶ 19 (Exhibit D). Although "discovery should
21 be allowed to proceed if it will likely produce relevant evidence or it appears reasonably
22 calculated to lead to the discovery of admissible evidence," the "internal methods of the CLECs
23 are not, however, at issue in this case." *Id.* at ¶¶ 40-43. Thus, U S WEST discovery exceeds the
24 proper bounds of this § 271 case if U S WEST's "requests are designed to elicit information
25 regarding the capability of the CLECs' internal OSS" or focus on CLEC lack of capability to
26 handle U S WEST's interfaces. *Id.* (See, for example, Arizona Data Request Nos. 18-20, 22, 23
27 and 25).

1
2 In identical circumstances to those presented here, the New Mexico commission
3 rejected many of the same data requests U S WEST is again advancing:

4 Based on our reading of the federal act, our order in SCC Docket No. 96-411-TC,
5 the Ameritech Michigan 97-137 Order and the Eighth Circuit's decision in [Iowa
6 Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1998), affirmed in part, reversed in part
7 by ___ U.S. ___, 119 S.Ct. 721 (1999)], we conclude that any internal matter such
8 as how a CLEC currently initiates an order on its own system is of no relevance. It
9 is U S WEST that has to satisfy the statutory requirement of showing that it has
provided access to its operational support systems that is at least equal in quality to
those levels at which it provides these services to itself. What the CLECs do in
their own internal operations is not relevant to a Section 271 proceeding. Id. at
¶ 47.¹

10 As New Mexico noted, "nondiscriminatory access is not defined in terms of providing no worse
11 access to the operational support systems that a CLEC provides to itself. It is the BOC's, not the
12 CLEC's, system that is relevant." Id. at ¶ 49. "Data requests that seek information about how
13 CLECs use their own OSS to serve their own retail customers [are] irrelevant..." Id.

14 Likewise, "queries about a CLEC's relationship with other ILECs...are not
15 expected to provide information that is likely to lead to admissible evidence because it is only U S
16 WEST's practices that are relevant..." Id. at ¶ 61. (See, for example, Arizona Data Request Nos.
17 23-25 and 35.) And CLECs need not provide any internal "performance data." Id. at ¶ 64. (See,
18 for example, Arizona Data Request Nos. 28 and 31.) Finally, U S WEST's data requests that
19 focus on "the particular details of the internal business plans of the CLECs do not appear
20 reasonably calculated to lead to the admission of relevant evidence." Id. at ¶ 79. (See, for
21 example, Arizona Data Request Nos. 36-39.)
22

23 The Montana Commission echoed these sentiments by sustaining CLEC objections
24 to U S WEST's data requests "because the information requested was irrelevant, relate[d] to
25 subjects which the Commission has already determined are beyond the scope of the proceeding,
26 the data requests are duplicative, and they requested information that is more easily obtained by
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1 U S WEST or in its control.” See Montana Public Service Commission Order dated July 16,
2 1998, Docket No. 97.5.87, p. 2 (Exhibit E).

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4 Specifically, the Montana commission rejected U S WEST’s data requests which
5 focused on CLEC “internal performance measures,” internal operating systems,” and their “own
6 interfaces—all of which the Commission has previously ruled is irrelevant to and outside the
7 scope of this proceeding.” Id. at p 4. The Commission also rejected U S WEST’s data requests
8 relating to CLEC “future business plans, other ILEC’s OSS systems, MCI’s own internal systems
9 and performance measures.” Id. at p 5. Finally, the Montana commission ruled that “intervening
10 parties are not required to identify ‘complaints’ about the manner in which U S WEST provides
11 checklist items...” Id. at p 7. (See, for example, Arizona Data Request Nos. 1-14.) This
12 Commission should issue the same rulings here.
13

14 **C. U S WEST’s Data Requests Are A Mere Subterfuge to Drive ELI and Other**
15 **CLECs Out of This Case.**

16 It’s clear that U S WEST’s data requests and motion to compel are a strategy to
17 place ELI and other CLECs in an untenable situation. If this Commission grants U S WEST’s
18 motion to compel, ELI would have two choices--(1) commit the considerable manpower and
19 resources necessary to respond to U S WEST’s massive data requests or (2) decline to answer U S
20 WEST’s requests and withdraw from the case. That’s exactly what CLECs in Nebraska faced.
21 They had no choice but to withdraw their participation in U S WEST’s § 271 application. If the
22 motion to compel is granted, the practical effect will be to deprive this Commission of the input it
23 invited in Decision No. 60218.

24
25 U S WEST’s track record in § 271 cases is to propound discovery in a way that
26 puts all the burden on CLECs. U S WEST’s use of discovery in these cases violates principles of
27 fairness, the public interest and § 271’s statutory scheme.

¹ See, for example, Arizona Data Request Nos. 21 and 26-34.

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III. THE COMMISSION SHOULD SUSTAIN ELI'S DISCOVERY OBJECTIONS.

ELI's objections should be upheld and U S WEST's discovery requests limited and confined as follows:

- Data Request Nos. 1, 3-12 and 14. Notwithstanding and subject to its objections, ELI in good faith responded to these and other data requests on March 19, 1999. It provided, among other things, information concerning interconnection provisioning delays and blocking problems (Data Request No. 1); pole, duct, conduit and right-of-way access difficulties (Data Request No. 3); local loop problems (Data Request No. 4); Unbundled Dedicated Transport issues (Data Request No. 5); unbundled switching matters (Data Request No. 6); 911 and E911 problems associated with number portability issues (Data Requests Nos. 7 and 12); indicated it had performed no analyses of directory assistance, operator call completion and white pages listing services (Data Request Nos. 8, 9, and 10); explained why it does not use U S WEST unbundled signaling in Arizona (Data Request No. 11); and provided information on resale (Data Request No. 14). It did not conduct the global document search demanded by the data requests. Given the nature of this case and the other matters previously discussed, these responses are more than adequate at this stage. To the extent ELI files testimony later, U S WEST will be free to propound additional but more specific requests on ELI's positions. Obviously, U S WEST knows exactly how its provisioning of services to ELI compares with services provided to itself and other CLECs. The Commission should require ELI to respond to these requests only under these limited circumstances and conditions. The Commission also should sustain ELI's objections to the extent U S WEST already possesses such information and/or U S WEST's requests require ELI to conduct any special studies or inquiries.
- Data Request No. 2. Subject to execution of an acceptable confidentiality agreement, ELI is prepared to provide current collocation listings and reference its most recent collocation forecast already provided to U S WEST. ELI has objected to any additional or special forecast, if required by the data request, as irrelevant, immaterial, vague, burdensome, speculative, confidential and proprietary. U S WEST already possesses data on all of ELI's collocations and planned collocations. As such, this data request is unduly burdensome, oppressive and unnecessary. And this information isn't necessary to U S WEST's § 271 case. The Commission shouldn't require ELI to respond further to this request.
- Data Request No. 13. ELI responded to this data request; primarily with reference to its reciprocal compensation complaint against U S WEST currently in Commission Docket No. T-0105B-98-0689. ELI already provided this information to U S WEST with its complaint in that case. No further response is necessary nor should be ordered.
- Data Request No. 15. This request is beyond the scope of this case, irrelevant, immaterial, vague, ambiguous, speculative, burdensome and calls for proprietary information. Data concerning experience "in any of the other 13 states in

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U S WEST's region" is clearly irrelevant to this proceeding. The primary issue in this Docket is whether U S WEST has complied with § 271 requirements in Arizona, not, for example, whether ELI has obtained or can obtain elements, items or services from others. This request simply isn't necessary for U S WEST to make its § 271 case in Arizona. U S WEST has equal access to this information without requiring ELI to conduct a special study to determine the availability of network elements, items and services from other providers in 14 states. The Commission should sustain ELI's objections to this request.

- Data Request No. 16. See discussion of Data Request No. 15 above. ELI also objects to U S WEST's request for "any analysis" as vague, ambiguous and overly broad. ELI did respond to this request by reference illustratively to documents and information already supplied U S WEST in relation to a pending antitrust case which ELI has filed against U S WEST for the states of Washington, Oregon and Utah. The Commission should sustain ELI's objection to this request.
- Data Request No. 17. See discussions of Data Request Nos. 2 and 15 above. ELI did respond to this data request by providing a reference to its latest forecast information at the quarterly joint planning meeting. U S WEST already possesses much of the information sought in this request (for example, ELI provides U S WEST with forecast information on interconnection trunking and collocation in quarterly planning meetings). Finally, U S WEST must show it currently meets the checklist requirements. Thus, ELI's projected demand "two years" from now is irrelevant. The Commission should sustain ELI's objections to this request.
- Data Request Nos. 18-20. See discussion of Data Request No. 15. ELI's OSS capabilities are irrelevant to this proceeding.
- Data Request No. 21. See discussion of Data Request No. 15. ELI responded to this data request by referencing errors which are maintained in the EXACT system (which is controlled by U S WEST) but indicating it would search for and provide additional error data, if maintained. No further response should be ordered.
- Data Request Nos. 22 - 25. See discussion of Data Request No. 15 above. ELI responded to these data requests primarily by discussing its problems with the U S WEST IMA system and by reference to testimony, briefing and other information already supplied in the Arizona consolidated arbitration proceeding (Docket Nos. U-3021-96-448, U-3245-96-448 and E-1051-96-448). As to Data Request No. 24, ELI is prepared to provide Arizona order placement information subject to execution of a satisfactory confidentiality agreement. The motion to compel any further response should be denied.
- Data Request Nos. 26-29, 31, 32, 33, 35 and 36. See discussion of Data Request Nos. 2 and 15. The issue in this Docket is not ELI's provisioning commitments, customer materials, time it spends with customers, hours of operation, customer notice procedures, internal capabilities, or historic and projected orders and transactions. These requests involve highly confidential and proprietary internal business information. On these issues as well, customer perspectives are relevant only to the

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extent they concern the U S WEST, not the ELI, system. The Commission should sustain ELI's objections to these requests.

- Data Request No. 30. See discussion of Data Request No. 15. ELI responded to this data request by stating it is impossible to provide local telecommunications service using only its own facilities. No further information can be supplied for that reason.
- Data Request Nos. 37, 38 and 39. These requests exceed the scope of this case and are irrelevant, immaterial, burdensome and call for proprietary information. The issue in this Docket is not past and present ELI business plans. Such plans are highly confidential and very sensitive. The Commission should sustain ELI's objection to these requests.
- Data Request Nos. 40 and 41. See discussion of Data Request Nos. 2 and 15. In relation to Data Request No. 40, ELI responded that it had not yet performed any competitive analysis and re-described its interconnection difficulties in response to Data Request No. 41. The Commission should sustain ELI's objections and deny the motion to compel.

IV. CONCLUSION.

For the reasons set forth, the Commission should deny U S WEST's motion to compel and uphold ELI's discovery objections.

RESPECTFULLY SUBMITTED this 26th day of March, 1999.

GALLAGHER & KENNEDY, P.A.

By Michael M. Grant
Michael M. Grant
Todd Wiley
2600 North Central Avenue
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(602) 530-8291
Attorneys for Electric Lightwave, Inc.

Original and ten (10) copies filed
this 26th day of March, 1999,
with Docket Control.

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Copy of the foregoing hand delivered
this 26th day of March, 1999, to:

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Hearing Division
Arizona Corporation Commission
1200 West Washington
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Copy of the foregoing faxed and
mailed this 26th day of March, 1999, to:

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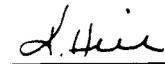
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10407-0007/719264

EXHIBIT A

BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION

FEB 26 2 25 PM '99

JIM IRVIN
COMMISSIONER-CHAIRMAN
TONY WEST
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

DOCUMENT CONTROL

IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC.'S)
COMPLIANCE WITH § 271 OF THE)
TELECOMMUNICATIONS ACT OF 1996)

DOCKET NO. T-00000B-97-238

**OBJECTION TO U S WEST'S FIRST
SET OF DATA REQUESTS TO
ELECTRIC LIGHTWAVE, INC.**

On Monday, February 22, 1999, Electric Lightwave, Inc. ("ELI") received a First Set of Data Requests from U S WEST Communications, Inc. ("U S WEST") in this proceeding.¹ ELI objects to this discovery as inconsistent with the Procedural Orders of the Commission and unfair to ELI and other new competitors given U S WEST's refusal to file, as required, its full application under Section 271.

Both the May 27, 1997 and June 16, 1998 Commission Orders require U S WEST to file with the Commission "at least 90 days prior to making its FCC filing, the full and complete application which [it] intends to file at the FCC, including all information responsive to Attachments A and B to Decision No. 60218."² On February 8, 1999, U S WEST filed a Notice of Intent to File with the FCC. That filing (1) was not U S WEST's "complete application," (2) did not contain any supporting evidence of compliance with the 14-point competitive checklist contained in 47 U.S.C. §271(c)(2)(B) and (3) did not contain "all information" responsive to Decision No. 60218. Therefore, on February 16, ELI and several other parties asked the Commission to reject the filing as non-compliant and require U S WEST to file its full and complete application. (Joint Motion to Reject U S WEST's Notice, filed February 16, 1999.)

GALLAGHER & KENNEDY
A PROFESSIONAL ASSOCIATION
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16021 930-8000

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1 As stated in Decision No. 60218, the time frames imposed in this case by the
2 Telecommunications Act of 1996 are abbreviated. For this reason, all parties must be permitted to
3 review and take discovery on U S WEST's complete application during the full 90-day period
4 preceding its FCC filing. U S WEST's attempts to ignore this Commission's Orders, file an
5 incomplete application, effectively prevent discovery by other parties in the case and simultaneously
6 barrage parties which have no burden of proof with sweeping discovery are outrageous.
7

8 Therefore, ELI objects and will respond to U S WEST's Data Requests only after the
9 Commission has ruled on the pending Joint Motion to Reject the Notice or after U S WEST has
10 complied with the Commission Orders by filing its full and complete application. All other
11 objections to the Data Requests are reserved.
12

13 DATED this 26th day of February, 1999.

14 GALLAGHER & KENNEDY, P.A.

15
16 By Michael M. Grant
17 Michael M. Grant
18 Todd C. Wiley
19 2600 North Central Avenue
20 Phoenix, Arizona 85004-3020
21 Attorneys for Electric Lightwave, Inc.

22 Original and 10 copies filed this 26th
23 day of February, 1999 with Docket Control.

24 Copies of the foregoing document mailed
25 this 26th day of February, 1999 to:

26 Paul Bullis, Esq.
27 Maureen Scott, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

1 U S WEST filed by mail a notice and sample set of these Data Requests with Docket Control on February 22,
1999.

2 Page 2, paragraph 4, June 16, 1998 Procedural Order (Emphasis supplied.)

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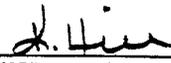

#687711 v1 - Objection

EXHIBIT B

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PETER KIEWIT, JR.
PAUL R. MADDEN
OF COUNSEL

WRITER'S DIRECT LINE
(602) 530-8514

March 9, 1999

VIA FACSIMILE AND U.S. MAIL

Charles W. Steese, Esq.
U S WEST, Inc.
1801 California Street
Suite 5100
Denver, Colorado 80202

Re: In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Arizona Corporation Commission Docket No. T-00000B-97-0238

Dear Mr. Steese:

This letter addresses various discovery issues in this proceeding and responds to your March 5, 1999 letter. Unfortunately, U S WEST didn't fax that letter and it didn't arrive in our offices until after close of business on Friday, March 5, 1999. Even further, Mike Grant was out of the office yesterday (and his secretary was out ill). As a result, we weren't apprised of your letter until today. It should also be noted that we didn't receive the March 2, 1999 procedural order until March 3, 1999. These circumstances put your March 5, 1999 letter into proper context.

ELI doesn't agree with your March 5, 1999 letter on several fronts. To start, on Monday, February 22, 1999, ELI received a first set of data requests from U S WEST in this proceeding. On February 26, 1999, ELI objected to U S WEST's data requests "given U S WEST's refusal to file, as required, its full application under Section 271." Specifically, ELI objected to the discovery request and reiterated that it "will respond to U S WEST's data request only after the Commission has ruled on the pending joint motion to reject the notice or

Charles W. Steese, Esq.
March 9, 1999
Page 2

after U S WEST has complied with the Commission orders by filing its full and complete application.”

On March 2, 1999, Chief Hearing Officer Rudibaugh issued a procedural order addressing underlying application and discovery issues. Specifically, the Hearing Officer ruled “the parties may begin general discovery regarding U S WEST’s Section 271 compliance, with more specific discovery to follow U S WEST’s supplemental filing. U S WEST will be allowed to pursue discovery to the extent necessary to demonstrate that it has met Section 271 requirements. Confidentiality arrangements may be made, where appropriate.” See March 2, 1999 Procedural Order, p. 3. This letter addresses ELI’s responses to U S WEST’s previous data requests in light of the March 2, 1999 order.

Given the Hearing Officer’s rulings on the discovery issues, ELI believes that U S WEST’s previous data requests are not valid. Many of U S WEST’s prior data requests aren’t necessary to demonstrate that U S WEST has met Section 271 requirements. Under these circumstances, it is ELI’s position that U S WEST’s existing data requests exceed the bounds of proper discovery. ELI believes U S WEST is obligated to rewrite and resubmit its data requests. In particular, U S WEST must confine its data requests to a proper scope given the Hearing Officer’s March 2, 1999 ruling. U S WEST also must make an effort to submit reasonable discovery requests that will not cause ELI to incur unnecessary expenses and burden in responding to the requests.

It should be noted that in other jurisdictions, U S WEST imposed burdensome and expensive discovery on parties like ELI. The commissions in those states prohibited such efforts. As such, U S WEST should make a good-faith effort to refine its data requests and resubmit them to ELI. In the event U S WEST insists that ELI respond to U S WEST’s prior data requests, ELI will respond to the extent U S WEST’s data requests are necessary to establish U S WEST’s Section 271 compliance. Further, ELI will need additional time to respond to such discovery requests. Under the March 2, 1999 Procedural Order, ELI and U S WEST are obligated to address and negotiate these issues in good faith. By this letter, ELI is attempting to do just that. ELI is willing to discuss these issues with U S WEST.

ELI also believes the deadlines set forth in your letter are incorrect. In an abundance of caution, however, ELI objects to U S WEST’s data requests because, among other things, U S WEST’s data requests are vague, ambiguous, overbroad and unreasonably burdensome. They involve proprietary and confidential information. Many of the data requests simply are irrelevant to the issue of U S WEST’s Section 271 compliance. All in all, U S WEST’s prior data requests exceed the bounds of proper discovery and aren’t necessary to demonstrate U S WEST “has met Section 271 requirements.”

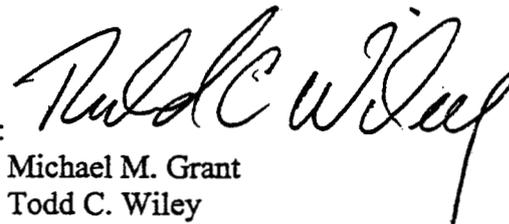
Charles W. Steese, Esq.
March 9, 1999
Page 3

Please let us know U S WEST's position and response on these issues as soon as possible. If you have any questions or comments in the meantime, simply give me a call.

Very truly yours,

GALLAGHER & KENNEDY, P.A.

By:



Michael M. Grant

Todd C. Wiley

TCW:mhh

cc: Timothy Berg, Esq. (via facsimile)
Penny Bewick

10407-0008/694159v1

EXHIBIT C

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A PROFESSIONAL ASSOCIATION

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March 12, 1999

VIA FACSIMILE
AND U.S. MAIL

Charles W. Steese, Esq.
U S WEST, Inc.
1801 California Street
Suite 5100
Denver, Colorado 80202

Re: U S WEST's First Set of Data Requests to Electric Lightwave, Inc. ("ELI")

Dear Mr. Steese:

As discussed, the purpose of this letter is to state more definitively ELI's objections and positions in relation to these Data Requests. It is offered as a good faith attempt to narrow and define the discovery disagreements between the parties as requested in the Commission's Procedural Orders. It is also offered without waiver of the general and specific objections previously raised in ELI's Objection dated February 26, 1999 and our correspondence to you dated March 9, 1999.

ELI does not take the position that U S WEST is not entitled to any discovery. Rather, the March 2 Procedural Order authorized such discovery as might be necessary "to demonstrate that [U S WEST] has met Section 271 requirements." Clearly, major portions of the First Set of Data Requests violate and/or exceed that standard. It was therefore incumbent on U S WEST to review and re-issue a revised set. Because you indicate that U S WEST disagrees with that position, we will set forth more detailed objections here.

ELI anticipates that it can provide responses to those data requests not objected to by March 24, 1999. It has limited resources which it can dedicate to this matter. Some of the data requests require searches for information which is not readily available. By voice mail, you indicated that U S WEST would only be willing to extend the response date to March 18. We have communicated that position to our client. It advises it could have only partial, incomplete responses by that date. We therefore would request again response extension to the 24th - particularly in light of the fact that U S WEST has until April 12 to file its complete Section 271 application.

As to specific data requests, we state the following:

- Data Request No. 1. ELI will respond to this data request. The response may reference complaints, problems or concerns which ELI has called to U S WEST's attention, orally, in writing or in other proceedings, concerning its existing interconnection agreements.

- Data Request No. 2. ELI provides collocation and other forecasts to U S WEST under its interconnection agreement and will provide or reference those forecasts in response to this request. It objects to any additional or special forecast, if required by the data request, as irrelevant, immaterial, vague, burdensome, speculative and proprietary.
- Data Request Nos. 3 to 12 and 14. See response to Data Request No. 1.
- Data Request No. 13. ELI will respond to this data request; primarily with reference to its complaint against U S WEST in Commission Docket No. T-0105B-98-0689.
- Data Request No. 15. Objection: the request is irrelevant, immaterial, vague, ambiguous, speculative, burdensome and calls for proprietary information. Data concerning experience "in any of the other 13 states in U S WEST's region" is clearly irrelevant to this proceeding. The primary issue in this Docket is whether U S WEST has complied with Section 271 requirements in Arizona, not, for example, whether ELI has obtained or can obtain elements, items or services from others. Without waiver of the objections and with specific reference to this data request, based on actual knowledge or experience in Arizona, ELI will provide data, if any, concerning the request subject to any vendor confidentiality provisions.
- Data Request No. 16. See objections to Data Request No. 15. In addition, ELI objects to "any analysis" as vague, ambiguous and overly broad. Without waiver, ELI will provide Arizona information where available.
- Data Request No. 17. Objection: Irrelevant, immaterial, vague, ambiguous, burdensome, calls for speculation and proprietary information. See also objections to Data Request Nos. 2 and 15. Without waiver, ELI will provide Arizona information where available.
- Data Request Nos. 18 to 20. See objections to Data Request No. 15. Without waiver, ELI will respond.
- Data Request No. 21. See objections to Data Request No. 15. ELI will attempt to provide data concerning errors in local service requests in Arizona but U S WEST already has such information in its own records.
- Data Request No. 22. See objections to Data Request No. 15. This information has previously been supplied by ELI to U S WEST in the Arizona consolidated arbitration proceeding ("OSS Costing") and the testimony, briefing and other

matters involved therein. ELI will supply Arizona responses, if any, supplementing and updating that information. See also the performance indicators and measures portion of that consolidated proceeding.

- Data Request No. 23. See objections to Data Request No. 15. The issue in this Docket is not whether ELI contends that other ILEC's are meeting any of its electronic interface needs.
- Data Request No. 24. See objections to Data Request No. 15. The issue in this Docket is not how many electronic interface orders ELI has placed with other ILECs per day over the past year.
- Data Request No. 25. See response and objections to Data Request Nos. 22 and 24.
- Data Request Nos. 26 to 29 and 32. Objection: Irrelevant, immaterial, unduly burdensome and calls for proprietary information. The issue in this Docket is not ELI's capabilities, hours of operation or the provisioning commitments ELI gives to, materials used in relation to or time per call spent with its customers.
- Data Request Nos. 30 and 31. See objections to Data Request No. 15. Without waiver, in relation to Data Request No. 30, ELI will provide Arizona information and, in relation to Data Request No. 31, ELI will provide Arizona information, if available.
- Data Request Nos. 33 and 36. See objections to Data Request Nos. 15 and 2.
- Data Request No. 34. See objections to Data Request Nos. 15 and 2.
- Data Request No. 35. Objection: irrelevant, immaterial, unduly burdensome and calls for proprietary information. The issue in this Docket is not ELI's order placement and process techniques with other ILEC's.
- Data Request No. 37. See objection to data Request Nos. 15 and 2. See also ELI's ACC certificate proceeding to which U S WEST was a party.
- Data Request Nos. 38 and 39. Objection: Irrelevant, immaterial, burdensome and calls for proprietary information. The issue in this Docket is not past and present ELI business plans. Such plans are highly confidential, very sensitive and would require extraordinary protective measures.

Charles W. Steese, Esq.
March 12, 1999
Page 4

- Data Request Nos. 40 and 41. See objections to Data Request Nos. 2 and 15. These requests are premature prior to the filing of the complete Section 271 application. However, ELI will respond preliminarily.

One final administrative matter. I'm advised that there may be a confidentiality agreement pertaining to this docket dated April of 1998. If you will forward a copy for my review that may expedite provision of information.

Please call with questions or comments concerning any of these matters.

Very truly yours,

GALLAGHER & KENNEDY

A handwritten signature in black ink, appearing to read "Michael M. Grant", with a long horizontal flourish extending to the right.

By
Michael M. Grant

EXHIBIT D

STATE CORPORATION COMMISSION
BEFORE THE NEW MEXICO STATE CORPORATION COMMISSION
FILED

IN THE MATTER OF THE
INVESTIGATION CONCERNING
U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH
SECTION 271(c) OF THE
TELECOMMUNICATIONS ACT OF 1996

'98 SEP 21 PM 1 18

DOCKET NO. 97-106-TC

ORDER RELATING TO OUTSTANDING DISCOVERY MOTIONS

THESE MATTERS came before the New Mexico State Corporation Commission ("SCC" or the "Commission") on numerous discovery motions, objections, and related memoranda that have been filed in response thereto. This docket was initiated by the Commission on its own motion and pursuant to its Order filed March 14, 1997. U S West Communications, Inc. ("U S WEST") on June 5, 1998, filed its Notice of Intention to File Section 271(c) Application with the FCC and Request for Commission to Verify U S WEST Compliance with Section 271(c) of the Telecommunications Act of 1996.¹ ("U S WEST 271 Application") Hearings are scheduled to begin on October 1, 1998. There follows a brief summary of the pending discovery motions before the Commission that require decision at this time.

AT&T Communications of the Mountain States, Inc., ("AT&T") served its First Set of Data Requests on U S WEST on July 6, 1998. On July 11, 1998 U S WEST filed its objections to AT&T 's first set of data requests. On July 14, 1998, U S WEST filed its First Set of Data Requests to AT&T, MCI Telecommunications Corporation ("MCI"), Brooks Fiber Communications of New Mexico, Inc. ("Brooks Fiber"), ACSI Local Switched Services, Inc.

RECEIVED
AT&T Corp. Legal - Denver

¹ 47 U.S.C. § 271, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) codified at 47 U.S.C. §§ 151 et seq

SEP 23 1998

rec'd fax copy 9/21/98 PF

OTHER INITIALS _____
RECEIVED BY MAIL _____
INITIALS _____
OTHER INITIALS _____

d/b/a e.spire Communications ("e.spire"), and Sprint². On July 16, 1998 AT&T filed a Motion to Compel Responses to Discovery by U S WEST. On July 17, 1998 e.spire and Brooks Fiber filed a Joint Motion for Protective Order "relieving them from their obligation to respond to the burdensome and oppressive" nature of all of U S WEST's discovery requests. Also, AT&T moved to quash U S WEST's first set of data requests on July 21, 1998.

U S WEST filed its Response to AT&T's Motion to Compel on July 22, 1998 while Brooks Fiber and MCI filed their objections and responses to U S WEST's first set of data requests. Then on July 23rd U S WEST moved to compel responses to its first set of data requests. The Commission then filed its Notice of Hearing and Procedural Order on Joint Motion for Protective Order and AT&T's Motion to Quash wherein responses of e.spire, Brooks Fiber, and AT&T to U S WEST's first set of data requests were held in abeyance.

On July 24, 1998 the Commission filed its Order on AT&T's Motion to Compel Responses to Discovery by U S WEST in which we directed U S WEST to respond to all of AT&T's requests that had not been objected to on grounds that they were privileged. For documents or communication which U S WEST claimed were privileged, we directed U S WEST to provide a privilege log for those materials.

On July 30, 1998 U S WEST filed its Response to AT&T's Motion to Quash and Motion to Compel Responses to Discovery. That same day U S WEST also filed its Response to Joint Motion for Protective Order and Motion to Compel Answers to Data Requests Served on e.spire, Brooks Fiber, and MCI. On July 31, 1998 U S WEST filed the Privilege Log as we requested in our July 24th Order.

² Discovery requests were also filed with LCI International Telecom Corp. and GST Telecom New Mexico, Inc., intervenors that have withdrawn from this docket. See, Orders filed on July 17 and July 20, 1998, respectively.

On August 3rd MCI filed its response to U S WEST's motion to compel. And on August 6, 1998 AT&T filed its Supplemental Memorandum in Support of Its Motion to Compel Responses to Discovery by U S WEST. Then, on August 12, 1998 AT&T filed a response to U S WEST's motion to compel discovery. On August 18th U S WEST responded to AT&T's Supplemental Memorandum that was filed on August 6th.

On August 21, 1998 U S WEST filed its Motion to Set Pending Discovery Motions for Hearing. And on August 24th e.spire filed its Reply to U S WEST's Response to Joint Motion for Protective Order and Motion to Compel Responses. On September 11, 1998 U S WEST filed a Renewed Motion Requesting a Hearing and Oral Argument and Supplemental Memorandum in Support of Motions to Compel ("U S WEST's Renewed Motion"). On September 17, 1998 AT&T filed its Response to U S WEST's Renewed Motion.

The Commission having considered the filings described above, and otherwise being fully advised, **FINDS, CONCLUDES, AND ORDERS:**

PROCEDURAL BACKGROUND – FINDINGS OF FACT

1. Through this proceeding, U S WEST begins the process to seek approval, pursuant to the federal Telecommunications Act of 1996 ("federal act"), to provide interLATA or long-distance services originating from New Mexico.

2. The Federal Communications Commission ("FCC") must act within ninety days on any application U S WEST files seeking this approval. *See* Section 271(d)(3) of the federal act. Before making its determination, the FCC must consult with the Commission to ascertain whether U S WEST meets the requirements specified in Section 271³ that are the prerequisites for being allowed entry into the interLATA market for calls originating in New Mexico. *See*

Section 271(c)(2)(B) of the federal act, which lists the 14-point checklist criteria that must be reviewed.

3. U S WEST has stated in its application that it plans to seek Section 271 approval pursuant to the provisions of Section 271(c)(1)(A) of the federal act. U S WEST 271 Application at 1. This is what is termed a "Track A" request.⁴ It requires that U S WEST prove that "it has entered into one or more binding agreements that have been approved under section 252 . . . [of the federal act] . . . specifying the terms and conditions under which the . . . company [U S WEST] is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers. . . ." Section 271(c)(1)(A) of the federal act.

4. The unaffiliated competing providers that U S WEST asserts it has entered into such binding agreements with are Brooks Fiber, e.spire and GST, which are also referred to as the "facilities-based Competing Local Exchange Companies" ("facilities-based CLECs"). *See*, U S WEST 271 Application at 15 and 17.

5. The Commission has adopted procedural rules to govern Section 271 applications. Procedural Order filed July 11, 1997. This proceeding is being conducted pursuant to those procedures. They include expedited filing requirements so the Commission can respond promptly and on an informed basis to the FCC when it conducts its 90 day review and the required consultation with this Commission pursuant to Section 271 of the federal act.

Id.

⁴ Section 271(c)(1) of the federal act provides two tracks for an RBOC, or Regional Bell Operating Company, to demonstrate that its local market is open to competition, Track A and Track B. In contrast to a Track A request, qualification under Track B would permit an RBOC, like U S WEST, to enter the interLATA market in its region

6. As noted above, a number of discovery motions have been filed in this proceeding. Hearings are scheduled to begin on October 1, 1998, and the discovery motions need to be resolved for the case to proceed on schedule. The purpose of this Order is to resolve the pending discovery disputes.

7. As for discovery that AT&T is seeking from U S WEST, the issues before the Commission have been simplified because U S WEST has agreed to "produce all documents responsive to the remaining 22 discovery requests" referenced in the Commission's July 24, 1998 Order. *See*, U S WEST's Response to AT&T's Supplemental Memorandum in Support of Its Motion to Compel Discovery by U S WEST, filed August 18th, ("U S WEST 8/18 Response"). Therefore, the only issue remaining before the Commission relating to AT&T's July 16th motion to compel is whether the 25 documents listed on the Privilege Log⁵ supplied by U S WEST in response to our July 24th Order are discoverable.

8. The remaining 25 documents that U S WEST seeks to shield from discovery relate to six of AT&T's data requests (Request Nos. 018, 037, 038, 041, 042, and 074). U S WEST maintains that the information sought in those requests is protected by the attorney-client privilege and the attorney work-product doctrine because the documents are expert reports commissioned by U S WEST attorneys for the purpose of evaluating U S WEST's compliance with the 14-point check-list and, therefore, they are documents prepared in anticipation of litigation that contain mental impressions of U S WEST's attorneys. U S WEST also argues that the documents are

even if no unaffiliated competing provider has requested access and interconnection to network elements provided by the RBOC pursuant to the federal act and FCC Rules.

⁵ The Privilege Log is Confidential and will not be attached to this order.

"immune" from discovery because they were prepared by non-testifying experts who were retained in anticipation of litigation and that, in the alternative, they are protected from discovery under the "corporate self-evaluation privilege." See, U S WEST 8/18 Response at 2.

9. AT&T, in its Supplemental Memorandum in Support of Its Motion to Compel Responses to Discovery by U S WEST, filed August 6, 1998, ("AT&T Supplemental Memorandum"), argues that 20 of the 25 documents are discoverable because they are central to the determination of whether an Incumbent Local Exchange Carrier ("ILEC") provides nondiscriminatory access to OSS functions and meets the requirements of Section 271, including the 14-point checklist. AT&T argues that some of the documents which U S WEST describes as expert reports commissioned by U S WEST attorneys to evaluate U S WEST's compliance with the 14-point checklist are not protected by the attorney-client privilege because they do not represent communications made for the purpose of facilitating the rendition of professional legal services. Furthermore, AT&T asserts that although the attorney-client privilege insulates communications from disclosure, it does not protect the disclosure of underlying facts that are communicated to the attorney. AT&T also argues that the attorney work-product doctrine is inapplicable because the documents were investigations for U S WEST's own purposes that were prepared in the ordinary course of business and that the documents are not otherwise obtainable through other means without undue hardship.

10. AT&T argues that, according to the Privilege Log, only eight of the documents that AT&T would compel U S WEST to disclose are some form of communication. The other seventeen documents consist of proposals, agreements or assessments or reports regarding the OSS. AT&T asserts that six of the eight communications, as they are described on the Privilege Log, do not sufficiently describe the function of the attorney who is party to the document.

AT&T also contends that one of the remaining documents is not privileged because the communications were made by an attorney who was acting in his capacity as a businessperson rather than as counsel. AT&T Supplemental Memorandum at 12 and 13.

11. U S WEST has also sought discovery from the CLECs that are parties to this proceeding. The facilities-based CLECs, Brooks Fiber, and e.spire, as well as the non-facilities-based CLECs, AT&T, MCI, and Sprint, seek blanket protection from U S WEST's discovery requests. AT&T did not deny U S WEST's right to discovery in this proceeding but objected to the discovery requests on the basis of their timing and because the requests seek disclosure of proprietary information. Brooks Fiber, e.spire, and MCI objected on grounds that U S WEST's discovery requests seek production of information that is irrelevant to this proceeding or is unlikely to lead to the discovery of admissible evidence. Joint Motion for Protective Order, July 17, 1998. MCI responded to some of U S WEST's discovery requests and challenged others as being irrelevant, "burdensome" and improper to the extent that some requests seek disclosure of proprietary information. MCI Response to Motion to Compel, filed August 3, 1998.

12. U S WEST argues that its discovery requests are relevant because they seek information relating to AT&T's experience in ordering and provisioning of U S WEST's services and whether AT&T intends to enter the local phone market. U S WEST's Response to AT&T's Motion to Quash and Motion to Compel Discovery, filed July 30, 1998.

13. U S WEST also denies the challenges raised by Brooks Fiber, e.spire, and MCI in their Joint Motion for Protective Order on grounds that U S WEST is entitled to information relating to their ability to order and provision U S WEST's services. U S WEST's Response to

Joint Motion for Protective Order and Motions to Compel Answers to Data Requests served on e.spire, Brooks Fiber and MCI, filed July 30, 1998.

14. AT&T and MCI have responded to some of U S WEST's discovery requests, but refused to respond to others.

15. Upon consideration of the foregoing, the Commission finds that briefing of these issues is adequate and that these discovery disputes can be most efficiently resolved without a hearing.

CONCLUSIONS OF LAW

16. Since U S WEST initiated this proceeding, it bears the burden of proof. "The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue." *In the Matter of ISDN*, No. 23,856, slip op. at 16 (N.M. S. Ct. September 15, 1998) (internal citations omitted), quoting from *Penecost v. Hudson*, 57 N.M. 7, 9, 252 P.2d 511, 512 (1953).

17. Section 271 places on the applicant, U S WEST, the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934 as Amended, To Provide In-Region, InterLata Services In Michigan*, CC Docket 97-137 Memorandum and Order, (Released August 19, 1997) at ¶ 43 ("*Ameritech Michigan FCC 97-137*"); *In the Matter of the Application of BellSouth Corporation Pursuant to Section of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208. Memorandum Opinion and Order, (Released December 24, 1997). ("*BellSouth South Carolina FCC 97-208*").

18. The 14-point competitive checklist set forth in Section 271(c)(2)(B) of the federal act requires review of more than simply the terms in the interconnection agreements. Much of the focus of the 14-point checklist is on whether the applicant, U S WEST, is providing nondiscriminatory access and services to the CLECs. *Ameritech Michigan FCC 97-137* at ¶ 131. This includes nondiscriminatory access to network elements; nondiscriminatory access to specified equipment and rights-of-way; nondiscriminatory access to 911, directory assistance and operator call completion services; nondiscriminatory access to telephone numbers for assignments; nondiscriminatory access to data bases for call routing and completion; and nondiscriminatory access to services or information to implement local dialing parity. *See Ameritech Michigan FCC 97-137* at ¶ 132.

19. Nondiscriminatory treatment in the context of a Section 271 case review means proving that each CLEC is provided at least the same access and treatment that the Bell operating company, in this case U S WEST, provides to its own operations and customers. *See*, Section 271(c)(2)(B)(i), which requires interconnection pursuant to Section 251(c)(2), which in turn specifies that the BOC's duty is to provide interconnection "that is at least equal in quality to that provided by the [BOC] to itself or to . . . any other party." Furthermore, "[f]or those OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness." *Ameritech Michigan FCC 97-137* at ¶ 141; *Iowa Utilities Bd v. FCC.*, 120 F.3d 753, 812, *cert.granted*, - U.S. -, 118 S.Ct. 879, 139 L.Ed.2d 867 (1998).

20. The discovery motions pending in this proceeding can be analyzed in two different categories: (a) the discovery sought from U S WEST by AT&T as to which U S WEST objects by asserting that the remaining 25 documents in dispute are privileged and confidential and should not be disclosed; and (b) the discovery that U S WEST seeks from the intervenor CLECs.

A. AT&T'S DISCOVERY REQUESTS OF U S WEST

21. As noted above, the remaining discovery dispute between AT&T and U S WEST revolves around six requests and whether three consultant reports and the 25 documents or communications relating to them are immune from discovery. *See*, U S WEST 8/18 Response at 4.

22. The six requests, AT&T request numbers 018, 037, 038, 041, 042 and 074, essentially seek information on all outside consultant and internal testing conducted by or for U S WEST of its OSS interfaces with CLECs. This information is critically important to the evaluation of U S WEST's Section 271 application. It goes to the heart of whether U S WEST is providing nondiscriminatory access under the 14-point checklist specified in the federal act. *See*, Section 271(c)(2)(B); *Ameritech Michigan FCC 97-137* at ¶ 137; *BellSouth South Carolina FCC 97-208* at ¶¶ 103 and 118 (recognizing essential nature of having evidence on ILEC's internal operations for purposes of making relevant comparisons to services provided to CLECs.)

23. Indeed, it may be argued that perhaps the most effective way an informed determination can be made on whether U S WEST is providing nondiscriminatory treatment to its competitors, and providing them with at least the same level of service U S WEST provides itself and its own customers, is to understand and analyze the U S WEST OSS operations with

precisely the type of information that is sought in these discovery requests. Likewise, it is only U S WEST that has access to the critical information about its own services and the treatment provided its own customers. Therefore, for this Commission to reach a fully informed decision in this case, it is essential to review documents that analyze U S WEST's OSS operations and compare the services U S WEST provides itself and its own customers against the services that are provided the CLECs. That is exactly the kind of information these disputed discovery requests seek.

24. Despite the relevance of the requests, U S WEST argues that the three consultant reports in dispute, and the communications relating to them, are immune from discovery because of "the attorney-client privilege, the attorney work-product doctrine, the prohibition of discovery of materials prepared by non-testifying experts, and the self-evaluation privilege." U S WEST 8/18 Filing at p. 2.

25. The attorney-client privilege and the attorney work-product doctrine are often thought of as closely related and analyzed jointly.

26. The attorney-client privilege protects the confidentiality of and seeks to encourage "full and frank communication communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). See State v. Valdez, 95 N.M. 70 (N.M. 1980). U S WEST correctly notes, and the United States Supreme Court recently confirmed, "the attorney-client privilege is one of the law's oldest and most venerable privileges." See, Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998); U S WEST 8/18 Response at 9. It protects the critically important and direct relationship between the attorney and the client.

27. However, “[t]he attorney-client privilege only applies to communications between the attorney and the client . . . , [and] [t]he underlying facts of an action are not protected by the attorney-client privilege.” 6 Moore’s Federal Practice, Section 26.49[1] at (1997 Ed.). “In addition, the privilege does not extend to information and statements obtained by an attorney from . . . third persons.” Wright, Miller & Marcus, Federal Practice and Procedure, Section 2017 (1994 Ed.).

28. The attorney work-product doctrine has been succinctly summarized as follows:

[A] party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party’s representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case, and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Moreover, in ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” 6 Moore’s Federal Practice, Section 26.70[1] (1997 Ed.).

See, Hickman v. Taylor, 329 U. S. 495 (1947). And, as with the attorney-client privilege, the work-product doctrine “does not protect facts concerning the creation of work-product, or facts contained within work-product.” 6 Moore’s Federal Practice at Section 26.70[2][a].

29. U S WEST’s affidavits emphasize that the three consultant reports were prepared at the direction and under the supervision of in-house attorneys. Bennett Affidavit attached to U S WEST 8/18 filing; Fitzsimons Affidavit attached to U S WEST’s Response to AT&T’ Motion to Compel filed July 21, 1998. The U. S. Supreme Court decided in the leading Upjohn case that communications with in-house attorneys should be entitled to the same protections under the attorney-client privilege as communications with outside counsel.

Upjohn, 449 U. S. at 389-390. There may be some confusion about whether the U S WEST employees here were acting as attorneys or in other capacities as corporate employees. U S WEST's Response to AT&T' Motion to Compel filed July 21, 1998, Fitzsimons Affidavit at ¶

2. In any event, it is undisputed that the three consultant reports in question were not prepared directly by corporate employees. They were prepared by outside third parties under contract with U S WEST. As such, the communications made may not be accurately characterized as direct and privileged attorney-client communications.

30. Reports prepared by experts, though they may be commissioned by an attorney acting in his capacity as a counselor, do not constitute privileged "communications" to the extent that they "consist of systematic analyses of data and cannot be considered the type of statement traditionally protected as a 'communication.'" *Southern Bell Telephone and Telegraph Co.*, 632 So.2d 1377, 1384 (Fla. 1994). Furthermore, as noted above, even to the extent the documents are attorney-client communications, underlying relevant facts in those document should be disclosed.

31. U S WEST nevertheless asserts that as professionals who were assisting attorneys in developing information in anticipation of litigation, the work of these consultants should be protected absolutely under the attorney-client privilege. Assuming without deciding that the consultant reports fall within the attorney-client privilege, it still remains to be determined whether the reports contain underlying relevant facts that should be disclosed. This determination requires an in camera review of the documents. See, *Schein v. No. Rio Arriba Elec. Co-op. Inc.*, 122 N.M. 800, 806, 932 P.2d 490, 496 (1997); *Fed. Deposit Ins. Corp. v. United Pac. Ins. Co.*, 1998 WL 526880 (10th Cir., Utah) slip op. at n.6; *S.E.C. v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997).

32. The consultant reports as described do appear to constitute attorney work-product, whether they were prepared for a corporate employee acting as a lawyer or a corporate employee who directed their preparation to assist a lawyer in preparation for litigation. We note, however, that under the definition of work-product, these reports cannot be considered to have been commissioned solely for the purpose of litigation since the recommendations contained within will inform technical specialists as to upgrades and modifications of facilities, network elements, standards, interfaces, and procedures necessary to provide the interconnectivity and access required by the federal act. *Southern Bell*, 632 So.2d at 1384-1385. Nevertheless, even as attorney work-product, the underlying facts contained in the consultants' reports that may be reasonably segregated from attorney mental impressions, opinions and legal theories should be disclosed. 6 Moore's Federal Practice Section 26.70[2][a]. Again, this determination can only be made after an in camera review of the documents.

33. U S WEST notes that to the extent the work-product doctrine applies, the consultant reports should not be disclosed unless the requesting party "has a substantial need for the reports and is unable to obtain substantially equivalent information by other means without undue hardship." 1998 NMRA Rule 1-026; U S WEST 8/18 Response at 22. Similarly, in pressing its argument that the reports should not be disclosed because they were prepared by experts who will not testify, U S WEST states that such reports require "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." 1998 NMRA Rule 1-026(B)(6); U S WEST 8/18 Response at 24.

34. These showings have been made in this case. The special circumstances of a Section 271 case analysis are unique because they essentially require a comparison of the OSS operations provided to CLECs with the internal OSS that U S WEST provides itself and its customers. *Ameritech Michigan* FCC 97-137 at ¶¶ 138, 161. The only way this determination can be made is by comparing the two types of services and looking at the data and analysis relevant to each. Only U S WEST has access to this information because only U S WEST has the data about its own operations and customer services with which to make the required comparison. Likewise, only the consultants retained by U S WEST itself would be in the position to have unfettered access to the critically important internal information about the services U S WEST provides itself and its own customers. In these circumstances, the requesting party and all intervenors granted access to the same information do have a substantial need for the reports and they are unable to obtain any substantially equivalent information by other means without undue hardship. There simply is no other realistic way to obtain the relevant facts about U S WEST's internal operations, and without these the required comparisons cannot be made.

35. For the same reasons, these seem to be precisely the type of exceptional circumstances that the rules of civil procedure contemplate before requiring disclosure of the facts or opinions held by an expert who is not expected to be called as a witness at trial. Fed. R. Civ. Pro. 26(b)(4)(B); *See, Braun v. Lorillard, Inc.*, 84 F.3d 230, 236 (7th Circ. 1996). It is impracticable if not impossible for any other party besides U S WEST to have access to the internal operations of U S WEST that must be considered before any informed conclusion can be reached about whether U S WEST is providing nondiscriminatory access to its OSS operations and related services as required under Section 271.

36. Because New Mexico courts have not yet ruled that there is a corporate self-evaluation privilege that applies to documents such as those in dispute here, we decline to address the merits of this argument. We nevertheless assume, without deciding, that the same factual disclosure requirements that were noted in the privilege discussion above would apply with at least equal force to the corporate self-evaluation privilege were it to be recognized in New Mexico.

B. U S WEST'S DISCOVERY REQUESTS OF THE CLECs

37. U S WEST submitted a set of discovery requests to each of the CLEC parties listed above. Each of these intervenors received 87 requests.⁶ These 87 data requests are identical and request a considerable amount of information from the intervenors about operational support systems, performance measures, local service entry, and other matters.

38. U S WEST argues essentially that the discovery it seeks from the intervenor CLECs is relevant to the extent it shows that any Section 271 operational shortfalls are not its fault. The CLECs object to the discovery. They argue that their operations are totally irrelevant to a Section 271 case, and that it is only what U S WEST provides in interconnection and operational support systems that matters.

39. As stated above, the burden in a Section 271 case does rest squarely on the applicant. *Ameritech Michigan* FCC 97-137 at ¶ 43. Discovery should be allowed to proceed if it will likely produce relevant evidence or it appears reasonably calculated to lead to the admission or discovery of relevant evidence.

⁶ The only exception was AT&T. It received 88 requests. The difference is Request No. 72 to AT&T, which is discussed *infra*, at ¶ 81. The analysis in this decision is based on the identical 87 requests submitted to all the other CLECs.

40. On the other hand, discovery should not be overly broad, unduly burdensome, or expensive. *See, e.g., e.spire's Reply to U S WEST's Response to Joint Motion for Protective Order and Response to Motion to Compel Responses at ¶ 8; Fed. R. Civ. Pro. 26(b)(2)(ii).*

41. Many of U S WEST's discovery requests are designed to elicit information regarding the capability of the CLECs' internal OSS. U S WEST also argues that if a CLEC's OSS are not capable of handling electronic interfaces with U S WEST's OSS, then U S WEST should be afforded the opportunity to "assert that its own OSS could have no negative effect upon the customer experience." U S WEST's Renewed Motion at 7. The Company adds "[t]o the extent that U S WEST learns that Intervenors have no [EDI] system, it would help to establish that Intervenors have no present intention of entering the local market through use of U S WEST's systems." *Id.* at 8.

42. In explaining its need for the information regarding the time a CLEC spends placing an order using a non-EDI or graphical user interface, (Request Nos. 26 and 28), U S WEST explains that "access to U S WEST's OSS is supposed to protect against a negative customer experience. To the extent that an intervenor's systems are either the problem or contain just as much delay, U S WEST would be able to assert that its systems are not affecting the customer experience." *Id.* at 10-11.

43. The internal methods of the CLECs are not, however, at issue in this case. Since this is a Track A application, it is U S WEST that must show that "[i]nterconnection [is provided] in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." Section 271(c)(2)(B)(i).

44. Subsection 251(c)(2)(C) requires incumbent local exchange carriers like U S WEST to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ."

45. U S WEST's submission suggests that if the CLECs are not in the position to take advantage of EDI,⁷ then ~~U S WEST~~ is not obligated to provide the capability. We disagree. As noted by the U. S. Court of Appeals for the Eighth Circuit: "While the phrase 'at least equal in quality' leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal--not superior. In other words, it establishes a floor below which the quality of the interconnection may not go." *Iowa*, 120 F.3d at 813. (emphasis added).

46. In the Commission's AT&T Arbitration Case, we addressed the provision of operational support systems and electronic interfaces. We found that the federal act requires "U S WEST [to] take the necessary steps to create electronic interfaces that will provide AT&T and other CLECs with ordering processes that are equal to the ordering processes U S WEST has available to itself." *In the Matter of the Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc. and U S WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252*, SCC Docket No. 96-411-TC ("SCC Docket No. 96-411-TC"), at ¶ 386.

⁷ EDI is a form of electronic interface between computer systems. In the AT&T arbitration case, we stated that "Electronic interfacing involves the implementation of telecommunications application programs that would allow U S WEST programs to communicate directly with AT&T programs without human intervention." SCC 96-411-TC at ¶ 376.

47. Based on our reading of the federal act, our order in SCC Docket No. 96-411-TC, the *Ameritech Michigan* FCC 97-137 Order, and the Eighth Circuit's decision in *Iowa*, we conclude that any internal matter such as how a CLEC currently initiates an order on its own system is of no relevance. It is U S WEST that has to satisfy the statutory requirement of showing that it has provided access to its operational support systems that is at least equal in quality to those levels at which it provides these services to itself. What the CLECs do in their own internal operations is not relevant to a Section 271 proceeding. See *Notice of Commission Action on Discovery Objections*, Docket No. D97/5/87 (Montana Public Service Commission) (June 26, 1998) ("Montana Commission Order") where in an almost identical proceeding the Montana Commission concluded that "[i]nformation of CLEC systems is not relevant to the issue of whether U S WEST has met the requirements of [Section] 271, nor is the information requested likely to lead to the discovery of relevant information." (Slip Op. at 2.)⁸

48. The FCC stated in its *Ameritech Michigan* FCC 97-137 decision that "[f]or those OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness." *Ameritech Michigan* FCC 97-137, ¶139.

49. Nondiscriminatory access is not defined in terms of providing no worse access to the operational support systems than a CLEC provides to itself. It is the BOC's, not the

⁸ We respectfully note but decline to follow the approach taken by the Special Master and the Public Service Commission in Nebraska in that Section 271 proceeding. The lack of any written opinion with analysis from Nebraska is significant. Further, the transcript reference submitted by AT&T on the special master's comments

CLEC's, system that is relevant. Since nondiscriminatory access to U S WEST's OSS is the clear threshold test for discrimination, we find that data requests that seek information about how CLECs use their own OSS to serve their own retail customers to be irrelevant to the subject matter in the pending case. As the Montana commission correctly noted, "CLECs' systems, processes and practices do not have to meet the [Section] 271 standards and thus are not acceptable to serve as benchmarks for U S WEST's performance." Montana Commission Order at 2. Stated most simply, if a CLEC takes two months or two minutes to internally process an order on its own network is of no relevance to this proceeding. Rather, the legal test for nondiscrimination is whether access to U S WEST's OSS is provided by U S WEST in a nondiscriminatory manner.

50. We have reviewed the U S WEST discovery requests against the above-described general standards and find that the following requests are not likely to lead to the discovery of admissible evidence or are overly broad or burdensome: U S WEST Request Nos. 1-15, 17, 20, 28, 30, 32-42, 48-52, 54(c), 54(d), 55-56, 59, and 75-87.⁹

51. For example, Discovery Request No. 1 states: "For each state in which [the CLEC] has operations and is providing customers with telecommunications services, please identify the electronic interfaces [the CLEC] uses to support the services it provides." U S WEST contends that this request is "highly relevant" because it "asks the Intervenors if they intend to commit to work with U S WEST to develop a production ready EDI interface and, if so, when." See U S WEST Renewed Motion at 12.

indicates a hesitation to review particular discovery requests for relevance. AT&T Response to U S WEST's Renewed Motion, filed September 17, 1998 at 5 and 6.

⁹ See, n. 5 and n. 9.

52. We disagree. The request asks about the CLECs' current practices and makes no mention of the CLECs' willingness to commit to work with U S WEST to develop a production ready EDI interface. Furthermore, the internal electronic interfaces used by the CLECs are not at issue in this proceeding. This is not likely to lead to admissible evidence because "it is [U S WEST's] practices that are under scrutiny in this proceeding, not the practices of CLECs." See e.spire's Reply to U S WEST's Response to Joint Motion for Protective Order and Response to Motion to Compel Responses at ¶ 11.

53. U S WEST offers the same explanation for Request No. 30. U S WEST contends that this request is "highly relevant" because it "asks the intervenors if they intend to commit to work with U S WEST to develop a production ready EDI interface and, if so, when." U S WEST Renewed Motion at 12.

54. At Request No. 30, U S WEST asks for information regarding the identity of who developed the CLEC's electronic interfaces with any ILECs, the time it took to develop the interfaces, and "the total cost incurred to develop the interface." U S WEST asserts that the purpose of this request is to ascertain if the CLECs will work with U S WEST to develop a production ready EDI interface. U S WEST's Renewed Motion at 12.

55. As stated above, however, the relevant issue is the degree to which U S WEST is providing nondiscriminatory access to its OSS. The work a CLEC has done to develop its own electronic interfaces is not relevant.

56. Through Discovery Request No. 41, U S WEST asks the CLECs if they intend to commit to the availability of a production-ready OSS EDI for their own residential and small business customers. Again, however, the relevant issue is the degree to which U S WEST is providing nondiscriminatory access to its OSS, not the internal practices of the CLECs.

57. In Request No. 10, U S WEST asks if the CLEC has a "real time order operational support system that [CLEC] service representatives use to place customer service requests or local service requests or any other requests for local telecommunications products or services." Once again, U S WEST misconstrues the focus of this Section 271 case. The issue in this proceeding is not the system used by the CLEC; rather, U.S WEST must show that its OSS offers nondiscriminatory access to unbundled network elements and that the "OSS functions provided to competing carriers ... are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings." *Ameritech Michigan* FCC 97-137 at ¶139. See also *Ameritech Michigan* FCC 97-137 at ¶141.

58. For the same reason, U S WEST's motion to compel responses to Request Nos. 11 through 15 is denied.

59. In denying Request Nos. 10 through 15, we emphasize that that these requests were not limited to information that addressed the OSS used to interface with U S WEST, the ILEC at issue in this case. Where relevant information regarding direct interfaces between U S WEST and a CLEC has been requested, such as in Request Nos. 18, 22, 31, and 34, this Commission has concluded that the information should be provided by the CLEC. This information might reasonably lead to the introduction of relevant evidence about whether and the extent to which U S WEST is offering nondiscriminatory access as required under Section 271.

60. With regards to the information sought at Request Nos. 47 and 53, U S WEST should have information regarding its own communications with the CLECs. If U S WEST does not have the requested data, insofar as the requests concern its performance and contacts with the CLECs, U S WEST is instructed to contact the CLECs for the requested information.

U S WEST is not required to reissue this request. Rather, the CLEC is required to provide the requested information if U S WEST states that it does not have the information.

61. The queries about a CLEC's relationship with other ILECs as sought in Request Nos. 47 and 53 are not expected to provide information that is likely to lead to admissible evidence because it is only U S WEST's practices that are relevant to the subject matter of this proceeding. Therefore, information sought about other ILECs in these requests should not be provided.

62. U S WEST has requested information about the CLECs' contacts with U S WEST (e.g., Request Nos. 77-87). This information should also already be in the hands of U S WEST.

63. U S WEST has requested information about the CLECs' internal performance standards (Request Nos. 48-52). U S WEST argues that these requests seek relevant information because: "To the extent that Intervenors utilize such performance data, it may establish that the service that U S WEST provides is better than that which the Intervenor provides its own customers." U S WEST's Renewed Motion at 14.

64. Once again, however, the issue in this proceeding is not a CLEC's own performance standards. Rather, U S WEST must show that its OSS offers nondiscriminatory access to its unbundled network elements and that the "OSS functions provided to competing carriers are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings . . ." *Ameritech Michigan FCC 97-137* at ¶ 139.

65. Request No. 28 asks the intervenors for data on how long it takes a CLEC representative to key an order into the CLEC's legacy system for different types of orders. U S

WEST contends that this information would help it determine if "an intervenor's systems are either the problem or contain just as much delay . . ." U S WEST's Renewed Motion at 11.

66. We disagree. The legacy systems used by the CLECs are not at issue in this proceeding. This is not likely to lead to admissible evidence because "it is [U S WEST's] practices that are under scrutiny in this proceeding, not the practices of CLECs." e.s.pire's Reply to U S WEST's Response to Joint Motion for Protective Order and Response to Motion to Compel Responses at ¶ 11.

67. In Request Nos. 72-74, U S WEST asks the CLECs to speculate about the effects of U S WEST's entry into the long distance market. This proceeding is being conducted in New Mexico because the Federal Communications Commission has an obligation to consult with us regarding U S WEST's petition to enter the interLATA market. The FCC is directed to consult with us "to verify the compliance of the Bell operating company with the requirements of subsection (c)." §271(d)(2)(B). As noted above, subsection (c) identifies a 14 point checklist that U S WEST must satisfy. The likely impact of US WEST's operations on the interLATA market is not one of those 14 points. However, the likely impact of U S WEST's entry on the interLATA market may be part of the public interest criterion that is considered by the Federal Communications Commission when it evaluates whether to grant U S WEST's application. §271(d)(3)(C).

Likewise, this Commission is not precluded from considering whether the granting of U S WEST's petition to the FCC is in the public interest. A few parties have requested that we make a finding on this topic. For example, the State Attorney General's witness states that "The FCC has the duty to confer with the New Mexico State Corporation Commission on whether U S WEST has met the requirements of Track A and the terms of the competitive

checklist in New Mexico. The Commission also has the prerogative to advise the FCC on whether granting the application will serve the public interest." Testimony of Ronald Binz on behalf of the Attorney General of New Mexico, July 27, 1998, at 14. Also, U S WEST requests an order from this Commission in which, among other things, we "[a]dvis[e] the FCC that it would be in the public interest of the State of New Mexico for the FCC to grant U S WEST authority to enter the interLATA long distance market in this state." Direct Testimony of Mary S. Owen, U S WEST, June 2, 1998 at executive summary.

At this juncture we do not want to preclude ourselves from addressing the issue of whether the granting of US WEST's petition to provide interLATA services is in the public interest. Therefore, the parties are required to provide responses to Request Nos. 72 - 74.

68. The CLEC parties are required to provide responses to the following U S WEST Discovery Requests: Nos. 16, 18-19, 21-26, 29, 31, 44, 54(a), 54(b), 60, 61 and 63-74 as explained infra.

69. As stated above, the intervenening CLECs have objected to some of U S WEST's discovery requests because they seek disclosure of proprietary information. Given the Protective Order filed in this proceeding, these objections have no merit.

70. We require the CLECs to provide certain information regarding their OSS interface needs that may impact directly upon U S WEST. The Federal Communications Commission has stated: "The Commission will examine operational evidence to determine whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle reasonably foreseeable demand volumes." *Ameritech Michigan* FCC 97-137 at ¶ 138. Therefore, the type of information requested by U S WEST at, for example, Request Nos. 18, 19, 44, 57, and 58, are relevant and may be expected

to lead to the admission of relevant evidence in this proceeding regarding reasonably anticipated future demand.

71. Similarly, in assessing the reasonably foreseeable demand issue, the CLECs should respond to Request Nos. 63-71, but only to the extent the requests seek information about U S WEST's 13-state region. All of these requests appear reasonably related to assessing the demands that may be placed on U S WEST for effective competition in the local market in New Mexico, and that is the focus of this Section 271 inquiry.

72. If a CLEC does not provide the type of information requested at Request Nos. 18, 19, 44, 57, 58, and 63-71, then the Commission will consider such non-responsiveness when weighing the CLEC may not submit testimony to the effect that U S WEST's OSS does not meet the CLEC's speculative, future needs. That is, in order to determine if U S WEST's OSS meets the "reasonably foreseeable demand volumes" of the CLECs, the CLECs must identify those needs. If a CLEC fails to identify those needs, the Commission may decide to discount the probity of evidence offered by the non-responsive CLEC regarding the inadequacy of U S WEST's OSS to satisfy future demand.

73. When responding to Request No. 58, the CLEC is only required to provide information regarding its reasonably foreseeable demand for use of U S WEST's systems for pre-ordering, ordering, billing, maintenance and repair functions. We believe this clarification is necessary since U S WEST did not indicate what activities were to be included in the calculation of the "total demand."

74. Discovery Request Nos. 21-26 seek information on the type of OSS used by the CLECs to place orders with ILECs. Although information about other ILECs would not normally be relevant to this proceeding, we find that the information sought in these particular

requests that focus on ILEC interfaces may possibly lead to the admission of relevant information in this proceeding. The CLECs are therefore ordered to respond to these requests.

75. The CLECs are also required to respond to Discovery Request No. 27 to the limited extent that U S WEST seeks information about maintenance or repair orders that the CLEC has placed with ILECs in New Mexico for local interconnection, unbundled network elements, and resale. Maintenance and repair orders for other activities, such as access, are not relevant.

76. The CLECs are not required to provide the information sought in Request No. 20 because the number of employees that carry out an internal function is not at issue in this proceeding. On the other hand, the number of orders that it can issue, as sought in Request No. 29, may be of significant relevance.

77. The CLECs are required to answer Request No. 43 to the limited extent that U S WEST is seeking information about orders submitted to an ILEC for local interconnection, unbundled network elements, and resale.

78. In Request Nos. 45 and 46, U S WEST seeks information about testing the CLECs have undertaken with ILECs. U S WEST explains that the requested information will "shed light on the number of transactions that U S WEST should reasonably expect in the coming months." U S WEST Renewed Motion at 12 and 13. The CLECs are required to respond to Request Nos. 45 and 46 to the extent that U S WEST is seeking information about internal testing between the CLEC and U S WEST. The CLEC is not required to provide information about testing conducted with other ILECs. Information regarding testing with other ILECs will not "shed light on the number of transactions that U S WEST should reasonably expect in the coming months."

79. The CLECs are required to respond to Request No. 62. The CLECs do not, however, have to provide the documents requested by U S WEST because the particular details of the internal business plans of the CLECs do not appear reasonably calculated to lead to the admission of relevant evidence.

80. The CLECs are required to respond to Request Nos. 25 and 26. Their responses to these items will assist in the determination of the degree to which graphical interfaces provide "eas[y] and efficien[t]" access to U S WEST's OSS. U S WEST's Renewed Motion at 10.

81. As noted supra, AT&T received one request which the other CLECs did not: No. 72. That request asks AT&T to produce all documents concerning its decision to enter the local market in Connecticut. We in New Mexico fail to see the relevance of AT&T's decision to enter the market in Connecticut. AT&T does not have to respond to that request.

IT IS THEREFORE ORDERED THAT:

1. AT&T's Motion to Compel Responses to its First Discovery Requests will not be finally decided until after in camera review by the Commission of the 25 disputed documents. U S WEST shall provide for in camera review the 25 disputed documents, as identified in the Privilege Log, to the Commission and its expert consultant, Dr. David Gabel, on or before September 23, 1998.

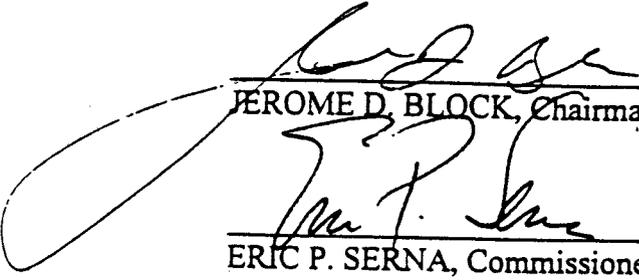
2. U S WEST's Motion to Compel Responses to its First Set of Requests for Discovery Responses from the intervenor CLECs in this proceeding and the intervenor CLECs' motions to quash and for a protective order are **GRANTED** in part and **DENIED** in part as set forth in this decision. The CLECs do not have to respond to the following U S WEST Discovery Requests: Nos.1-15, 17, 20, 28, 30, 32-42, 48-52, 54(c), 54(d), 55, 56, 59, and 75-

87¹⁰. The CLECs shall respond in full, consistent with the expedited discovery time frames previously specified for this proceeding, to U S WEST Discovery Request Nos. 16, 18-19, 21-26, 29, 31, 44, 54(a), 54(b), 60, 61, and 72-74. AT&T is not required to respond to the separate Request No. 72 asked of it. The CLECs shall respond to the remaining U S WEST Discovery Request Nos. 27, 43, 45-47, 53, 57, 58, 62-71 as directed in this decision.

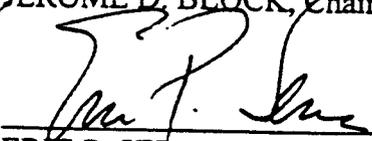
3. U S WEST's Motion to Set Pending Discovery Motions for Hearing and U S WEST's Renewed Motion Requesting a Hearing and Oral Argument are **DENIED**.

¹⁰ See, n.5. Because the Requests directed at AT&T had one request, No. 72, that was not posed to the other CLECs, AT&T, when construing this order, must increase by one the number of each Request No. above No. 72. That is, AT&T must respond to Request Nos. 73-75 asked of it, and it need not respond to Request Nos. 76 - 88.

DONE this 21st day of September, 1998.



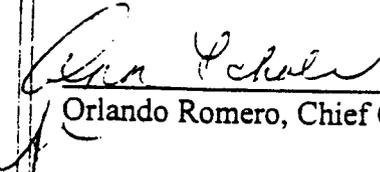
JEROME D. BLOCK, Chairman



ERIC P. SERNA, Commissioner

BILL POPE, Commissioner

ATTEST:



Orlando Romero, Chief Clerk

ORDER - 97-106-TC

BEFORE THE NEW MEXICO STATE CORPORATION COMMISSION

**IN THE MATTER OF THE
INVESTIGATION CONCERNING
U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH
SECTION 271(c) OF THE
TELECOMMUNICATIONS ACT OF 1996**

DOCKET NO. 97-106-TC

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing Order Relating to Outstanding Discovery Motions in Docket No. 97-106-TC to be mailed* ** to each of the following persons, First Class mail, postage prepaid, this ____ day of September, 1998:

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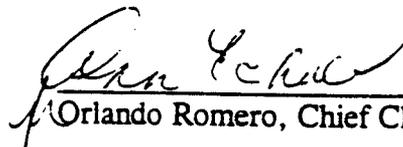
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Orlando Romero, Chief Clerk

- *Indicates hand-delivery rather than mailing.
- **Indicates service by facsimile and mailing.

EXHIBIT E

Service Date: July 13, 1998

Tyler, S

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

RECEIVED
MS 7/14
JUL 16 1998

OV-NIT _____
MESS _____
INTER _____
OTHER _____

IN THE MATTER of the Investigation)
into U S WEST Communications, Inc.'s)
Compliance with Section 271(c) of the)
Telecommunications Act of 1996.)

UTILITY DIVISION
DOCKET NO. D97.5.87

NOTICE OF COMMISSION ACTION

PLEASE TAKE NOTICE that the Montana Public Service Commission (Commission), in scheduled work sessions conducted during the week of July 6-10, 1998, took the following action:

1) Montana Wireless - Sustained MWI's objections to U S WEST Communications, Inc.'s (U S WEST) Second Set of Data Requests to Montana Wireless, Inc. (July 7, 1998). Montana Wireless has not filed any witness testimony.

2) Eclipse - Sustained Eclipse's objections to USW-1248 through USW-1263 (July 7, 1998); sustained objections to USW-1230, USW-1238, and USW-1241 (July 8, 1998), and sustained the objection to the first question and denied the objection to the second question in USW-1233 (July 8, 1998). Objections were sustained because the information requested was irrelevant, relates to subjects which the Commission has already determined are beyond the scope of the proceeding, the data requests are duplicative, and they requested information that is more easily obtained by U S WEST or in its control.

3) Touch America - Sustained Touch America's objections to USW-1102 through USW-1116 (July 7, 1998), and sustained objections to USW-1094 and USW-1098 (July 8, 1998) which request information that requires the witness to make legal conclusions which even the FCC has declined to do as yet and which the Commission may have to make after much testimony and argument in this or future cases.

4) Sprint – Sustained Sprint's objections to USW-1296 through 1309, USW-1325, USW-1326, USW-1330, USW-1333, USW-1350 through USW-1352, USW-1357, USW-1365, USW-1368 (July 8, 1998); sustained objections USW-1386 through USW-1401 (July 7, 1998), and denied objections to USW-1353 and USW-1354. Sustained objections for data requests, many vague and ambiguous, that asked for information about Sprint's internal performance measures; information about Sprint's internal operating systems for its interexchange services; and information about Sprint's own interfaces—all which the Commission has previously ruled is irrelevant to and outside the scope of this proceeding. Others requested information about Sprint's long distance operations that is irrelevant or overly burdensome to produce. For the objections denied, the request is not unduly burdensome to produce. USW-1368 is duplicative. The Commission will address the remainder of the objections in future work sessions.

5) MCI – Sustained MCI's objections to USW-1175, USW-1179, USW-1201, USW-1202, USW-1204, USW-1206, USW-1207, USW-1208, AND USW-1190 through USW-1194 (July 9, 1998); and MCI-1210 through MCI-1226 (July 7, 1998). The objections sustained relate in part to MCI's future business plans, other ILEC's OSS systems, MCI's own internal systems and performance measures. Others are duplicative data requests.

6) AT&T – Sustained AT&T's objections to PSC-137(b) and PSC-138(a); denied AT&T's objections to PSC-138(b) (the Commission staff will clarify this data request); and withdraws PSC-139(d) (July 8, 1998); and sustained AT&T's objections to USW-897 through USW-912 (July 7, 1998).

7) TCG – Sustained TCG's objections to USW-1402, USW-1403, USW-1410 through USW-1415, and USW-1419; and denied TCG's objections to USW-1405, USW-1408 and USW-1409 (U S WEST must reference testimony and clarify that the questions request information on the basis for the specific testimony but does not require that a special study be done to find all data and supporting documentation for the testimony).

The Commission addressed objections in the July 7 work session which correspond to USW-1210 through USW-1226 to MCI—set forth at the end of this paragraph for other parties—which ask for each party to identify each and every complaint the party has with the manner in which U S WEST makes available each item from the 14-point checklist. The Commission

concluded that these data requests are vague (they do not identify what a "complaint" refers to), they are duplicative (to the extent the information is already set forth in witness testimony if the intervenor has any complaints about each checklist item), they are unduly burdensome, and they are not likely to lead to the discovery of additional admissible evidence. The intervening parties are not required to identify "complaints" about the manner in which U S WEST provides checklist items; however, many of them have done so and this is already included in witness's testimony. Moreover, the deadline for intervenors' to file their testimony has passed and U S WEST is essentially asking for additional testimony. Therefore, the Commission's decision for the following data requests applies to all intervenors, whether or not they filed objections to the data requests: USW-897 through USW-912 (AT&T); USW-1055 through USW-1070 (Montana Tel-Net); USW-1076 through USW-1091 (McLeod); USW-1102 through USW-1116 (Touch America); USW-1119 through USW-1134 (Skyland Technologies); USW-1138 through USW-1153 (LCI); USW-1210 through USW-1226 (MCI); USW-1248 through USW-1263 (Eclipse); USW-1280 through USW-1295 (Montana Consumer Counsel); and USW-1386 through USW-1401 (Sprint).

The Commission will rule on other data requests to AT&T by the PSC staff and from U S WEST, and other data requests to Sprint from U S WEST in future work sessions after July 10, 1998. The Commission staff has requested AT&T to revise its objections to restate the data requests for more expedient review and will act on the remainder of the objections when AT&T has complied with this request and after July 10, 1998. The Commission previously ordered U S WEST to explain the relevancy of certain data requests in its first sets of data requests to intervenors and will not address these objections until such information is received from U S WEST.

BY THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman
NANCY MCCAFFREE, Vice Chair
BOB ANDERSON, Commissioner
DANNY OBERG, Commissioner
BOB ROWE, Commissioner

MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a copy of NOTICE OF COMMISSION ACTION, in DOCKET NO. D97.5.87, in the matter of PSC INVESTIGATION INTO USWC'S COMPLIANCE WITH SECTION 271 (c) OF THE TELECOMMUNICATION ACT OF 1996, dated July 13, 1998, has today been served on all parties listed on the Commission's most recent service list, updated 7/13/98, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: July 13, 1998



For/The Commission

Intervenors

Montana Consumer Counsel
Montana Department of Administration, Information Services Bureau
Eclipse Communications Corp.
AT&T Communications of the Mountain States, Inc.
ICG Telecom Group, Inc.
MCI Telecommunications Corporation
McLeod, USA, Inc.
Montana Independent Telecommunications Systems
Montana TEL-NET
Montana Wireless, Inc.
Northwest Payphone Association
Skyland Technologies, Inc.
Sprint Communications Company L.P.
Telecommunications Resellers Association
Touch America
Ronan Telephone Company
Hot Springs Telephone Company
Montana Telephone Association (withdrew)
LCI International Telecom Corp.
Teleport Communications Group, Inc.