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BEFORE THE ARIZONA CORPORATION COMMISSION

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CARL J. KUNASEK
CHAIRMAN
JIM IRVIN
COMMISSIONER
RENZ D. JENNINGS
COMMISSIONER

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)

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. U-3175-96-479

DOCKET NO. E-1051-96-479
Arizona Corporation Commission

DOCKETED

SEP 29 1997

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DOCKET NO. U-2428-96-417

DOCKET NO. E-1051-96-417

RESPONSE OF AT&T
TO U S WEST'S
APPLICATION FOR
REHEARING

I. INTRODUCTION

For a third time, U S WEST has requested that this Commission allow it to dismantle its network to the detriment of potential competitors. If U S WEST worked as hard at implementing competition as its lawyers have in pursuing this argument, Arizona consumers would already enjoy choice in local exchange providers. U S WEST has made no new arguments here. There is no reason for the Commission to reconsider its decision that U S WEST may not tear its network apart simply to impose unnecessary costs on new entrants.

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II. ARGUMENT

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2 Both FCC Rule 51.315(b) and the nondiscrimination requirements of the
3 Telecommunications Act of 1996 (the "Act") prohibit U S WEST from disassembling
4 presently combined network elements for sale to new entrants except at a new entrant's
5 request. Rule 315(b) is specific in this prohibition, stating that "[e]xcept upon request, an
6 incumbent LEC shall not separate requested network elements that the incumbent LEC
7 currently combines." A host of other regulations lead to the same result, requiring
8 U S WEST and other incumbent local exchange carriers ("ILECs") to provide new
9 entrants with access to combinations of network elements on the same terms and
10 conditions that the ILEC enjoys. See, e.g., 47 C.F.R. § 51.313(b); § 51.309(a).

11
12
13 U S WEST contends here, as it has from the beginning, that the Eighth Circuit's
14 decision in Iowa Utils. Bd. v. Federal Communications Comm'n, Nos. 96-3321, et al., 1997 WL
15 403401 (8th Cir. July 18, 1997) ("Eighth Circuit Decision") requires a different conclusion.
16 U S WEST admits that Rule 51.315(b) remains in effect, but argues that it is inconsistent
17 with the Decision and that it must be a "leftover" that the Eighth Circuit somehow missed.
18 U S WEST Application at 4. To the contrary, it is U S WEST's position that cannot be
19 reconciled with the Eighth Circuit Decision and the Commission was right when it rejected
20 U S WEST's position in the first instance.

21
22 U S WEST requested that the Eighth Circuit vacate Rule 51.315 in its entirety. See
23 Attachment A. Instead, the Court specifically retained Sections (a) and (b) of the Rule, a
24 decision consistent with its analysis of the Rule. The Eighth Circuit's concern in vacating
25 Rule 315(c)-(f) was that ILECs would be "force[d] to combine network elements" even
26 though "the Act does not require the incumbent LECs to do all the work." 1997 WL 403401

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*25 (emphasis in original). For this reason, the Court determined that an ILEC could not be required to recombine network elements not already combined within the ILEC's network.

Id.

Rule 51.315(b) does not require an ILEC to perform the work required to recombine elements. Instead, the Rule simply provides that ILECs may not perform the unnecessary work of uncombining what is already combined. Nothing about the Eighth Circuit's Decision undermines this common-sense rule.¹

In fact, the procedure U S WEST proposes for gaining access to unbundled network elements necessarily violates another of the Eighth Circuit's determinations. The Eighth Circuit specifically held that a new entrant must be permitted to acquire all of the elements necessary to provide a finished telecommunications service from an ILEC and that the new entrant need not own any part of a network to gain such access. 1997 WL 403401 at *26. Under U S WEST's argument, new entrants will be required to own collocation equipment before obtaining access to the unbundled elements required to provide any finished service. See Attachment B. This position is directly contrary to the Eighth Circuit Decision and supports this Commission's rejection of that position.

U S WEST repeats other arguments in contending that the Commission should rethink its rejection of U S WEST's position. U S WEST again contends that prohibiting it from dismantling its network will promote arbitrage and undermine universal service. As

¹ U S WEST admits that other state Commissions have agreed with this Commission in rejecting U S WEST's position. See U S WEST Application at 8, fn.5. U S WEST contends, however, that the New Mexico and Nebraska Commissions agree with U S WEST. In fact, the New Mexico Commission has made no such determination. The Commission has recognized that the Order U S WEST cites is ambiguous and has requested briefing to assist it in determining this very issue. Moreover, the Order of the Nebraska Commission is presently on appeal.

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Attachment C indicates, the proposed prices for unbundled elements and resold IFB service are almost identical, eliminating U S WEST's arbitrage concerns. Moreover, the Commission has never found that residential local exchange service is priced below its cost or that the rates for business service are the only source of universal service support. To the contrary, the Commission has established explicit universal service funding to which all telecommunications providers are required to contribute -- including AT&T as a provider of local exchange service using U S WEST's unbundled network elements. See A.C.C. R 14-2-1204 (establishing USF surcharge for local exchange service providers based on access lines and interconnecting trunks in service).

Finally, U S WEST contends that the Commission should stay its order until the Eighth Circuit rules on U S WEST's motion for rehearing now pending in that Court. This is not necessary. The Interconnection Agreement between the parties specifically provides for revision based on actions by the Eighth Circuit. Meanwhile, the FCC's Rule prohibiting U S WEST from tearing apart its network at the expense of new entrants remains in effect. The Commission was correct in recognizing this Rule and the Commission should not reconsider its August 27, 1997 Order.

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RESPECTFULLY SUBMITTED this 29th day of September 1997.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RECEIVED
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REGULATORY DIST

No. 96-3321 (and Consolidated Cases)

IOWA UTILITIES BOARD, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Consolidated Petitions to Review an Order of the
Federal Communications Commission

BRIEF FOR PETITIONERS
REGIONAL BELL COMPANIES AND GTE

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it was originally paired — regardless of differences in context or in the commercial assumptions on which each bilateral arrangement is based. Given this prospect, the incumbent simply cannot afford to make tradeoffs, and a negotiated agreement that would otherwise benefit the negotiating parties will not be reached.

In short, the FCC's radical pick-and-choose rule conflicts with the terms of the Act and, as this Court recognized in granting its stay, simply serves "to further undercut any agreements that are actually negotiated or arbitrated" under the Act. Stay Order at 17.

CONCLUSION

We have identified a series of critical errors in the FCC's Order. First, the FCC usurped jurisdiction over pricing and other aspects of intrastate services that properly belonged to the States. Second, the FCC's pricing methodologies and proxies violate the Act. Third, the FCC's rules on unbundled network elements and resale violate the Act. And, fourth, by establishing default pricing proxies and an extreme pick-and-choose provision, the FCC negated the Act's process of private negotiations.

Specific regulations that correspond to each of the errors noted above are listed below. Each of these regulations should be vacated as contrary to the Act and unlawful:

Part I — FCC Jurisdiction:

47 C.F.R. §§ 51.501-.515, 51.601-.611, 51.701-.717.

Part II — FCC Pricing Methodology:

47 C.F.R. §§ 51.501-.515, 51.601-.611, 51.701-.717.

Part III -- Unbundling and Access to Network Elements:

47 C.F.R. §§ 51.305(a)(2), 51.305(a)(4), 51.307(a), (c), 51.309(a), 51.309(c),
51.311(c), 51.313(c), 51.315, 51.317, 51.319, 51.323(f).

Part IV -- Pick-and-Choose Rules and Proxy Prices:

47 C.F.R. §§ 51.303(c), 51.513, 51.707, 51.809.

For two separate reasons, moreover, the Court should vacate the remainder of the Order and remand to the FCC for such further proceedings as are not inconsistent with the Court's decision. First, as explained in Part I of the argument, the FCC has no jurisdiction over pricing matters and has failed to justify its assertion of jurisdiction broadly to impose other rules binding on the States and carriers with respect to the intrastate matters at issue in this case. The Court should instruct the FCC that it may not reimpose such non-pricing rules on remand except to the extent that it can establish, pursuant to the principles limiting its jurisdiction over intrastate matters, that it has lawful authority to do so.

Second, we have specifically shown that scores of provisions in the Order are invalid and must be vacated. The sum of those provisions comprise an integral, and not meaningfully severable, part of the whole Order, and therefore the whole Order should be vacated. Indeed, the FCC represented to the Supreme Court that the pricing provisions alone are "the heart of the Commission's Order." FCC's Application to Vacate Stay at 12. That being so, the specific invalidation of those pricing provisions plus other vital provisions of the Order — including a large portion of the unbundling and access to network element provisions and the pick-and-choose rules — undermine the Order's coherency. Accordingly, we believe that the most prudent course would be to vacate the entire Order, and leave it to

the Commission in the first instance to decide whether to attempt to reimpose any provisions not specifically invalidated by this Court's decision.

November 18, 1996

Respectfully submitted,



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STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

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IN RE: :
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U S WEST COMMUNICATIONS, INC.: DOCKET NO. RPU-96-9
: VOLUME XIII
----- X

Hearing Room 1
First Floor
Lucas State Office Building
Des Moines, Iowa
Wednesday, September 17, 1997

Met, pursuant to adjournment at 9:00 a.m.

BEFORE: THE IOWA UTILITIES BOARD
ALLAN THOMS, Chairperson
EMMIT GEORGE, Board Member

(Pages 4001 through 4474.)

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1 that loop to the switch, and by the way, if that
2 customer should happen to move from their home and
3 that house sits empty for a period of time until it
4 is sold again, those connections remain in place,
5 so that the next customer who moves into that home
6 enjoys the benefit of having that service provision
7 very quickly, and that is the effort that over the
8 years by having those policies put into place to
9 where those connections stay in place, we are able
10 to provision service more quickly to those
11 customers.

12 Q. Just to give you my layman's understanding
13 of this, and you tell me whether I'm right, the way
14 I understand it is that when somebody moves into a
15 house where there's already been service, and calls
16 up and says, "I want to have phone service," the
17 switch already knows what loop is connected to that
18 house; is that right?

19 A. In a real high level sense, yes.

20 Q. Okay. Good. I'm glad that I understand
21 it that far.

22 Now, your testimony indicates that you
23 can't do this for an unbundled loop, and you can't
24 do it because when a new entrant comes and orders
25 an unbundled loop, you are going to be physically

1 disconnecting the loop from the switch; is that
2 correct?

3 A. That is correct.

4 Q. Now, I want you to assume that the new
5 entrant is going to order the loop and switch at
6 the same time.

7 A. I'm assuming what, resale then?

8 Q. No. I'm assuming that the new entrant is
9 going to order the loop and the switch at the same
10 time. Is it U S West's position that it would be
11 appropriate in that case to take apart the loop and
12 switch?

13 A. No. I believe, quite frankly, it is U S
14 West's position that that would be a resell order
15 because that is a switch port and a loop, which is
16 a service that you would resell to the customer.
17 That's not unbundling anything.

18 Q. Well, if I order an unbundled loop and an
19 unbundled switch port and I want to serve a
20 particular customer with that unbundled loop and
21 switch, is it U S West's position that what U S
22 West will do is to take apart the loop and the
23 switch that you've already preprovisioned?

24 A. It would be my position that that is
25 correct. If you order an unbundled switch port,

1 that unbundled switch port would come over to your
2 collocated space, and the unbundled loop that you
3 ordered would also come over to your collocated
4 space. The chance that I should happen to know
5 that this one particular port and this one
6 particular loop that you wanted to go to an address
7 was supposed to do that is not mine to know. That
8 is the way you would engineer it.

9 Q. What if I told you that that's the way it
10 was today?

11 A. Then I would refer you to the resale
12 tariff and tell you to buy a service.

13 Q. So you're telling me the only way that I
14 as a new entrant can buy an unbundled loop and
15 unbundled switch is to buy them both and take them
16 to another piece of equipment in my collocated
17 space and put them together?

18 A. That is what I understand unbundled
19 network elements to be, are just those things on
20 your own that you would purchase from U S West and
21 connect yourself in the manner that you wish to
22 connect them.

23 Q. On page 13 of your testimony you talk
24 about the fact that there are--it makes sense to
25 bury cable in Iowa because of favorable soil

C

REPACKAGING

(AT&T PRICE EXAMPLE: BUSINESS RATES)

■	AGGREGATED LOOP	\$16.37
■	LOCAL SWITCHING PORT	\$ 1.66
■	LOCAL SWITCHING USAGE (1250 MIN.)	\$ 3.62
■	TRANSPORT ¹	<u>\$ 5.12</u>
■	TOTAL:	\$26.77
■	CURRENT ARIZONA BUSINESS RATE.....	\$32.78
■	AT&T WHOLESALE DISCOUNT	18.44%
■	TOTAL:	<u>\$26.74</u>

1. Transport includes a weighted average of 80% dedicated transport \$5.20 and 20% common transport \$0.0009, tandem switching .0014, and signaling .