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BEFORE THE ARIZONA CORPORATION COMMISSION,  
Arizona Corporation Commission  
AZ CORP COMMISSION

DOCKETED

CARL J. KUNASEK  
CHAIRMAN  
JAMES M. IRVIN  
COMMISSIONER  
WILLIAM MUNDELL  
COMMISSIONER

AUG 06 1999

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IN THE MATTER OF PLAN TO DOCKET NO. RT-00000J-99-0095  
IMPLEMENT TOLL CARRIER  
PRESUBSCRIPTION SYSTEM BASED ON REPLY COMMENTS OF U S WEST  
STATE RATHER THAN LATA COMMUNICATIONS, INC.  
BOUNDARIES.

U S WEST Communications, Inc. ("U S WEST"), by its attorneys, respectfully submits these comments in reply to the responses of AT&T and MCI to the Staff letter of July 2, 1999. In response to that letter, U S WEST states as follows:

There is little to respond to in the comments of AT&T and MCI. Neither party comments at all on how the Commission's order should be implemented. Instead, they both repeat arguments (that they made several times in the past in this docket) regarding why they believe that the Commission should not have entered its order. AT&T and MCI made the same arguments to the Commission before the Commission entered its order, and the Commission disagreed with them when it entered its order.

The comments of AT&T and MCI deserve no reply, and they should be disregarded. In case the Staff feels a reply is necessary, U S WEST will repeat the responses it earlier made to AT&T and MCI.

Section 2(b)(1) of the Communications Act<sup>1</sup> provides that, except as provided in certain identified sections of the Act, "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communications service. . ."

The Supreme Court construed this section in *Louisiana Public Service Comm'n v. FCC*,<sup>2</sup> and at least two United States Courts of Appeal have construed *Louisiana PSC* to preserve state authority over intrastate telecommunications matters. For example, the United States Court of Appeals for the Ninth Circuit stated:

We reject the [Federal Communications] Commission's interpretation of § 2(b)(1). We find nothing in the language of § 2(b)(1) to support the cramped reading advanced by the Commission. To the contrary, the broad language of § 2(b)(1) makes clear that the sphere of state authority which the statute "fences off from FCC reach or regulation," *Louisiana PSC*, 476 U.S. at 370, includes, at a minimum, services that are delivered by a telephone carrier "in connection with" its intrastate common carrier telephone services.

*California v. FCC*.<sup>3</sup> Similarly, in *Nat'l Ass'n of Regulatory Utils. Comm'rs v. FCC*,<sup>4</sup> the United States Court of Appeals for the D.C. Circuit stated:

*Louisiana PSC* establishes the governing principles for interpreting section 152(b). There the Court made clear that the Act, through section 152(b), establishes a system by which the states exercise the same

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<sup>1</sup> 47 U.S.C. § 152(b).

<sup>2</sup> 476 U.S. 355 (1986).

<sup>3</sup> 905 F.2d 1217, 1240 (9th Cir. 1990) (footnote omitted).

<sup>4</sup> 880 F.2d 422 (D.C. Cir. 1989).

authority over intrastate wire communication as the FCC exercises over interstate wire communications:

"By its terms, this provision fences off from FCC reach or regulation intrastate matters - indeed, *including matters 'in connection with' intrastate service.* Moreover, the language with which it does so is certainly as sweeping as the wording of the provision [section 151] declaring the purpose of Act and the role of the FCC. . . . We agree with petitioners that . . . sections [151 and 152(b)] are naturally reconciled . . . to enact a *dual* regulatory system. . . ." <sup>5</sup>

The United States Supreme Court decision in *AT&T Corp. v. Iowa Utils. Bd.* <sup>6</sup> does not alter the result or confer exclusive authority over all local competition issues on the FCC. In *AT&T Corp.*, the Court addressed the discrete issue whether Congress vested the FCC with any authority to establish pricing rules for state utility commissions to apply in arbitrations under 47 U.S.C. §§ 251-252. The Court held that the FCC had such authority. <sup>7</sup> The Court, however, did not hold that only the FCC can establish pricing rules to apply under the Act or that the FCC has exclusive authority to implement the Act.

In its *LATA Declaratory Ruling*, the Common Carrier Bureau assumed that Congress had conferred exclusive jurisdiction on it to modify LATA boundaries. <sup>8</sup> That assumption is not correct.

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<sup>5</sup> 880 F.2d at 428 (quoting *Louisiana PSC*, 476 U.S. at 370) (emphasis added and in the originals).

<sup>6</sup> 119 S.Ct. 721 (1999).

<sup>7</sup> *Id.* at 729-33.

<sup>8</sup> *LATA Declaratory Ruling* ¶16. Admittedly, U S WEST had taken the position before the state commissions in Minnesota and Arizona that the Telecommunications Act of 1996 assigned authority over LATA boundaries to the Commission. U S WEST's principal contention was that the commission had delegated this authority concerning intrastate LATA boundaries to the states, and that was the issue

Section 251 (g) of the Act does not confer sole jurisdiction over LATA boundaries to the Commission. That section states:

On and after . . . the date of enactment of the Telecommunications Act of 1996 [February 8, 1996], each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same *equal access and nondiscriminatory interconnection restrictions and obligations* (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until *such restrictions and obligations* are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.<sup>9</sup>

"Such restrictions and obligations" refers back to "equal access and nondiscriminatory interconnection restrictions and obligations." These were the restrictions and obligations imposed by Sections II(A) and (B) of the Consent Decree,<sup>10</sup> and not the prohibition against providing interLATA telecommunications services in Section II(D). Indeed, § 251(g) does not even mention LATAs.

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that the Common Carrier Bureau addressed. U S WEST maintains, however, that the Commission does not have exclusive jurisdiction to address this issue, and the ACC apparently agrees.

<sup>9</sup> 47 U.S.C. § 251(g) (emphasis added).

<sup>10</sup> *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

Section 271 of the Act<sup>11</sup> codifies a prohibition against RBOCs providing certain interLATA services. Significantly, nothing in § 153(25), which defines LATAs, precludes state commissions from altering in-state LATA boundaries.<sup>12</sup> Section 153(25) defines a LATA to include (A) LATAs established before the Act by a Bell operating company ("BOC") and (B) LATAs established or modified by a BOC after enactment.<sup>13</sup> By its express terms, § 153(25) requires Commission approval only if a BOC seeks to establish or modify LATA boundaries.<sup>14</sup> This was the issue in the *LATA Declaratory Ruling*, since U S WEST, a BOC, had petitioned the state commissions for redefinition of the Arizona and Minnesota LATA boundaries. Here, the ACC itself is proposing to modify in-state LATA boundaries under its sovereign authority. Section 153(25) is silent regarding state commission LATA modifications and, certainly, does not declare that a state commission cannot modify an intrastate LATA boundary.

Thus, Congress has not explicitly delegated sole authority over purely intrastate LATA boundaries to the Commission. In addition, federal law has not preempted the ACC's authority to modify in-state LATA boundaries. The federal government does not

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<sup>11</sup> 47 U.S.C. § 271.

<sup>12</sup> 47 U.S.C. § 153(25).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (A LATA means "a contiguous geographic area" established February 8, 1996, or "established or modified by a Bell operating company after such date of enactment and approved by the Commission." (emphasis added).

"occupy the field" with respect to telecommunications matters,<sup>15</sup> nor has the Act impliedly preempted the ACC from taking the action at issue. To permit preemption of a power traditionally exercised by a state or local government, Congress must make its intention to do so unmistakably clear in the language of the state,<sup>16</sup> which it has not done here. Moreover, even if it had done so, there is a strong argument that any interpretation of § 152(b) that prevents states from modifying entirely intrastate LATA boundaries would violate the Tenth Amendment of the United States Constitution by impermissibly infringing upon state authority over intrastate calls. Although *New York v. United States*<sup>17</sup> and *Printz v. United States*<sup>18</sup> principally involved congressional efforts to compel states and their officers to execute federal law, both cases provide strong support for sovereign state's rights.

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<sup>15</sup> Several provisions of the Act confirm that Congress has not "occupied the field" and preempted all state regulation of telecommunications matters. See, e.g., Telecommunications Act of 1996, § 601(c)(1) (uncodified), 47 U.S.C. §§ 261(c), 251(d)(3), 252(e)(3).

<sup>16</sup> See *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999).

<sup>17</sup> 505 U.S. 144 (1992).

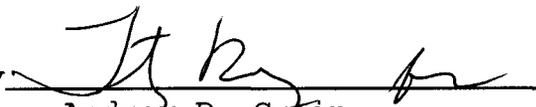
<sup>18</sup> 521 U.S. 898 (1997).

DATED this 6<sup>th</sup> day of August, 1999.

Respectfully submitted,

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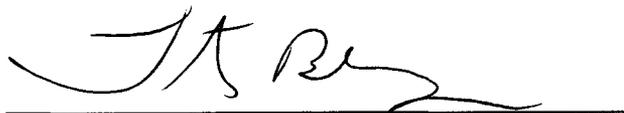
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