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IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. 252 (b) OF THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-02428A-96-0417
DOCKET NO. T-01051B-96-0417

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IN THE MATTER OF THE PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS PURSUANT TO 47 U.S.C. § 252 (b) OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-03175A-96-0479
DOCKET NO. T-1051B-96-0479

APPLICATION OF U S WEST COMMUNICATIONS, INC. FOR EXPEDITED STAY OF DECISION NO. 60353

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U S WEST Communications, Inc. ("U S WEST") requests that the Arizona Corporation Commission ("Commission") stay the obligations imposed by Commission Decision No. 60353 and the resulting interconnection agreements requiring U S WEST to combine unbundled network elements for AT&T Communications of the Mountain States, Inc. ("AT&T") and MCIMetro Access Transmission Services, Inc. ("MCI") until the FCC issues a decision on new rules defining what elements must be provided to CLECs by incumbent LECs such as U S WEST. Issuance of this stay on an expedited basis is necessary to resolve this issue and preserve the status quo, so that the FCC's ultimate decision can be implemented without undue prejudice. In support of its application, U S WEST states:

1 1. On January 25, 1999, the United States Supreme Court
2 reversed in part and affirmed in part the Eighth Circuit's
3 decision concerning the Federal Communications Commission's
4 ("FCC's") rules on unbundled elements. The Supreme Court's
5 opinion impacts the issue of rebundling in four regards. AT&T
6 Corp. v. Iowa Utils. Bd., No. 97-826, 1999 U.S. LEXIS 903 (U.S.
7 January 25, 1999).

8 a. The Supreme Court vacated 47 C.F.R. § 51.319,
9 holding that the FCC's approach to determining which network
10 elements incumbent LECs must provide under Section 251(c)(3) of
11 the Act was fundamentally flawed and provided CLECs with "blanket
12 access" to incumbent LEC networks. AT&T Corp., 1999 U.S. LEXIS at
13 *32-*40.

14 b. The Court held that the FCC began with an unlawful
15 presumption, i.e., that incumbent LECs must provide any network
16 element where unbundling was technically feasible;¹ this erroneous
17 presumption consequently tainted the FCC's interpretation of
18 Section 251(d)(2). Id. at *38-*39.

19 c. The Supreme Court found that the FCC
20 misinterpreted the "necessary" and "impair" standards of Section
21 251(d)(2) by failing to consider self-provisioning or the
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24 ¹ No party petitioned for review of the Eighth Circuit's determination
25 that "technical feasibility" determines only where CLECs may obtain
26 access to unbundled network elements, not which elements must be
provided. Iowa Utils. 120 F.3d at 810. However, the Supreme Court
noted that the FCC's position was "undoubtedly wrong." AT&T Corp.,
1999 U.S. LEXIS at *38.

1 availability of elements outside incumbent LEC networks. *AT&T*
2 *Corp.*, 1999 U.S. LEXIS at *35-*36. The Court stated that the FCC
3 "cannot, consistent with the statute, blind itself to the
4 availability of elements outside the incumbent's network." *Id.* at
5 *35. The Court also rejected the FCC's interpretation that any
6 increase in cost or decrease in quality means a CLEC is "impaired"
7 in its ability to offer service. *Id.* at *36. The Court reasoned
8 that because "any new entrant will request the most efficient
9 network element that the incumbent has to offer, it is hard to
10 imagine when the incumbent's failure to give access to the
11 element would not constitute 'impairment' under [the FCC's]
12 standard." *Id.* at *35. Ultimately, the Court concluded that the
13 FCC's interpretation of the "necessary" and "impair" standards
14 "is simply not in accord with the ordinary and fair meaning of
15 those terms." *Id.* at *36.

16 d. Because no party petitioned for review of FCC
17 Rules 51.315(c)-(f), the Supreme Court left intact the Eighth
18 Circuit's decision invalidating these rules, which had previously
19 required incumbent LECs to combine network elements for CLECs.

20 2. In its decision, the Supreme Court held that FCC Rule
21 51.315(b)—which prohibited incumbents from separating currently
22 combined network elements—was not unreasonable. *AT&T Corp.*, 1999
23 U.S. LEXIS 903 at *43. The Supreme Court recognized, however,
24 that its decision to vacate FCC Rule 51.319 and uphold FCC Rule
25 51.315(b) and the "all elements" rule were tied. Thus, the Court
26 stated that its decision to vacate Rule 51.319 might render

1 incumbent LEC objections to Rule 51.315(b) and sham unbundling
2 "academic." *AT&T Corp.*, 1999 U.S. LEXIS 903 at *40-*42. The
3 Court explained that if, on remand, the FCC "makes fewer network
4 elements unconditionally available through the unbundling
5 requirement, an entrant will not longer be able to lease every
6 component of the network." *Id.* at *40-*41.

7 3. On August 27, 1997, the Commission issued Decision No.
8 60353, which required U S WEST to combine unbundled network
9 elements for AT&T and MCI. In that decision, the Commission
10 rejected the U S WEST position on combination of unbundled network
11 elements, relying on the fact that the United States Court of
12 Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120
13 F.3d 753 (8th Cir. July 18, 1997) had not vacated Federal
14 Communications Commission ("FCC") Rule 51.315(b) when making its
15 decisions on combinations of elements in its July 18, 1997
16 opinion. FCC Rule 51.315(b) provides, in part, that "except upon
17 request, an incumbent LEC shall not separate requested network
18 elements that the incumbent LEC currently combines." U S WEST had
19 argued that the Commission's reading of FCC Rule 51.315(b)
20 conflicted with the Eighth Circuit's opinion.

21 4. Subsequently, the Arbitrators approved addenda to the
22 AT&T and MCI interconnection agreements that imposed a requirement
23 on U S WEST to combine unbundled network elements for AT&T and MCI
24 pursuant to Decision No. 60353.

25 5. On October 14, 1997, the United States Court of Appeals
26 for the Eighth Circuit vacated FCC Rule 3.15(b) and found that

1 requiring incumbent LECs to combine unbundled network elements was
2 contrary to Section 251(c)(3) of the Telecommunications Act of
3 1996 (the "Act"). *Iowa Utilities Board v. FCC*, 120 F.3d at
4 813-818 (8th Cir., as amended on rehearing October 14, 1997).

5 6. Pursuant to Section 251(c) of the Act, incumbent LECs
6 (like U S WEST) must provide access to unbundled network elements
7 to CLECs including AT&T and MCI; however, the requesting CLECs
8 (and not the incumbent) must actually perform the recombining. U
9 S WEST still maintains that Decision No. 60353 requires U S WEST,
10 and not AT&T and MCI, to perform the functions necessary to
11 combine requested elements in any technically feasible manner
12 either with other elements from U S WEST's network or with
13 elements possessed or arranged for by AT&T or MCI. Thus, Decision
14 No. 60353 and the resulting interconnection agreements unlawfully
15 require U S WEST to provide combinations of network elements.

16 7. Moreover, Decision No. 60353 and the resulting
17 interconnection agreements require U S WEST to combine elements
18 ordinarily combined in its network in the manner they are
19 typically combined. Providing these combinations also violates
20 Section 251 of the Act and undermines the distinction between
21 resale and unbundled network elements.

22 8. Until the FCC issues new rules in accordance with the
23 Supreme Court's decision in *AT&T v. Iowa Utils. Bd.*, there is no
24 current, valid unbundling standard against which U S WEST can
25 judge a request to provide a currently-connected-combination-of-
26 elements. To remove any potential conflict between the Supreme

1 Court's decision, future FCC rules, Decision No. 60353 and the
2 parties' interconnection agreements, the Commission should stay
3 Decision No. 60353 to the extent that it creates any obligation on
4 the part of U S WEST to combine unbundled network elements for
5 AT&T and MCI.

6 9. Given the importance of the combination of elements
7 issue and need for further action by the FCC to implement the
8 Supreme Court's decision, the Commission should enter an order
9 granting U S WEST's application for a stay on an expedited basis
10 without further proceedings.

11 RESPECTFULLY SUBMITTED this 30^h day of April, 1999.

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16 AND

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25 ORIGINAL and 10 copies of the
26 foregoing hand-delivered for
filing this 30th day of April, 1999, to:

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hand-delivered this 30th day of April, 1999, to:

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