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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSION

CARL J. KUNASEK  
Chairman

JIM IRVIN  
Commissioner

WILLIAM A. MUNDELL  
Commissioner

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

Docket No: T-00000A-97-0238

**JOINT STATEMENT OF POSITION**  
**ADDRESSING RECIPROCAL COMPENSATION FOR ISP TRAFFIC**

MCI WorldCom, Inc., on behalf of its regulated subsidiaries, (collectively "MCIW"), AT&T Communications of the Mountain States, Inc. ("AT&T"), and Sprint Communications Company L.P. ("Sprint") (collectively "Joint Intervenors") submit their statement of position addressing reciprocal compensation for Internet service provider ("ISP") traffic for consideration by the Commission as it determines whether U S WEST Communications, Inc. ("U S WEST") has complied with the requirements of Checklist Item 13 found in the Section 271 checklist.

These comments are being filed at the request of the Staff of the Commission in light of the recent court rulings by the Court of Appeals for Washington D.C. ("D.C. Circuit")<sup>1</sup> and the

<sup>1</sup> Bell Atlantic Tel. Cos. v. FCC, \_\_\_ F.3d \_\_\_, 2000 WL 273383, (D.C. Cir. Mar. 24, 2000).

1 Court of Appeals for the 5<sup>th</sup> Circuit (“5<sup>th</sup> Circuit”).<sup>2</sup> Further, during workshops conducted on  
2 Checklist Item 13 and U S WEST’s Statement of Generally Accepted Terms (“SGAT”), the  
3 payment of reciprocal compensation for ISP was not discussed because of the ruling in the  
4 FCC’s Bell Atlantic 271 (“BANY Order”) order on checklist Item 13.<sup>3</sup> In that order, the FCC  
5 found that “[I]n light of our prior ruling that “ISP-bound traffic is non-local interstate traffic” and  
6 that “the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do[es] not  
7 govern inter-carrier compensation for this traffic,” we conclude that Global NAPs’ arguments are  
8 irrelevant to checklist item 13.<sup>4</sup> Therefore, this issue was deemed to be irrelevant to consideration  
9 of U S WEST’s compliance with Checklist Item 13 here. As a result of recent decisions from the  
10 DC and 5<sup>th</sup> Circuit Courts of Appeal, the FCC’s determination that ISP traffic is not local traffic  
11 for purposes of Section 251(b)(5) and Checklist Item 13 is no longer viable.  
12

### 13 INTRODUCTION AND SUMMARY OF ARGUMENT

14  
15 Checklist Item No. 13 requires U S WEST to provide reciprocal compensation  
16 arrangements for the transport and termination of telecommunications in accordance with the  
17 requirements of Section 252(d)(2). Pursuant to Section 252(d)(2), the rates, terms and conditions  
18 for reciprocal compensation shall not be considered just and reasonable unless the terms and  
19 conditions provide for mutual and reciprocal recovery of costs associated with transport and  
20 termination of calls and such terms and conditions determine such costs on the basis of a  
21

22 \_\_\_\_\_  
23 <sup>2</sup> Southwestern Bell Tel. Co. v. Public Utils. Comm'n, \_\_ F.3d \_\_, 2000 WL 332062, (5th Cir.  
Mar. 30, 2000).

24 <sup>3</sup> In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of  
25 the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC  
Docket No. 99-295, Decision No. FCC99-404, adopted: December 21, 1999, released: December  
26 22, 1999.

<sup>4</sup> *Id.* at ¶377.

1 reasonable approximation of the additional costs of terminating such calls. (*See* Footnote 11,  
2 *supra.*)

3           The FCC removed the treatment of ISP traffic from consideration as a Checklist Item 13  
4 issue in the BANY Order based upon its own ISP order.<sup>5</sup> However, that order has been vacated  
5 by the D.C. Circuit. Section 251(b)(5) requires reciprocal compensation for calls to ISPs as local  
6 calls. The D.C. Circuit found that such calls most likely terminate at the ISP and are, therefore,  
7 local calls. The 5<sup>th</sup> Circuit found that under the FCC's own definition of termination, these calls  
8 are local. Thus, both courts, relying on prior pronouncements of the FCC, seriously undermine  
9 the FCC's determination that these calls could be considered interstate traffic.  
10

11           Even if the FCC were to rule on remand that no reciprocal compensation is required  
12 because these calls are exchange access traffic and, therefore, do not fit within 251(b)(5), the  
13 Arizona Corporation Commission still has the authority to require reciprocal compensation for  
14 these calls. As the 7th Circuit stated some time ago in the Illinois ISP case, the fact that the Act  
15 does not explicitly require reciprocal compensation for calls to ISPs is not to say that the Act  
16 prohibits reciprocal compensation for these calls.  
17

18 **I. The Act requires reciprocal compensation for calls to ISPs.**

19           Section 251(b)(5) of the Act requires all LECs to "establish reciprocal compensation  
20 arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5).  
21 In its Local Competition Order, the FCC narrowed the class of traffic for which the Act requires  
22

23  
24  
25 <sup>5</sup> In re Implementation of the Local Competition Provisions in the Telecommunications  
26 Act of 1996, Inter-Carrier compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 ¶¶ 1,10  
(1999) ("ISP Order")

1 payment of reciprocal compensation to "local traffic."<sup>6</sup> The FCC held that traffic is "local" and  
2 entitled to reciprocal compensation if it "originates and terminates within a local service area."<sup>7</sup>  
3 The FCC defined termination as "the switching of traffic that is subject to section 251(b)(5) at the  
4 terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that  
5 switch to the called party's premises."<sup>8</sup> In its ISP Order, the FCC stated in a conclusory manner  
6 that calls to ISPs are not subject to this regulation and do not terminate at the ISP.<sup>9</sup>  
7

8 The DC Circuit vacated that decision for lack of reasoned decision-making. The Court  
9 stated:

10 The end-to-end analysis applied by the Commission here is one that  
11 it has traditionally used to determine whether a call is within its  
12 interstate jurisdiction. Here it used the analysis for quite a different  
13 purpose, without explaining why such an extension made sense in  
14 terms of the statute or the Commission's own regulations. Because  
of this gap, we vacate the ruling and remand the case for want of  
reasoned decision-making.

15 \* \* \*

16 Calls to ISPs are not quite local, because there is some  
17 communication taking place between the ISP and out-of-state  
18 websites. But they are not quite long-distance, because the  
19 subsequent communication is not really a continuation, in the  
20 conventional sense, of the initial call to the ISP. The Commission's  
21 ruling rests squarely on its decision to employ an end-to-end  
22 analysis for purposes of determining whether ISP- traffic is local.  
There is no dispute that the Commission has historically been  
justified in relying on this method when determining whether a  
particular communication is jurisdictionally interstate. But it has yet  
to provide an explanation why this inquiry is relevant to discerning  
whether a call to an ISP should fit within the local call model of two

23  
24 <sup>6</sup> In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 ¶¶ 1033-1034 (1996).

25 <sup>7</sup> *Id.* ¶¶ 1034-1035.

26 <sup>8</sup> *Id.* ¶ 1040; 47 C.F.R. § 51.701(d).

<sup>9</sup> The ISP Order ¶¶ 1, 10 (1999).

1 collaborating LECs or the long-distance model of a long-distance  
2 carrier collaborating with two LECs.

3 In fact, the extension of "end-to-end" analysis from jurisdictional  
4 purposes to the present context yields intuitively backwards results.

5 \* \* \*

6 Because the Commission has not provided a satisfactory  
7 explanation why LECs that terminate calls to ISPs are not properly  
8 seen as "terminat[ing] ... local telecommunications traffic," and why  
9 such traffic is "exchange access" rather than "telephone exchange  
10 service," we vacate the ruling and remand the case to the  
11 Commission.

12 The Court also indicated that calls to ISPs *do* fit the FCC's regulatory definition of  
13 termination for reciprocal compensation purposes:

14 Calls to ISPs appear to fit this definition: the traffic is switched by  
15 the LEC whose customer is the ISP and then delivered to the ISP,  
16 which is clearly the "called party." In its ruling the Commission  
17 avoided this result by analyzing the communication on an end-to-  
18 end basis: "[T]he communications at issue here do not terminate at  
19 the ISP's local server ..., but continue to the ultimate destination or  
20 destinations." FCC Ruling, 14 FCC Rcd at 3697 (p 12). But the  
21 cases it relied on for using this analysis are not on point. Both  
22 involved a single continuous communication, originated by an end-  
23 user, switched by a long-distance communications carrier, and  
24 eventually delivered to its destination. Bell Atlantic Tel. Cos. v.  
25 FCC, \_\_\_ F.3d \_\_\_, 2000 WL 273383, at 5 (D.C. Cir. Mar. 24, 2000).

26 The Fifth Circuit also has held that calls to ISPs terminate at the ISP under the FCC's  
regulatory definition: "So, under the foregoing [FCC regulatory] definition, 'termination' occurs  
when Time Warner switches the call at its facility and delivers the call to 'the called party's  
premises,' which is the ISP's local facility. Under this usage, the call indeed 'terminates' at the  
ISP's premises."<sup>10</sup>

<sup>10</sup> Southwestern Bell Tel. Co. v. Public Utils. Comm'n, \_\_\_ F.3d \_\_\_, 2000 WL 332062, at 9 (5th  
Cir. Mar. 30, 2000).

1           Because a call to an ISP terminates at the local ISP's premises under the FCC's own  
2 regulations, it is a local call and federal law requires carriers to pay reciprocal compensation for  
3 calls to ISPs.

4  
5 **II.     The Arizona Corporation Commission Has the Authority to Require Reciprocal**  
6 **Compensation For Calls to ISPs.**

7           Even if it is argued that federal law does not require reciprocal compensation for calls to  
8 ISPs, or if the FCC finds in the remand of the ISP Order that reciprocal compensation is not  
9 required, this commission still has the authority to require reciprocal compensation for calls to  
10 ISPs. As the Seventh Circuit has held: "That the Act does not require reciprocal compensation for  
11 calls to ISPs is not to say that it prohibits it."<sup>11</sup> The Ninth Circuit and several federal district  
12 courts have affirmed decisions of state commissions requiring reciprocal compensation for calls to  
13 ISPs in arbitration proceedings.<sup>12</sup>

14  
15           The FCC made clear in the ISP Order that state commissions can require reciprocal  
16 compensation for calls to ISPs in arbitration proceedings.<sup>13</sup> Though several incumbent local  
17 exchange carriers ("ILECs") challenged this ruling on appeal, the D.C. Circuit did not address  
18 their challenge, though it made clear that state commissions do retain the authority to regulate  
19 calls to ISPs: "the [ILECs are] free to seek relief from state-authorized compensation that they  
20 believe to be wrongfully imposed."<sup>14</sup>

21  
22  
23 <sup>11</sup> Illinois Bell Tel. Co. v. WorldCom Technologies, 179 F.3d 566, 573 (7th Cir. 1999).

24 <sup>12</sup> US West Communications v. MFS Intelenet, 193 F.3d 1112, 1122 (9th Cir. 1999) aff'g US  
25 West Communications v. MFS Intelenet, No. C97-222WD, 1998 WL 350588 (W.D. Wash. Jan. 7,  
1998); see also US West Communications v. Jennings, 46 F. Supp. 2d 1004, 1026 (D. Ariz. 1999);  
US West Communications v. WorldCom Technologies, 31 F. Supp. 2d 819, 825 (D. Or. 1998).

26 <sup>13</sup> ISP Order ¶¶ 24-25.

<sup>14</sup> Bell Atlantic Tel. Cos. v. FCC, \_\_\_ F.3d \_\_\_, 2000 WL 273383, at 9 (D.C. Cir. Mar. 24, 2000).

1 The Fifth Circuit held that the FCC "has rejected" the argument that state commissions  
2 lack authority to regulate calls to ISPs, and instead found that "state commission authority over  
3 interconnection agreements pursuant to section 252 'extends to both interstate and intrastate  
4 matters."<sup>15</sup> The Court in responding to arguments from Southwestern Bell stated:

5 Southwestern Bell poses yet another challenge to the PUC's  
6 jurisdiction, urging that, because Internet traffic is interstate, as a  
7 matter of federal law state commissions such as the PUC lack  
8 jurisdiction to impose reciprocal compensation liability for such  
9 traffic. We disagree.

10 \* \* \*

11 The FCC too has rejected the argument advanced by Southwestern  
12 Bell, noting that "state commission authority over interconnection  
13 agreements pursuant to section 252 'extends to both interstate and  
14 intrastate matters.'" Reciprocal Compensation Ruling ¶ 25, quoting  
15 *Implementation of the Local Competition Provisions in the*  
16 *Telecommunications Act of 1996, First Report and Order*, 11  
17 F.C.C.R. 15499 ¶ 84 (1996). Accordingly, we hold that here the  
18 PUC properly exercised its jurisdiction regardless of any interstate  
19 aspect of the subject telecommunications.

20 In affirming the rulings of the Texas PUC and the district court below, the Court approved  
21 the Texas PUC's conclusions that:

22 "a call between two end users in the same local calling area is local  
23 traffic." Agreeing with the FCC's then-prevailing view that  
24 providing of Internet service involved "multiple components," the  
25 PUC declared that "it is the telecommunications service component,  
26 rather than the information service component, that constitutes the  
basis for determining the jurisdiction of the traffic involved in calls  
to ISPs. (Footnote omitted)

The 5<sup>th</sup> Circuit went on to hold that:

the PUC's determination that reciprocal compensation obligations  
encompass ISP-bound traffic does not conflict with the Act or with  
any FCC rule regarding such traffic. As the Seventh Circuit  
observed,

<sup>15</sup> Southwestern Bell Tel. Co. v. Public Utils. Comm'n, \_\_\_ F.3d \_\_\_, 2000 WL 332062, at 3 (5th Cir. Mar. 30, 2000)

1 The FCC could not have made clearer its willingness--at least until  
2 the time a rule is promulgated--to let state commissions make the  
3 call. We see no violation of the Act in giving such deference to state  
4 commissions; in fact, the Act specifically provides state  
5 commissions with an important role to play in the field of  
6 interconnection agreements. . . . In short, nothing in what the [state  
7 commission] said violates federal law in existence at this time.

8 The Act allows states to impose requirements in interconnection agreements and  
9 presumably SGATs pursuant to state law, so long as there is no conflict with federal law.<sup>16</sup> There  
10 is no conflict with federal law in requiring reciprocal compensation for calls to ISPs, as the FCC  
11 has recognized in the ISP Order.<sup>17</sup>

12 The FCC has also held in the access charge context that state regulators should continue to  
13 regulate calls to ISPs as local calls, instructing ILECs that if they believe that "some intrastate rate  
14 structures fail to compensate incumbent LECs adequately for providing service to customers with  
15 high volumes of incoming calls [including ISPs], incumbent LECs may address their concerns to  
16 state regulators."<sup>18</sup> The Eighth Circuit specifically affirmed the FCC on this point.<sup>19</sup>

17 **III. The Commission Must Require U S WEST to Amend its SGAT by Requiring  
18 Reciprocal Compensation for Calls to ISPs.**

19 Since U S WEST has chosen to file an SGAT addressing reciprocal compensation  
20 which is being relied on as evidence of its compliance with Section 271, including Checklist Item  
21 13, and since several courts have ruled on this issue, this issue is now ripe for consideration in this  
22 proceeding. U S WEST should be directed to modify its Arizona SGAT to treat ISP traffic as

23 <sup>16</sup> 47 U.S.C. §§ 251(d)(3); 252(e)(3); see also Michigan Bell Tel. Co. v. Strand, 26 F. Supp. 2d  
24 993, 1000 (W.D. Mich. 1998).

25 <sup>17</sup> ISP Order ¶ 26.

26 <sup>18</sup> In re Access Charge Reform, First Report and Order, 12 F.C.C.R. 15982 ¶ 346 (1997).

<sup>19</sup> Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 542-43 (8th Cir. 1998).

1 local traffic subject to reciprocal compensation. Therefore, paragraph 7.3.4.1.3 of US WEST's  
2 SGAT should be changed to read as follows:

3  
4 7.3.4.1.3 ~~As set forth above,~~ The Parties agree that reciprocal  
5 compensation ~~only~~ applies to Exchange Service (EAS/Local)  
6 Traffic and further agree ~~that the FCC has determined~~ that traffic  
7 originated by either Party (the "Originating Party") and delivered to  
8 the other Party, which in turn delivers the traffic to the enhanced  
9 service provider (the "Delivering Party") is ~~interstate~~ Exchange  
10 Service (EAS/Local) Traffic in nature. ~~Consequently, the Delivering~~  
11 ~~Party must identify which, if any, of this traffic is Exchange Service~~  
12 ~~(EAS/Local) Traffic. The Originating Party will only pay reciprocal~~  
13 ~~compensation for the traffic the Delivering Party has substantiated~~  
14 ~~to be Exchange Service (EAS/Local) Traffic. In the absence of such~~  
15 ~~substantiation, such traffic shall be presumed to be interstate.~~

11 In addition, corresponding changes should be made to other paragraphs, including  
12 but not limited to paragraph 7.3.2.3. US West should be required to make all  
13 corresponding changes and submit those to all parties for review and approval.

15 Because the originating LEC, such as U S WEST, collects the revenue from its local  
16 customers for calls that must be routed on the CLEC's network to be delivered to the called party  
17 (the ISP) the only way for CLECs to be compensated for delivering calls from ILECs' customers  
18 to ISPs is through reciprocal compensation. Absent an intercarrier compensation mechanism,  
19 CLECs do not recover legitimate costs incurred to complete calls made by U S WEST's end-  
20 users. Calls to ISPs should be eligible for reciprocal compensation because they are just like local  
21 calls and should be treated as such. Calls made by U S WEST end users to ISPs require the same  
22 switching, transport and termination facilities as voice calls that unquestionably are subject to  
23 reciprocal compensation. Moreover, like CLECs, U S WEST serves ISPs on its network and  
24 receives full local rates for terminating such traffic to its ISPs. It is therefore discriminatory and  
25  
26

1 anticompetitive to permit U S WEST to receive full local rates for such traffic when it terminates  
2 the same calls on its network, but then not require it to pay identical reciprocal compensation rates  
3 for the terminating portion (which have been set at the local rates in Arizona) to CLECs when U S  
4 WEST is relieved of the burden of terminating such traffic on the CLEC network. This is  
5 particularly so because it is the U S WEST end user that places the ISP call which in turn places  
6 costs on the CLEC network. Denying such reciprocal compensation clearly stalls competition in  
7 the local telecommunications market, and perpetuates U S WEST's anticompetitive monopoly.  
8

9 Telecommunications service does terminate at the ISP because ISPs provide customers  
10 with information services, not telecommunication services. The D.C. Circuit agrees. The D.C.  
11 Circuit concluded that calls to ISPs may terminate at the ISP because the information services that  
12 an ISP provides are distinct from the separate telecommunications service used to connect the  
13 caller to the ISP. As the D.C. Circuit stated:  
14

15 ISPs . . . are "information service providers," . . . which upon  
16 receiving a call originate further communications to deliver and  
17 retrieve information to and from distant websites. . . . Although ISPs  
18 use telecommunications services to provide information services,  
19 they are not telecommunications providers (as are long-distance  
20 carriers).

21 Adopting Joint Intervenors' argument, the D.C. Circuit recognized that "[i]n this regard, an  
22 ISP appears no different from many businesses, such as 'pizza delivery firms, travel reservations  
23 agencies, credit card verification firms, or taxicab companies,' which use a variety of  
24 communication services to provide their goods or services to their customers.<sup>20</sup> Further, calls to  
25 ISPs are just like other local calls – e.g., caller dials seven-digit number and is billed for a local  
26 call.

<sup>20</sup> Bell Atlantic Tel. Cos. v. FCC, \_\_ F.3d \_\_, 2000 WL 273383, at 6 (D.C. Cir. Mar. 24, 2000).

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**CONCLUSION**

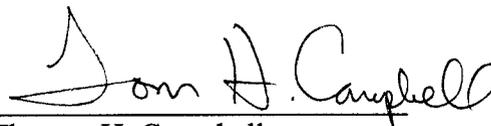
For the foregoing reasons, the Commission must now address the issue of reciprocal compensation for ISP traffic as part of this proceeding. When the workshop addressing Checklist Item 13 was held, the BANY order essentially precluded discussion of this issue. However, with the rulings by the DC Circuit and the 5<sup>th</sup> Circuit, the Commission must address ISP traffic as part of Checklist Item No. 13 and require U S WEST to provide reciprocal compensation for ISP traffic.

The undersigned is authorized to sign this pleading and file it on behalf of the named intervenors herein.

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26

Dated: April 14, 2000.

LEWIS AND ROCA LLP



Thomas H. Campbell  
40 N. Central Avenue  
Phoenix, Arizona 85007  
Attorneys for MCI WorldCom, Inc.

- AND -

Thomas F. Dixon  
MCI WorldCom, Inc.  
707 -17<sup>th</sup> Street, #3900  
Denver, Colorado 80202  
303-390-6206

- AND -

Thomas C. Pelto  
Rebecca B. Cook  
Richard S. Wolters  
AT&T Communications of the Mountain States, Inc.  
1875 Lawrence Street  
Suite 1575  
Denver, Colorado 80202  
(303) 298-6357

- AND -

Darren Weingard  
Sprint Communications Company L.P.  
1850 Gateway Drive  
7<sup>th</sup> Floor  
San Mateo, California 94404-2567

ORIGINAL and ten (10) copies  
of the foregoing filed this 14<sup>th</sup>  
day of April, 2000 with:

Arizona Corporation Commission  
Utilities Division – Docket Control  
1200 W. Washington Street  
Phoenix, Arizona 85007

**LEWIS  
AND  
ROCA  
LLP**

L A W Y E R S

1 COPY of the foregoing hand-  
delivered this 14<sup>th</sup> day of April,  
2 2000, to:

3 Maureen Scott  
Legal Division  
4 Arizona Corporation Commission  
1200 W. Washington Street  
5 Phoenix, Arizona 85007

6 Lyn Farmer, Chief Hearing Officer  
Arizona Corporation Commission  
7 1200 W. Washington Street  
Phoenix, Arizona 85007

8 Deborah Scott, Director  
9 Utilities Division  
Arizona Corporation Commission  
10 1200 W. Washington Street  
Phoenix, Arizona 85007

11 COPY of the foregoing mailed  
12 This 14<sup>th</sup> day of April, 2000, to:

13 Scott Wakefield  
Residential Utility Consumer Office  
14 2828 N. Central Avenue  
Phoenix, Arizona 85004

15 Maureen Arnold  
16 US West Communications, Inc.  
3033 N. Third Street  
17 Room 1010  
Phoenix, Arizona 85012

18 Mark Dioguardi  
19 Tiffany and Bosco PA  
500 Dial Tower  
20 1850 N. Central Avenue  
Phoenix, Arizona 85004

21 Thomas L. Mumaw  
22 Snell & Wilmer  
One Arizona Center  
23 Phoenix, Arizona 85004-0001

24 Andrew O. Isar  
25 TRI  
4312 92<sup>nd</sup> Avenue N.W.  
Gig Harbor, Washington 98335

26

**LEWIS  
AND  
ROCA  
LLP**

LAWYERS

- 1 Michael Patten  
Brown & Bain, P.A.  
2901 N. Central Avenue  
Phoenix, Arizona 85012
- 3 Timothy Berg  
4 Fennemore, Craig, P.C.  
3003 N. Central Avenue  
5 Suite 2600  
Phoenix, Arizona 85012-3913
- 6 Thomas M. Dethlef  
7 Andrew D. Crain  
Charles Steese  
8 US West, Inc.  
1801 California Street, Ste. 5100  
9 Denver, Colorado 80202
- 10 Joan S. Burke  
Osborn & Maledon  
11 2929 N. Central Avenue  
21<sup>st</sup> Floor  
12 Phoenix, Arizona 85067-6379
- 13 Michael M. Grant  
Gallagher & Kennedy  
14 2600 N. Central Avenue  
Phoenix, Arizona 85004-3020
- 15
- 16 Richard M. Rindler  
Morton J. Posner  
17 Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
18 Washington, D.C. 20007-5116
- 19 Carrington Phillip  
Cox Communications, Inc.  
20 1400 Lake Hearn Drive, N.E.  
Atlanta, Georgia 30319
- 21 Penny Bewick  
22 Electric Lightwave, Inc.  
4400 NE 77<sup>th</sup> Avenue  
23 Vancouver, Washington 98662
- 24
- 25
- 26

**LEWIS  
AND  
ROCA  
LLP**

LAWYERS

- 1 Raymond S. Heyman  
Randall H. Warner
- 2 Roshka Heyman & DeWulf  
Two Arizona Center  
3 400 Fifth Street  
Suite 1000  
4 Phoenix, Arizona 85004
- 5 Diane Bacon, Legislative Director  
Communications Workers of America  
6 5818 North 7<sup>th</sup> Street  
Suite 206  
7 Phoenix, Arizona 85014-5811
- 8 Charles Kallenback  
ACSI  
9 131 National Business Parkway  
Annapolis Junction, Maryland 20701
- 10 Richard Smith  
11 Cox California Telecom, Inc.  
Two Jack London Square  
12 Oakland, California 94697
- 13 Bill Haas  
Richard Lipman  
14 McLeod USA  
6400 C Street S.W.  
15 Cedar Rapids, Iowa 54206-3177
- 16 Joyce Hundley  
United States Department of Justice Antitrust Division  
17 1401 H Street, N.W.  
Suite 8000  
18 Washington, D.C. 20530
- 19 Daniel Waggoner  
Davis Wright Tremaine  
20 2600 Century Square  
15011 Fourth Avenue  
21 Seattle, Washington 98101-1688
- 22 Alaine Miller  
NextLink Communications, Inc.  
23 500 108<sup>th</sup> Avenue NE  
Suite 2200  
24 Bellevue, Washington 98004
- 25
- 26

LEWIS  
AND  
ROCA  
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LAWYERS

1  
2  
3  
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22  
23  
24  
25  
26

Richard Smith  
Cox California Telecom, Inc.  
Two Jack London Square  
Oakland, CA 94697

Philip Doherty  
545 S. Prospect Street  
Suite 22  
Burlington, VT 05401

Craig Marks  
Citizens Utilities Company  
2901 N. Central Avenue  
Suite 1660  
Phoenix, Arizona 85012

Douglas Hsiao, Esq.  
Rhythms Links Inc.  
6933 S. Revere Parkway  
Englewood, CO 80112

David Kaufman  
e-spire Communications, Inc.  
466 W. San Francisco Street  
Santa Fe, NM 87501

W. Hagood Bellinger  
5312 Trowbridge Drive  
Dunwoody, GA 30338

*Betty J. Griffin*