



0000008585

RECEIVED
AZ CORP COMMISSION

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE ARIZONA CORPORATION COMMISSION

JAMES M. IRVIN
Chairman
TONY WEST
Commissioner
CARL J. KUNASEK
Commissioner

DOCUMENT CONTROL Arizona Corporation Commission
DOCKETED

MAR 16 1999

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

DOCKET NO.

DOCKETED BY	T-000008-97-0238
	JW

**U S WEST'S MOTION TO COMPEL RESPONSES BY
VARIOUS INTERVENORS
TO U S WEST'S FIRST SET OF DATA REQUESTS**

U S WEST Communications, Inc. ("U S WEST") submits this motion to compel in response to the objections it received from AT&T Communications of the Midwest ("AT&T"), Teleport Communications Group ("TCG"), MCI WorldCom, Inc. ("MCIW"), Brooks Fiber Communications of Tucson, Inc. ("Brooks"), Sprint Communications Company ("Sprint"), Cox Arizona Telecom, Inc. ("Cox"), e.spire(Communications, Inc. ("e.spire("), GST Telecommunications, Inc. ("GST"), NEXTLINK Arizona, Inc. ("NextLink"), ACI Corp. ("ACI"), Electric Lightwave Inc. ("ELI"), and the Telecommunications Resellers Association ("TRA"). These CLECs (collectively referred to as the "Intervenors") voluntarily intervened in this proceeding; some if not all in an attempt to preclude U S WEST from competing with them in the long distance market. U S WEST will explain why the Intervenors must be

1 compelled to respond completely to U S WEST's first set of Data
2 Requests.

3 **I. INTRODUCTION**

4 U S WEST's argument is composed of two parts and an
5 attachment. First, it describes the purpose and scope of
6 discovery under Arizona law. Second, it responds to the General
7 Objections raised by the Intervenors. U S WEST submitted even
8 more expansive discovery in its Nebraska 271 proceeding where a
9 retired District Court Judge acting as a Special Master ordered
10 Intervenors to respond to all of the present data requests and
11 more. The current discovery only seeks the production of
12 discovery for those items essential to the presentation of its
13 affirmative section 271 case.

14 U S WEST propounded 41 identical Data Requests upon each
15 intervenor to this proceeding. These requests seek four
16 categories of information -- all central to this section 271
17 proceeding: (1) Intervenors' use of and projected demand for
18 each checklist item; (2) information concerning the Intervenors'
19 use or plans to use U S WEST's Operational Support Systems (OSS),
20 if any, and the identity of the systems that Intervenors actually
21 need to provide telecommunications services; (3) information
22 about how Intervenors currently use performance data to either
23 provide service to customers or to perform customer service
24 operations; and (4) information about Intervenors' plans for
25 entering the local exchange market. The Attachment sets forth in
26 detail the relevance of each of the 41 Data Requests to the 271

1 process, the FCC's description as to why this information is
2 germane to these proceedings, and how U S WEST plans to use this
3 information. U S WEST is not on a fishing expedition. Each of
4 the requests submitted by U S WEST is targeted to obtain specific
5 information to help it establish that it has satisfied a portion
6 of Section 271.

7 Intervenors objections are numerous. As U S WEST predicted
8 when seeking a modification to the Procedural Order to require a
9 strict schedule for motions to compel, the objections are so
10 numerous that they make telephonic objection and hearing
11 virtually impossible. Hence the written motion. AT&T and TCG
12 object to every request. Other Intervenors agree to provide
13 responses to a few specific questions. No intervenor comes
14 anywhere close to agreeing to provide answers to all of the
15 requests, all of which are central to this case. The reason:
16 Intervenors assert that U S WEST has the burden of proof in this
17 proceeding to establish that it satisfies each aspect of Section
18 271. While this statement is unquestionably true, what
19 Intervenors fail to inform the Division is that much of the
20 information in their possession will assist U S WEST in doing
21 just that. As a result, this information is central to the case,
22 subject to discovery, and must be produced. Why are parties such
23 as AT&T so reluctant to produce information that will help U S
24 WEST show that it has satisfied section 271? Once proven, U S
25 WEST will be able to compete in Arizona's billion plus dollar per
26 year interLATA market. That means many Intervenors such as AT&T

1 will lose market share and, in turn, money. Throughout this
2 proceeding, Intervenors will raise every conceivable barrier,
3 raise every conceivable issue, and make every effort to delay the
4 proceeding, if not stop it altogether; all in an effort to keep
5 U S WEST out of the interLATA market. Intervenors have this
6 right; just as U S WEST has the right to the discovery it seeks.

7 U S WEST urges the Hearing Division to compel the
8 Intervenors to respond promptly to U S WEST's Data Requests.
9 Such action is vital if U S WEST is to develop the data and
10 information necessary to present its case to the Arizona Public
11 Service Commission to the full extent allowed by Arizona law. U
12 S WEST's direct testimony is due on or before April 12, and its
13 rebuttal 9 weeks later. U S WEST seeks to obtain the information
14 in sufficient time to incorporate it into its testimony.

15 **II. DISCUSSION**

16 **A. Arizona Law Strongly Favors Discovery Of All Information**
17 **Reasonably Likely To Lead To The Discovery Of Admissible**
Evidence.

18 The right to broad and liberal discovery is a fundamental
19 element of the American legal process. The purpose and scope of
20 discovery are issues that are commonly considered by American
21 courts pursuant to well-established principles and rules. This
22 motion revisits such principles and rules in order to remind the
23 parties to this proceeding of the vital role discovery plays in
24 the preparation and assessment of cases.

25

26

1 1. Purpose of Discovery

2 The right to broad and liberal discovery facilitates the
3 identification of issues, promotes justice, provides more
4 efficient and speedy case disposition, avoids surprise, and
5 prevents the trial of a lawsuit from becoming a guessing game.
6 *Cornet Stores v. Superior Court*, 108 Ariz. 84; 492 P.2d 1191,
7 1193 (1972); *U-Totem Store v. Walker*, 142 Ariz. 549, 691 P.2d 315
8 (App. 1984). Discovery also provides parties with a mechanism
9 with which to prove or disprove facts, to challenge witness
10 recollection, and to ensure an informed cross-examination.
11 *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 596, 558 N.W.
12 2d 799 (1997). Interrogatories and requests for production are
13 two means by which Arizona courts and Arizona rules allow for the
14 collection of such information. See Rules 33 & 34, Ariz. R. Civ.
15 P.; see also *Di Pietruntonio v. Superior Court*, 84 Ariz. 291, 327
16 P.2d 746 (1958) (Rule 33 allows use of interrogatories to obtain
17 discovery to "lead to information for use in the trial.").

18 U S WEST submitted its data requests in accordance with
19 these purposes. Its data requests are designed to identify and
20 obtain discoverable information in order to narrow the issues in
21 controversy at hearing and to allow an efficient and economical
22 presentation of evidence at hearing. Full and complete answers
23 to all 41 data requests are necessary to create a complete record
24 and to ensure that U S WEST has the ability to conduct an
25 informed cross-examination. Finally, full and complete answers
26 to all 41 data requests are necessary to avoid the inherent

1 surprise that would result if the Intervenor's are permitted to
2 hide issues that they intend to raise at hearing.

3 2. Scope of Discovery

4 The scope of discovery is an outgrowth of the broad and
5 significant purpose discovery plays in our legal process. The
6 Arizona discovery rules for civil cases are virtually identical
7 to the Federal Rules of Civil Procedure. Under the FRCP and
8 comparable state practice, the scope of discovery is broad. *U-*
9 *Totem Store v. Walker*, 142 Ariz. 549, 552, 691 P.2d 315, 318
10 (App. 1984).

11 As an initial matter, virtually every objection made by
12 Intervenor's is based, at least in part, on "relevance." While
13 this is a valid objection, the language of Rule 26(b)(1) sets
14 forth the actual objection. The rule states that discovery is
15 allowed when it **"appears reasonably calculated to lead to the**
16 **discovery of admissible evidence."** Ariz. R. Civ. P. 26(b)(1)
17 (emphasis added); see *Brown v. Superior Court*, 137 Ariz. 327,
18 332, 670 P.2d 725, 730 (1983) (relevancy at discovery stage is
19 "loosely construed" and information "need only be reasonably
20 calculated to lead to the discovery of admissible evidence.")

21 This is not the first time that a judge has reviewed such
22 requests propounded by U S WEST in the context of a Section 271
23 proceeding. On one other occasion, a judge reviewed similar
24 requests (the requests were actually broader in scope), and
25 determined that each was "reasonably calculated to lead to the
26 discovery of admissible evidence." Specifically, Judge Samuel

1 Van Pelt, appointed as a Special Master over discovery issues in
2 U S WEST's Nebraska 271 application, held:

3 The subject of this 271 proceeding is the status of
4 local competition in the state. . . . U S WEST cannot
5 prove Section 271(c) compliance in the state . . .
6 unless it has information from the intervenors
7 respecting OSS system needs and the status or potential
8 status of competition. Although U S WEST has a primary
9 obligation to open its markets and put systems in place
10 that will allow competition if it wishes to enter the
11 long-distance market at any time soon. For this
12 reason, Nebraska may be different from Montana,
13 Michigan, South Carolina and other states.
14 Consequently, it is necessary for the FCC to look at
15 the status of competition in each state to determine
16 what the competitors are really planning to do and
17 whether the OSS obligations will be satisfied. The OSS
18 system needs of AT&T may be different from those of
19 [other competitors]. For the above reasons, the
20 Special Master believes that all of the requests for
21 information are reasonably calculated to lead to the
22 discovery of relevant and admissible evidence.

23 *U S WEST's Nebraska 271 Application, Progression Order No. 9,*
24 *App. No. C-1830 (Dec. 4, 1998) (a complete copy of such Order is*
25 *attached hereto). U S WEST suspects that Intervenors will*
26 *attempt to combat this ruling by citing to purported contrary*
rulings in Montana and New Mexico. In neither of these states
did a judge with experience, trained in the law and understanding
the importance of discovery evaluate the discovery. Moreover, 41
data requests is hardly burdensome in a case of this size,
magnitude and complexity.

U S WEST is being extremely focused. As the Attachment to
this pleading demonstrates, U S WEST has taken great pains to
pose data requests that are (a) reasonably calculated to lead to
the discovery of admissible evidence and (b) designed to obtain

1 information that will narrow the fact issues in controversy and
2 facilitate trial preparation.

3 **B. Intervenor's Objections To U S WEST's Data Requests Are**
4 **Entirely Without Merit And Should Be Summarily Denied.**

5 The objections of the Intervenors can be broken into several
6 general categories. Those categories are as follows: (1) burden
7 of proof; (2) relevance/timing of the requests; (3)
8 Oppressive/Burdensome; (4) proprietary/trade secret; (5)
9 attorney-client privilege/attorney work-product; (6) production
10 of non-Arizona information; and (7) contention interrogatories.

11 Each of these will be discussed and refuted in turn.

12 1. *Intervenors' assertion that U S WEST bears the burden*
13 *of proof has no bearing upon the Intervenor's duty to*
14 *respond to U S WEST's first set of Data Requests.*

15 The Intervenors assert that U S WEST bears the burden of
16 proof to show compliance with § 271 of the Telecommunications Act
17 of 1996 and, therefore, any information about their business
18 plans, operational support system ("OSS") needs, performance
19 indicators and policies and practices (etc.) are irrelevant.
20 They are misguided. Although Intervenors try to confuse matters
21 by arguing that U S WEST has the burden of proof, Arizona courts
22 have long recognized that the objecting party has the burden to
23 substantiate its objections. *Cornet Stores v. Superior Court,*
24 *108 Ariz. 84, 492 P.2d 1191(1972); Hine v. Superior Court, 18*
25 *Ariz. App. 568, 504 P.2d 509 (1972).* The Intervenors improperly
26 attempt to shift this burden to U S WEST and, in so doing,
attempt to circumvent the purpose of discovery.

1 As the Division knows all too well, the availability of
2 discovery is simply not tied to whether or not the party has the
3 burden of proof. For example, suppose an older woman gets hit by
4 a car that ran a red light, she sues and seeks to discover
5 information about the driver's insurance coverage and whether or
6 not he/she was driving while impaired. According to Intervenors'
7 theory, the victim would be denied discovery because she bore the
8 ultimate burden of proof at trial. Contrary to Intervenors'
9 theory, the ultimate question is always whether the information
10 sought may lead to the discovery of information that will aid in
11 the truth seeking process. The Intervenors should be compelled
12 to respond to data requests that seek information that may lead
13 to the discovery of admissible evidence. U S WEST understands
14 the Intervenors' desire to keep such information hidden; however,
15 such a desire is contrary to the purpose of discovery. U S
16 WEST's data requests have been drafted to develop facts to use at
17 hearing.

18 2. *The Intervenors' incorrectly assert that most of U S*
19 *WEST's data requests are irrelevant and premature.*

20 The Intervenors assert that U S WEST's data requests are, in
21 many cases, not relevant to U S WEST's request for authority to
22 offer long distance services pursuant to Section 271 of the
23 Telecommunications Act of 1996. This assertion is presumptuous
24 and fails to consider the scope and purpose of discovery. The
25 attachment to this brief outlines the purpose of each of the Data
26 Requests.

1 One feature of discovery upon which courts and commentators
2 generally agree is that the ability to obtain discovery should be
3 construed broadly:

4 Rule 26 is by its terms very broad and allows for the
5 discovery not only of relevant documents but all
6 documents which "appears reasonably calculated to lead
7 to the discovery of admissible evidence." Prochaska &
Associates v. Merrill Lynch Pierce Fenner & Smith Inc.,
155 F.R.D. 189, 192, 1993 U.S. Dist. Lexis 20182 (D.
Neb. 1993).

8 All relevant matters are discoverable unless
9 privileged. The proper standard for ruling on a
10 discovery motion is whether information sought is
11 relevant to the subject matter involved in the pending
12 action This phraseology implies a broad
13 construction of relevancy at the discovery state
14 because one of purposes of discovery is to examine
15 information that may lead to admissible evidence at
16 trial. 8 C. Wright and A. Miller, Federal Practice and
17 Procedure, @ 2008.

18 Relevancy is to be broadly construed at the discovery
19 stage of the litigation and a request for discovery
20 should be considered relevant if there is any
21 possibility the information sought may be relevant to
22 the subject matter of the action.

23 *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. at 27. So long
24 as a request does not seek privileged information, and is
25 reasonably calculated to lead to the discovery of admissible
26 evidence, it merits a full and complete response.

Intervenors also object stating that the March 2, 1999,
Procedural Order only contemplates discovery concerning U S
WEST's satisfaction of section 271 and, therefore, much of the
discovery U S WEST seeks is premature. This objection is again
tantamount to stating that the information U S WEST seeks is not
relevant to its affirmative 271 case; therefore, this objection

1 is equally unavailing. All evidence that will aid U S WEST in
2 establishing that it satisfies section 271 is discoverable now.
3 Although U S WEST must wait to collect impeachment evidence,
4 everything that U S WEST seeks in its 41 Data Requests goes
5 directly to its affirmative case and, therefore, must be produced
6 under applicable Arizona law.

7 3. *Intervenors Generic Burdensomeness Claims Are*
8 *Insufficient.*

9 Intervenors assert general claims that U S WEST's data
10 requests are burdensome and would require the Intervenors to
11 perform special studies. All discovery is burdensome to some
12 degree, but only discovery that is unduly burdensome should be
13 restricted. The Intervenors should be compelled to answer U S
14 WEST's data requests, because these data requests are not "overly
15 burdensome" and, contrary to their assertions, do not seek the
16 creation of any "special studies." U S WEST is asking the
17 Intervenors to identify and disclose readily ascertainable facts
18 and information in their possession that are responsive to the
19 particular data requests at issue.

20 The point of discovery is to obtain knowledge of facts in
21 the other side's possession.

22 The Intervenors, however, seek to avoid any discovery
23 whatsoever because it is inconvenient and costly. They elected
24 to participate in this proceeding, they cannot now avoid their
25 discovery obligations. Furthermore, the Intervenors should not
26 be permitted to avoid discovery by claiming that virtually every

1 request to which they object requires them to prepare a study.
2 It is permissible to require the Intervenors to compile
3 information. *Cornet Stores v. Superior Court*, 108 Ariz. 84, 492
4 P.2d 1191 (1972) (answers to interrogatories must be provided
5 even if it requires compilation of data). U S WEST is not asking
6 the Intervenors to generate documents, but to provide all
7 relevant materials within their custody and control, even if this
8 requires a searching inquiry.

9 4. *Protective Agreements already exist in this docket;*
10 *therefore, Intervenors refusal to produce*
confidential/trade secret material is misguided.

11 All Intervenors object and refuse to produce otherwise
12 discoverable information claiming it is confidential, proprietary
13 and/or trade secret. This objection has no merit because
14 Protective Agreements providing a procedure for disclosure of,
15 use of, and return of sensitive information already exist in this
16 docket.. Rule 26(c), Ariz.R.Civ.P., states that a protective
17 order may be issued to ensure "that a trade secret or other
18 confidential research, development or commercial information may
19 not be disclosed or be disclosed only in a designated way . . .
20 ."

21 The Protective Agreements entered into in this proceeding
22 specifically state, *inter alia*: (1) Confidential Information can
23 only be used in this proceeding; (2) Confidential Information may
24 only be disclosed to counsel, retained experts, and certain
25 limited (Intervenor) employees who have executed Non-Disclosure
26 Agreements; (3) under no circumstances shall anyone "engaged in

1 the sales or marketing of (Intervenor) products or services" have
2 access to any Confidential Information; (4) Confidential
3 Information shall not be used "for purposes of business or
4 competition;" (5) specific procedures are in place to ensure that
5 Confidential Information receives protected status even if
6 utilized in pleadings or in the hearing; and (6) "(a)ll notes and
7 copies of Confidential Information which have not been received
8 into evidence shall be returned to the providing party within
9 thirty (30) days after the final settlement or conclusion of this
10 matter. Thus, the Intervenors and U S WEST have entered into
11 Protective Agreements to protect against the very objections that
12 the Intervenors now raise.

13 The Intervenors must exhibit trust in the Protective
14 Agreement and the procedures set forth therein. Just as in many
15 271 proceedings in the past, U S WEST will be required to
16 disclose many items it considers confidential, proprietary, or
17 trade secret in response to data requests in this proceeding.
18 Now, in good faith, the Intervenors should be obligated to do
19 likewise. If the response to a data request requires an
20 Intervenor to provide documents or information it considers
21 confidential, proprietary, or a trade secret, the Intervenor
22 should simply identify such documents as confidential and produce
23 them pursuant to the Protective Agreement.

24 5. *Intervenors must comply with Arizona case law*
25 *concerning the attorney-client privilege and work*
26 *product doctrine.*

1 Intervenors object to U S WEST's data requests by stating
2 the requested information or documents are protected from
3 disclosure by the attorney-client privilege or the work-product
4 doctrine. In Arizona, the party objecting to discovery requests
5 based on privilege initially bears the burden of establishing
6 such privilege pursuant to Rule 26.1(f), Ariz. R. Civ. P. The
7 party withholding information on a claim of privilege must, at a
8 minimum, provide "a description of the nature of the documents,
9 communications, or things not produced or disclosed that is
10 sufficient to enable other parties to contest the claim." Ariz.
11 R. Civ. P. 26.1(f) No such production has been provided by
12 intervenor. Each intervenor should be compelled to comply with
13 Rule 26.1(f). Without this information, U S WEST cannot
14 determine whether it will dispute such objections.

15 6. *Out of state material is relevant.*

16 In response to several data requests, several Intervenors
17 assert that any information sought from outside of the state of
18 Arizona is not relevant to this proceeding. These assertions are
19 mistaken. In every other 271 proceeding to date, and as
20 recognized by the FCC, material both within and outside the state
21 is discoverable. When Intervenors submit discovery to U S WEST,
22 Intervenors will certainly assert region wide information is
23 important and discoverable. This is especially true when
24 considering systems with region wide application, such as
25 operational support systems and performance measures. Moreover,
26 information about Intervenors plans outside of Arizona will

1 directly affect their ability to invest substantial resources and
2 time in Arizona and will directly affect the demand placed on
3 systems in Arizona.

4 There should be absolutely no question that materials
5 outside of Arizona are discoverable. Although the parties may
6 object to the introduction of non-Arizona specific information at
7 hearing, such objection(s) have absolutely nothing to do with
8 discovery. As previously discussed, admissibility is not the
9 standard upon which discovery decisions are made; rather, the
10 question is whether the information sought is reasonably
11 calculated to lead to the discovery of admissible evidence. At a
12 minimum, U S WEST seeks uniformity in the rulings that the
13 Commission makes on this topic. U S WEST therefore asks the
14 Hearing Division to inquire whether or not Intervenors will agree
15 to confine their inquires and presentation of evidence to Arizona
16 specific evidence. U S WEST is confident the answer will be
17 "no", which answer will dictate the propriety of such objection
18 here.

19 7. *Intervenors "Contention Interrogatory" objection lacks*
20 *merit.*

21 AT&T and TCG claim that several of U S WEST's Data Requests
22 ask Intervenors to provide "all facts" that support their
23 position. "Contention Interrogatories are interrogatories that
24 seek to clarify the basis for or scope of an adversary's legal
25 claims. The general view is that contention interrogatories are
26 a perfectly submissible form of discovery, to which a response

1 would ordinarily be required." *Starcher v. Correctional Med.*
2 *Sys.*, 144 F.3d 418, n. 2 (6th Cir. 1988), citing *Taylor v. FDIC*,
3 132 F.3d 753, 762 (D.C. Cir. 1997); *Vidimos, Inc. v. Laser Lab*
4 *Ltd.*, 99 F.3d 217, 222 (7th Cir. 1997). Thus, the usage of
5 contention interrogatories is generally authorized.

6 In fact, Intervenors do not state that these Data Requests
7 are improper, instead they say they are "improper at this stage
8 of the proceeding." It is instructive to review the one case
9 cited by Intervenors, which actually supports U S WEST's
10 position. In *In re Convergent Technologies*, the court created a
11 "frame work for handling contention interrogatories that are
12 served before substantial discovery has been completed through
13 other means." Citing to the 1970 Advisory Committee comments
14 that gave rise to the current Rules of Civil Procedure, the court
15 stated that judges had latitude to "wait until the end of the
16 discovery period" before requiring answers to contention
17 interrogatories. In the context of this proceeding, however,
18 there is simply no time to wait. The beginning and end are
19 virtually synonymous. The Commission has committed to hear and
20 decide this entire complex docket within 90 days of U S WEST's
21 filing of direct testimony; in other words, no later than July
22 12, 1999. Time is at a premium. Any sanctioned delay may result
23 in a denial of the information altogether.

24 Moreover, U S WEST seeks to establish that it has satisfied
25 the requirements of Section 271 including the Track A component,
26 the 14 point checklist component, Section 272, and the public

1 interest component. Telecommunications Act of 1996 § 271 (c)-(d)
2 (1996). As any party to litigation, U S WEST is entitled to know
3 the complaints that Intervenors have in advance of hearing. The
4 purpose of the hearing should be truth finding and should not
5 involve surprise. Data Requests 1 through 14 ask each Intervenor
6 to identify and outline its objections to the manner in which U S
7 WEST makes each of the checklist items available. Intervenors
8 object stating that they should not be required to provide a
9 comprehensive list. The only possible reason for Intervenors to
10 raise such objections is to surprise U S WEST at hearing with new
11 items that they have failed to disclose, or to add new items once
12 their current concerns (valid or otherwise) are allayed. This is
13 the precise protection that discovery is intended to afford. The
14 Intervenors objection in this regard should be denied.

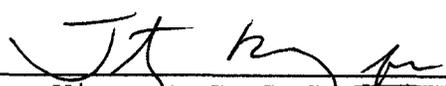
15 Finally, at a minimum, the Intervenors should be ordered to
16 respond to the extent currently possible. Intervenors should not
17 be able to withhold information central to this proceeding simply
18 because U S WEST framed the question as a contention
19 interrogatory. Intervenors should be required to provide all
20 known responsive information now. To the extent that Intervenors
21 learn new information responsive to such data requests,
22 Intervenors should be required to seasonably update their
23 answers. In other words, the Hearing Division should not allow
24 Intervenors to withhold information so that they can surprise U S
25 WEST at hearing and thereby deprive U S WEST of the principal
26 purpose of discovery - elimination of the element of surprise.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Hearing Division should
3 require Intervenors to respond to U S WEST's Data Requests. U S
4 WEST is entitled to receive full and complete discovery from the
5 Intervenors because all 41 Data Requests are reasonably
6 calculated to lead to the discovery of admissible evidence.
7 Anything less than full and complete discovery would contravene
8 the purposes for which discovery was established; narrowing the
9 fact issues in controversy, permitting pretrial preparation, and
10 avoiding surprise. Without responses to each of the 41 requests,
11 U S WEST cannot prepare for hearing to the fullest extent
12 permitted by Arizona law.

13 SUBMITTED this 16th day of March, 1999.

14 **U S WEST COMMUNICATIONS, INC.**

15
16 By 

Vincent C. DeCarlais
Andrew D. Crain
Charles W. Steese
Thomas M. Dethlefs
1801 California Street, Suite 5100
Denver, CO 80202
(303) 672-2948

FENNEMORE CRAIG, P.C.
Timothy Berg
3003 North Central Ave., Suite 2600
Phoenix, AZ 85012
(602) 916-5421

Attorneys for U S WEST
Communications, Inc.

25

26

1 ORIGINAL and ten copies of
2 the foregoing filed this 16th day
of March, 1999, with:

3 Docket Control
4 ARIZONA CORPORATION COMMISSION
5 1200 West Washington Street
6 Phoenix, Arizona 85007

7 COPY of the foregoing hand
8 delivered this 16th day of March, 1999,
9 to:

10 Maureen Scott
11 Legal Division
12 ARIZONA CORPORATION COMMISSION
13 1200 West Washington Street
14 Phoenix, Arizona 85007

15 Ray Williamson, Director
16 Utilities Division
17 ARIZONA CORPORATION COMMISSION
18 1200 West Washington Street
19 Phoenix, Arizona 85007

20 Jerry Rudibaugh, Chief Hearing Officer
21 Hearing Division
22 ARIZONA CORPORATION COMMISSION
23 1200 West Washington
24 Phoenix, Arizona 85007

25 COPY of the foregoing faxed this
26 15th day of March, 1999, to:

18 Michael M. Grant
19 GALLAGHER AND KENNEDY
20 2600 North Central Avenue
21 Phoenix, Arizona 85004-3020
22 Attorneys for U S West New Vector
23 Group

24 Stephen Gibelli
25 Residential Utility Consumer Office
26 2828 North Central Avenue, #1200
Phoenix, Arizona 85004

27 Kath Thomas
28 Brooks Fiber Communications
29 1600 South Amphlett Boulevard, #330
30 San Mateo, California 94402

Penny Bewick
Electric Lightwave, Inc.
4400 NE 77th Avenue
Vancouver, Washington 98662

Thomas L. Mumaw
SNELL AND WILMER, L.L.P.
One Arizona Center
Phoenix, Arizona 85004-0001
Attorneys for Brooks Fiber

Robert Munoz
WorldCom, Inc.
185 Berry Street, Building 1, #5100
San Francisco, California 94107

1	Richard M. Rindler	Donald A. Low
2	Morton J. Posner	Sprint Communications Company L.P.
3	SWIDLER BERLIN SHEREFF FRIEDMAN, LLP	8140 Ward Parkway 5E
4	3000 K Street, N.W., Suite 300	Kansas City, Missouri 64114
	Washington, D.C. 20007	
	Attorneys for GST	
5	Lex J. Smith	Charles Kallenbach
6	Michael Patten	American Communications Services, Inc.
7	BROWN & BAIN, P.A.	131 National Business Parkway
8	2901 North Central Avenue	Annapolis Junction, Maryland 20701
9	P.O. Box 400	
10	Phoenix, Arizona 85001-0400	
11	Attorneys for e-spire, Cox, and ELI	
12	Carrington Phillip	Richard Smith
13	Cox Communications, Inc.	Director of Regulatory Affairs
14	1400 Lake Hearn Drive, N.E.	Cox Communications
15	Atlanta, Georgia 30319	2200 Powell Street, Suite 795
16		Emeryville, California 94608
17	Karen L. Clausen	Thomas Campbell
18	Thomas F. Dixon	LEWIS AND ROCA
19	MCI Telecommunications Corporation	40 North Central Avenue
20	707 - 17 th Street, #3900	Phoenix, Arizona 85004
21	Denver, Colorado 80202	Attorneys for MCI and ACI Corp.
22	Bill Haas	Richard M. Rindler
23	Richard Lipman	Antony Richard Petrilla
24	McLeod USA	AWIDLER BERLIN SHEREFF FRIEDMAN, LLP
25	6400 C Street SW	3000 K Street, N.W., Suite 300
26	Cedar Rapids, Iowa 54206-3177	Washington, D.C. 20007-5116
	Richard S. Wolters	Joan Burke
	Law and Government Affairs	OSBORN MALEDON, P.A.
	AT&T & TCG	2929 North Central Avenue, 21 st Floor
	1875 Lawrence Street, Suite 1575	P.O. Box 36379
	Denver, Colorado 80202	Phoenix, Arizona 85067-6379
		Attorneys for AT&T and NEXTLINK
	Joyce Hundley	Daniel Waggoner
	United States Department of Justice	DAVIS WRIGHT TREMAINE
	Antitrust Division	2600 Century Square
	1401 H Street, NW, Suite 8000	1501 Fourth Avenue
	Washington, D.C. 20530	Seattle, Washington 98101-1688
		Attorneys for NEXTLINK
	Alaine Miller	Christine Mailloux
	NEXTLINK Communications, Inc.	BLUMENFELD & COHEN
	500 108 th Avenue NE, Suite 2200	Four Embarcadero Center
	Bellevue, Washington 98004	San Francisco, California 94111
		Attorneys for ACI Corp.

1 Pat Van Midde
2 AT&T Communications of the Mountain
3 States
4 2800 North Central Avenue, Suite 828
5 Phoenix, Arizona 85004

6 
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the US West) Application No. C-1830
Communications, Inc.'s filing of)
its notice of intention to file)
Section 271(c) application with) Progression Order No. 9
the FCC and request for Commission)
to verify US West compliance)
with Section 271(c).) Entered: December 4, 1998

B A C K G R O U N D

On August 14, 1998, US West Communications, Inc. (US West) filed its first set of data requests propounded to AT&T Communications of the Midwest, Inc. (AT&T); to Teleport Communications Group, Inc. (TCG); to Sprint Communications Company (Sprint); to McLeod USA Telecommunications Services, Inc. (McLeod); to MCI Telecommunications Corp. (MCI); to Nebraska Independent Telephone Association (NITA); to Nebraska Telephone Association (NTA); to Nebraska Technology and Telecommunications Inc. (NT&T); and to Cox Nebraska Telecom II, L.L.C. (Cox). On August 19, 1998, US West submitted its first set of data requests to Aliant Midwest, Inc. (Aliant).

On August 20, 1998, AT&T filed its objections to US West's first set of data requests. On August 20, 1998, TCG filed its objections to US West's first set of data requests. On August 20, 1998, McLeod filed its objections to US West's first set of data requests. On August 20, 1998, MCI filed its objection to US West's first set of data requests. On August 21, 1998, Cox filed its objection to US West's first set of data requests. On August 26, 1998, Sprint filed its response to US West's first set of data requests. On September 3, 1998, McLeod filed a supplemental response and objections to US West's first set of data requests.

The Nebraska Independent Telephone Association, the Nebraska Telephone Association, and Nebraska Technology and Telecommunications, Inc. have not filed any responses to US West's first set of data requests.

On August 24, 1998, US West filed a motion to compel responses by AT&T, Teleport, Sprint and McLeod to US West's first set of data requests. On August 25, 1998, AT&T and TCG filed their responses

FROM

Application No. C-1830
Progression Order No. 9

PAGE 2

to US West's motion to compel. On August 26, 1998, Sprint filed its response to US West's motion to compel.

On August 27, 1998, at 9:30 a.m., a hearing was held on all of the above requests for information, objections, motions to compel, and responses thereto. The parties were either present in person, by counsel, or by telephone. Staff Attorney John Doyle was present. Counsel for US West and Aliant announced that they had reached an agreement on their dispute. MCI's objection, based upon the applicability of Public Service Commission General Docket No. C-1540 stating that only those parties who submitted pre-filed testimony and witnesses would be required to respond to discovery, was argued and taken under submission.

Thereafter, arguments were made on behalf of AT&T, TCG, Sprint and McLeod, and a response was made by US West. The proceedings were continued until Monday, August 31, 1998, at which time a further teleconference hearing was held with the same parties participating. At that time, the Special Master announced his rulings. Specifically, he stated that even though the order in Docket No. C-1540 expressly states that discovery can be requested only of those parties who have filed sworn affidavits, exhibits and work papers, to so limit the discovery is a fundamental unfairness and a deprivation of due process to US West. This ruling was subsequently reconsidered by the entire Commission and reversed, and MCI's objections on that basis have been sustained.

The Special Master then stated that all other objections would be overruled, with specific exceptions mentioned below. It was stated that the proprietary objections are protected and covered by the protection order, which could be amplified if necessary to make certain that it was in place. The Special Master further stated that he would err on the side of discovery consistent with the general civil litigation rule, and let the Commission make a final determination as to relevance at the time of hearing. He further stated that he did not know what would be discovered, or how much of what was discovered would be relevant. The Special Master then made specific rulings on burdensome objections, sustaining in part and overruling in part the objections. Additional rulings were made overruling the attorney-client privilege objection.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1830
Progression Order No. 9

PAGE 3

A further teleconference hearing was held on September 2, 1998, with the same parties either present or represented by counsel. In addition, Commissioner Lowell Johnson, Commission Executive Director Robert Logsdon, and Staff Attorney John Doyle were also present. AT&T, TCG, Sprint, and McLeod stated that they wished to seek a reconsideration of the Special Master's previous overruling of their objections to the discovery requests. The Special Master advised that he had no objection to the parties presenting the motion for reconsideration to the entire Commission, and further stated that he was of the opinion that he would not alter his prior rulings on a motion for reconsideration.

The hearing was continued to September 3, 1998, at 3:00 p.m. At that time, the parties were present in person, represented by counsel, or by telephone. Commissioners Lowell Johnson and Frank Landis were present, along with Commission Executive Director Robert Logsdon and Staff Attorneys John Doyle and Chris Post. The Special Master announced that the Commission had agreed to have a special hearing on Tuesday, September 8, 1998, at 1:30 p.m., at which time all filed motions for reconsideration would be considered and ruled upon. Commissioner Landis announced that the hearing would be based upon the filings, without any oral argument. It was agreed that those parties who had not filed a motion for reconsideration would do so on or before 12:00 noon on September 8, 1998.

Hearing was held on September 8, 1998, and on that date the Commission sustained MCI's motion for reconsideration and overruled the Special Master's ruling regarding the applicability of the order in Docket No. C-1540. The Commission overruled all other motions for reconsideration and sustained the Special Master's previous ruling overruling the objections of all parties to the requests for information. Subsequent thereto, AT&T, Sprint, TCG and McLeod withdrew their interventions and asked leave to change their filing status so that they would not be required to respond to discovery requests. This request was granted by the Commission on September 21, 1998. Because of the change in status, the Special Master did not reduce to writing his previous discovery rulings.

On November 13, 1998, the Special Master received a written request from Frank Landis, Commission Vice Chairman, asking that a

Application No. C-1830
Progression Order No. 9

PAGE 4

D I S C U S S I O N

Intervenors are concerned that the data requested is confidential, proprietary, and trade secrets. The Commission has issued a Protective Order consistent with Rule 26(c) of the Nebraska Supreme Court Rules. That order provides that the material requested can only be disclosed to counsel, witnesses and experts; can only be used in this proceeding; cannot be given to anyone with marketing, pricing, product development, market analysis, market entry, or strategic planning responsibilities; and cannot be used for purposes of business or competition. All parties have a good faith obligation to abide by and trust the implementation of the Protective Order.

Rule 016.11 of the Nebraska Public Service Commission Rules of Procedure, Title 291 of the Nebraska Administrative Code, states that the use of discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court. The above rule was in full force and effect at all times mentioned herein. Rule 26(B)(1) of the Nebraska Supreme Court discovery rules provides that, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The Nebraska Rules of Civil Procedure are based upon the Federal Rules of Civil Procedures, and in both jurisdictions, the rules have been liberally construed to allow broad discovery. That is not to say that all information discovered is admissible, but discovery should be allowed when the request appears reasonably calculated to lead to the discovery of admissible evidence. (Henneck v. Lexington State Bank and Trust Company, 1994 Nebraska Appellate Court 228 at 232; Christensen v. Educational Service Unit No. 16, 243 Nebraska 553 at 563 (1993)).

The subject of this Section 271(c) proceeding is the status of competition in the state of Nebraska, and not in any other state. US West cannot prove Section 271(c) compliance in the state of Nebraska unless it has information from the intervenors respecting OSS system needs and the status or potential status of competition. Although US West has a primary obligation to open its markets and put systems in place that will allow competition if it wishes to

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1830
Progression Order No. 9

PAGE 5

enter the long-distance market, what intervenors AT&T, TCG, Sprint and McLeod plan to do is relevant. That is particularly true if these intervenors have no interest in entering the Nebraska market at any time soon. For this reason, Nebraska may be different from Montana, Michigan, South Carolina and other states. Consequently, it is necessary for the FCC to look at the status of competition in each state to determine what the competitors are really planning to do and whether the OSS obligations will be satisfied. The OSS system needs of AT&T may be different from those of Aliant, McLeod, Sprint and the others. For the above reasons, the Special Master believes that all of the requests for information are reasonably calculated to lead to the discovery of relevant and admissible evidence.

O R D E R

Thus, on August 31, 1998, except as to certain intervenors' objections based on burdensomeness, all of intervenors' objections to US West's first set of data requests were and are again hereby, overruled by the Special Master.

Dated this 4th day of December, 1998.


Samuel Van Pelt
Special Master

SECRETARY'S RECORD. NEBRASKA PUBLIC SERVICE COMMISSION
