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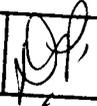
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Arizona Corporation Commission

DOCKETED

JUL 23 1999

WILLIAM A. MUNDELL
COMMISSIONER

DOCKETED BY 

IN THE MATTER OF PLAN TO IMPLEMENT)
TOLL CARRIER PRESUBSCRIPTION SYSTEM)
BASED ON STATE RATHER THAN LATA)
BOUNDARIES)

DOCKET NO. RT-00000J-99-0095

**OPENING COMMENTS OF
MCI WORLDCOM, INC.**

MCI WorldCom, Inc. ("MCIW"), on behalf of its regulated subsidiaries, submits these opening comments in response to letter issued by David A. Motycka, Acting Assistant Director, Utilities Division, dated July 2, 1999, concerning a Plan to Amend Commission Rules to Redefine the LATA Boundaries to Make Arizona a Single-LATA State and Modify the Current Toll Carrier Presubscription Process.

The Commission Staff seeks comment on the process for the development of this plan and proposed rule amendments to achieve the Commission's directives found in Decision No. 61696 issued in this docket on May 13, 1999. The Staff requested MCIW and other interested parties to comment on the following issues:

1.) Please identify any and all ramifications to your company once the LATA boundaries in Arizona are redefined to make it a single-LATA state. Please identify any and all ramifications to your company once the current LATA-based carrier selection process in Arizona is revised to be based upon state boundaries, rather than LATA boundaries.

RESPONSE: Once the LATA boundaries are redefined and the carrier selection process is revised, U S WEST's "carrot" to open the local exchange market in Arizona as contemplated under the Federal Telecommunications Act of 1996 will be eliminated, assuring that U S WEST will have little or no incentive to comply with the section 271 checklist in order for it to enter the interLATA long distance market in Arizona.

Because of U S WEST's dominance and virtual monopoly in the local exchange market, it will be in the best position to use its near monopoly market share to inappropriately offer packages of local and toll services throughout Arizona that no competitive local exchange carrier ("CLEC") or interexchange carrier ("IXC") will be able to match because no CLEC or IXC has any market power in either the local or toll market. U S WEST will also be able to price services in the short run with which no CLEC will be able to compete. For example, U S WEST may set toll prices that are lower than the access charges which IXCs must pay to originate or terminate toll services on U S WEST's network – a classic price squeeze. While those prices may appear to benefit consumers in the short run, in the long run competition in both the local and long distance markets will be deterred and economic barriers to entry will be erected.

If IXCs cannot compete with U S WEST toll rates because of improper and anti-competitive pricing, toll carriers will likely exit the market or certainly curtail activities in Arizona. Moreover, it is unlikely that MCIW or other providers would invest in additional

facilities in Arizona given the prices and resale discounts established by the Commission in the consolidated arbitration and this ruling to make Arizona a single-LATA state. In short, consumers will not be benefited and competition will be thwarted.

2.) Please describe how the ramifications identified in question 1 above can be addressed in the proposed rules.

RESPONSE: Absent a change of policy by the Commission in this docket which reverses the ruling entered in Decision No. 61696 and adopts the recommended ruling entered by Chief Hearing Officer Jerry L. Rudibaugh, the Commission's amendments cannot address MCIW's concerns stated in Question 1 above. However, any amendments issued should at least preclude U S WEST from setting prices which permit it to establish retail toll prices that create a price squeeze for competitors offering intrastate toll services in Arizona and preclude it from offering improper toll packages.

3.) Please identify any remaining issues arising in conjunction with redefining the LATA boundaries in Arizona. Please also identify any remaining issues arising in conjunction with amending the current intraLATA toll carrier presubscription plan in Arizona.

RESPONSE: The Telecommunications Act of 1996 (the "Act"), the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999), and an order of the Federal Communications Commission ("FCC") all demonstrate that the FCC has exclusive jurisdiction over LATA boundaries, and that states are not free to unilaterally redefine or obliterate those boundaries.

The FCC has explicitly held that it possesses "exclusive authority over LATA boundaries." Order, In the Matter of Petition for Declaratory Ruling Regarding U S WEST

Petitions to Consolidate LATAs in Minnesota and Arizona, 12 F.C.C.R. 4738, ¶ 19 (1997)

(“Arizona LATA Order”). In that Order, the FCC also held both that it had not delegated authority to redefine LATAs to the states, and that it lacked authority to make such a delegation.

See id. at ¶¶ 20-28.

The FCC issued the Arizona LATA Order in part as a response to U S WEST's 1997 petition requesting the ACC to declare Arizona a single-LATA state. The Arizona LATA Order, issued pursuant to 47 U.S.C. § 1.2, constitutes binding federal law, and it was “effective immediately upon release.” Arizona LATA Order ¶ 31. Neither the ACC nor U S WEST is free to disregard federal law. In fact, the ACC Order, which purports to order U S WEST to provide intrastate telecommunications service in Arizona based on a single LATA, may place U S WEST in a precarious position (albeit one U S WEST invited): if U S WEST follows the ACC Order and violates the FCC's Arizona LATA Order, it may face sanctions under Title V of the Communications Act, 47 U.S.C. §§ 501 et. seq. Similarly, in ignoring federal law, the ACC will also incur legal risks. The ACC Order requires U S WEST to provide interLATA service without complying with the pro-competitive provisions of the Act. See 47 U.S.C. § 271. Because those provisions are intended to facilitate MCIW's entry into the local telecommunications market, the ACC Order violates MCIW's federal rights under color of state law, and MCIW might potentially be entitled to seek relief under 42 U.S.C. § 1983, including attorneys' fees.

The FCC based the Arizona LATA Order on the plain text of the Act, and there are multiple provisions in the Act which demonstrate the FCC's exclusive authority over LATA boundaries. First, Section 3(25) of the Act defines a LATA as “a contiguous geographic area established before the date of enactment of the Telecommunications Act of 1996 . . . ; or

established or modified by a Bell operating company after such date of enactment and approved by the Commission.” 47 U.S.C. § 3(25). Thus, under the Act, LATAs remain unchanged unless and until the FCC approves their modification. This procedure constitutes the Act’s exclusive means for LATA modification. It does not require state commission participation or approval, and the Act simply does not provide any means through which a state commission can redefine LATA boundaries. In seeking the approval of a LATA boundary modification from the ACC rather than the FCC, U S WEST failed to follow the procedures specified by the Act. In approving U S WEST’s petition, the ACC ignored the Act’s procedures.

Second, Section 271(d) of the Act prevents U S WEST from providing interLATA service without applying to the Commission and obtaining a determination that U S WEST has complied with the procedures and requirements specified in Section 271(d)(3) of the Act. The congressional policy behind Section 271 is to encourage local competition by allowing Bell operating companies (“BOCs”) like U S WEST to provide interLATA service once they meet certain pro-competitive requirements specified by the Act. See, e.g., Memorandum Opinion and Order, In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, 12 F.C.C.R. 20543, ¶ 85 (1997). Congress deemed it essential that BOCs comply with these requirements before they could provide interLATA service -- even the FCC cannot waive the Section 271(d)(3) requirements. In Section 10(d) of the Act, Congress specified that the FCC “may not forbear from applying the requirements of . . . Section 271 . . . until it determines that those requirements have been fully implemented.” 47 U.S.C. § 10(d). U S WEST has not even applied for an FCC determination that it has satisfied the requirements of Section 271(d)(3).

If state commissions were allowed to redefine LATAs to produce single-LATA states, they could thwart the purpose behind Section 271 of the Act. Such state action would allow the BOCs to receive much of the benefits of providing interLATA service without complying with the requirements of Section 271, because they would be free to provide services which previously would have been forbidden under the Act -- intrastate, previously interLATA service. Because the Act makes clear that the requirements of Section 271 are mandatory, see 47 U.S.C. § 10(d), state redefinition of LATA boundaries is inconsistent with the Act.

Third, Section 251(g) of the Act delegates to Commission authority over the administration of all "equal access and nondiscriminatory interconnection restrictions and obligations" that applied under the AT&T Consent Decree. 47 U.S.C. § 251(g). The LATA boundaries were established under the AT&T Consent Decree, and until passage of the Act, they remained under the exclusive jurisdiction of the United States District Court, not the states. See Arizona LATA Order at ¶¶ 17-18. Thus, with the passage of the Act, LATA boundary jurisdiction passed to the FCC, because "[e]xclusive authority over LATA boundary establishment or modification is an essential component of the [FCC's] authority to enforce the equal access and interconnection restrictions established under the AT&T Consent Decree." Arizona LATA Order at ¶ 19.

The May 13 ACC Order provides no explanation for why the ACC believes that it is legally entitled to defy the Arizona LATA Order and redefine LATA boundaries. The ACC Order does not specify whether the ACC somehow believes that it is authorized under the Act to abolish LATA boundaries, or whether it believes that the FCC's exclusive authority over LATA boundaries is somehow an unconstitutional intrusion into states' rights. However, before the

FCC and ACC, U S WEST has advanced several arguments in support of the ACC Order. None of those arguments here merit.

First, before the FCC, U S WEST has suggested that Section 2(b) of the Act somehow prevents the FCC from exercising exclusive jurisdiction over LATA boundaries.^{1/} See U S WEST Communications' Opposition to AT&T's Motion for Standstill Order and for Expedited Resolution at 7-11, File No. NSD-L-97-6 (filed with the FCC on May 24, 1999). The FCC flatly rejected this argument in the Arizona LATA Order. See Arizona LATA Order at ¶¶ 111, 16-18. Moreover, the Supreme Court's decision in AT&T v. Iowa Utilities Board, 119 S. Ct. 721 (1999), refutes U S WEST's Section 2(b) argument. In Iowa Utilities Board, the Court explicitly rejected the argument that the FCC's authority was limited to purely interstate and foreign matters. Instead, the Court held that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of the Act.'" Iowa Utilities Board, 119 S. Ct. at 730; 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."). Under Iowa Utilities Board, because the Act itself affirmatively vests exclusive authority over LATA boundaries in the FCC, Section 2(b) is not a limitation on FCC jurisdiction over those boundaries.

Second, U S WEST has asserted that the ACC maintains "sovereign rights" over intrastate communications, including the right to redefine LATA boundaries, and that Sections 3 and 251 of the Act "violate the Tenth Amendment and the Commerce Clause of the Constitution of the United States." See Exceptions to Recommended Order, Docket No. RT-00000J-99-0095 (filed

^{1/} Section 2(b) states that "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 communication service." 47 U.S.C. § 152(b).

May 10, 1999). US WEST's appeals to principles of federalism, however, have no support in the law. In Iowa Utilities Board, the Supreme Court explicitly upheld federal regulation of intrastate communication under the Act. Indeed, it stated that: "the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to matters addressed by the 1996 Act, it unquestionably has." Iowa Utilities Board, 119 S. Ct. at 730 n.6. Following Iowa Utilities Board, U S WEST's federalism argument that the Act is unconstitutional is frivolous.

Third, U S WEST has suggested that perhaps even though the FCC has jurisdiction over LATA boundaries, it does not have exclusive jurisdiction. See U S WEST Communications' Opposition to AT&T's Motion for Standstill Order and for Expedited Resolution at 7-11, File No. NSD-L-97-6 (filed with the FCC on May 24, 1999). Not only does the FCC's binding decision in the Arizona LATA order foreclose this possibility, but also it is foreclosed by the text and structure of the Act. As explained above, under Section 251(g) of the Act, LATA boundary authority passed from the United States District Court to the FCC; nothing in the Act supports a transfer of such authority to the states. Similarly, as the FCC recognized in the Arizona LATA Order, state authority to redefine LATA boundaries would circumvent the pro-competitive requirements of Section 271. See Arizona LATA Order at ¶¶ 25-28. Moreover, state authority over LATA boundaries is incompatible with the structure of Section 3(25). For example, if state commissions and the FCC had joint authority to redefine LATA boundaries, there would be no means to settle a disagreement between the FCC and state commissions over proper LATA boundaries. Presumably, such joint authority could lead to an endless sequence of LATA boundary reversals, as the FCC and a state commission repeatedly reversed each other's LATA

boundary decisions. Such a result is absurd and demonstrates that state authority over LATA boundaries is inconsistent with the Act.

For the foregoing reasons, the actions of the Arizona Commission are flagrantly unlawful.

4.) Are there any factual issues which need further examination by the Commission staff before the issuance of proposed rules?

RESPONSE: See Response to Question 1.

5.) Please discuss any Federal requirements that the Staff should consider in drafting its proposed rules for both the carrier presubscription process and the redefinition of LATA boundaries.

RESPONSE: See Response to Question 3.

6.) What terms and conditions on Arizona becoming a single-LATA state should be included in the proposed rules? What terms and conditions should be placed on the new toll carrier presubscription process taking effect?

RESPONSE: See Response to Question 2.

7.) Please identify all sections of existing Commission rules that you believe would need to be amended to accomplish the objectives set out in the Commission's Order.

RESPONSE: Rule R14-2-1111. "Requirements for IntraLATA Equal Access" may need to be amended. To MCIW's knowledge, there are no other existing rules to be amended and there are no other existing rules addressing this issue. However, the Staff should review the procedures established when Rule R14-2-1111 was implemented addressing, for example, balloting, customer education, PIC freezes, and transfer fees.

Dated: July 23, 1999

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CERTIFICATE OF SERVICE

I hereby certify that on this day July 22, 1999, the Original and ten copies of the enclosed document were sent via Airborn Express to the Arizona Corporation Commission. In addition, a true and correct copy was sent via United States First Class Mail to the following:

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