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REHEARING 10-8-97

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CARL J. KUNASEK  
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JIM IRVIN  
COMMISSIONER  
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COMMISSIONER

Arizona Corporation Commission

DOCKETED

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SEP 18 1997

DOCKETED BY

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. U-3175-96-479  
DOCKET NO. E-1051-96-479

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-2428-96-417  
DOCKET NO. E-1051-96-417

APPLICATION FOR REHEARING, OR  
IN THE ALTERNATIVE, REQUEST  
FOR STAY

18 Pursuant to A.R.S. §40-253, U S WEST Communications,  
19 Inc. ("U S WEST") respectfully asks the Commission to rehear its  
20 August 27, 1997 decision in the above docket adopting the  
21 Arbitrators' recommended Order (the "Decision"). U S WEST  
22 submits that this Decision cannot be reconciled with the Eighth  
23 Circuit's opinion in Iowa Utilities Board v. FCC, \_\_\_ F.3d \_\_\_,  
24 1997 WL 403401 (8th Cir. 1997), because it relies on a leftover  
25 FCC regulation that the court never even considered to overrule  
26 its explicit holdings on combinations of network elements. In

48

1 addition, since the Commission issued its Decision, other states  
2 have reached different conclusions on element combinations, and  
3 even AT&T and MCI have joined U S WEST in asking the Eighth  
4 Circuit to clarify its holdings on unbundling. At the very  
5 least, given the current proceedings before the Eighth Circuit  
6 asking the court to clarify the very holdings that both sides  
7 agree control this dispute, the Commission should vacate its  
8 Decision or stay further proceedings in this docket pending the  
9 Eight's Circuit's imminent clarifications.

10 I. THE COMMISSION ERRED IN USING REGULATION §51.315(b) TO  
11 OVERRIDE THE EIGHTH CIRCUIT'S CLEAR RULING THAT  
12 INCUMBENT LECS CANNOT BE REQUIRED TO COMBINE NETWORK  
ELEMENTS FOR THEIR COMPETITORS.

13 The Telecommunications Act of 1996 (the "Act") requires  
14 an incumbent carrier to provide its competitors with access to  
15 the elements of its network "on an unbundled basis." 47 U.S.C.  
16 § 251(c)(3). The Act provides further that the incumbent "shall  
17 provide such unbundled network elements in a manner that allows  
18 requesting carriers to combine such elements in order to provide  
19 [a] telecommunications service." Id. (emphasis added).

20 As the Eighth Circuit made clear, the Act's plain  
21 language demonstrates that Congress wanted requesting carriers to  
22 take the elements of the incumbent's network "on an unbundled  
23 basis" and to bear the costs and risks of combining these  
24 elements into finished telecommunications services. The court  
25 held that the Act "unambiguously indicates that requesting  
26 carriers will combine the unbundled elements themselves" to

1 provide finished services. Iowa Utilities, 1997 WL 403401 at \*25  
2 (emphasis added). The requesting carriers cannot require  
3 incumbents to combine network elements on their behalf. "While  
4 the Act requires incumbent LECs to provide elements in a manner  
5 that enables the competing carriers to combine them, we do not  
6 believe that this language can be read to levy a duty on the  
7 incumbent LECs to do the actual combining of elements." Id.

8 For this reason, the Eighth Circuit struck down "the  
9 FCC's rule requiring incumbent LECs, rather than requesting  
10 carriers, to recombine network elements that are purchased by the  
11 requesting carriers on an unbundled basis." Id. (vacating 47  
12 C.F.R. § 51.315(c)-(f)). The court emphasized that this action  
13 "establishes that requesting carriers will in fact be receiving  
14 the elements on an unbundled basis." Id. at \*26. At the August  
15 26 Special Working Session, counsel for AT&T claimed that the  
16 specifically vacated provisions dealt only with an incumbent's  
17 duty to provide element combinations "that the ILEC doesn't  
18 currently combine in its own network," Tr. at 67, but this  
19 ignores the actual text of those provisions. Vacated § 51.315(c)  
20 established a general duty "to combine unbundled network elements  
21 in any manner" for requesting carriers, "even if those elements  
22 are not ordinarily combined in the incumbent LEC's network."  
23 (emphasis added). The remaining vacated sections were likewise  
24 not limited to cases where incumbents are asked to combine  
25 previously uncombined pieces of their networks.

26 The Commission's August 27 Decision ignores the Eighth

1 Circuit's clear ruling on element combinations in favor of a  
2 leftover FCC regulation that - contrary to what the Decision  
3 asserts, See Decision at 7 - none of the parties to the suit  
4 specifically briefed and that the court did not even mention.  
5 The Decision notes that the court did not vacate 47 C.F.R.  
6 § 51.315(b), which provides that an incumbent "shall not separate  
7 requested network elements that [it] currently combines." From  
8 there it assumes - erroneously - that the court must have  
9 endorsed this regulation implicitly, and that the implicitly  
10 endorsed rule overrides the court's express holding on element  
11 combinations. The Eighth Circuit may not have mentioned  
12 § 51.315(b), but clearly it ruled on the very same subject,  
13 holding that incumbents will provide network elements to  
14 requesting carriers "on an unbundled basis." Iowa Utilities,  
15 1997 WL 403401 at \*26.

16           Whatever the FCC originally intended § 51.315(b) to  
17 mean, the regulation must now be read consistently with the  
18 Eighth Circuit's ruling. The regulation cannot be read in a way  
19 that nullifies entire sections of the court's opinion.<sup>1</sup> Clearly

20 <sup>1</sup>As U S WEST has noted, § 51.315(b) is subject to a narrower reading that  
21 could survive the Eighth Circuit's opinion. When adopted, the rule was geared  
22 in part to cases where a state commission had broken down the FCC-defined  
23 elements into multiple subelements. If an incumbent ordinarily provided all  
24 of the state-identified subelements together in the form of the broader, FCC-  
25 defined element, the rule would prevent the incumbent from disaggregating the  
26 federal element into its state subparts. "This means, for example, that if  
the states require incumbent LECs to provision subloop elements, incumbent  
LECs must still provision a local loop as a single, combined element when so  
requested, because we identify loops as a single element in this proceeding."  
First Report and Order, Implementation of the Local Competition Provisions of  
the Telecommunications Act ¶ 295 (rel. Aug. 8, 1996). The best explanation  
for the Eighth Circuit's failure to vacate the rule (assuming that this was a  
conscious decision) is that it intended to preserve the rule's application to  
subelement unbundling. Regardless of whether the FCC originally meant the

1 the Decision's reading of § 51.315(b) does not square with the  
2 court's own understanding that its ruling "establishes that  
3 requesting carriers will in fact be receiving network elements on  
4 an unbundled basis," id. at \*26, and it flatly ignores the  
5 court's holding that Congress chose its words to "unambiguously  
6 indicate[] that requesting carriers will combine the unbundled  
7 elements themselves." Id. at \*25 (emphasis added). The Decision  
8 resurrects the incumbents' duty to provide competitors with  
9 prepackaged element combinations, notwithstanding the Eighth  
10 Circuit's statement that "we do not believe that [the Act] can be  
11 read to levy a duty on the incumbent LECs to do the actual  
12 combining of elements." Id.

13           The Decision's reading of § 51.315(b) also nullifies  
14 the court's holding on the difference between the unbundling and  
15 resale provisions of the Act. The court permitted competitive  
16 carriers to purchase all of the individual elements needed to  
17 provide finished services (instead of requiring them to provide  
18 some elements of their own) and held that this process would not  
19 make the resale provisions of the Act obsolete only because users  
20 of unbundled elements would face costs and business risks that  
21 true resellers could avoid: the need to design a network, to  
22 "make an up-front investment" in quantities of elements "without  
23 knowing whether consumer demand will be sufficient to cover such  
24 expenditures," and to "expend[] valuable time and resources

25  
26 rule to cover more than this one situation, this application is the only one  
that can survive the court's ruling on element combinations.

1 recombining unbundled network elements." Id at \*26.<sup>2</sup> The  
2 Commission's reading of § 51.315(b) enables AT&T and MCImetro to  
3 shift these costs and risks onto U S WEST in violation of the  
4 Eighth Circuit's ruling. Instead of planning out a network,  
5 purchasing individual elements in quantities sufficient to meet  
6 forecasted customer demand, incurring the costs of combining  
7 elements into services, and bearing the business risk that its  
8 forecasts are wrong, AT&T and MCI can simply use U S WEST's  
9 network on an as-needed basis by demanding prepackaged service  
10 "platforms" that U S WEST has paid to assemble.

11 In addition to undercutting the court's ruling, the  
12 Commission has made the resale provisions of the Act a nullity.  
13 Under the Commission's ruling, AT&T and MCImetro may use the  
14 unbundling rules to purchase the very same services that they  
15 would be purchasing if they were using the resale rules, though  
16 at much lower prices that strip out any contribution to universal  
17 service in Arizona. This is purely a pricing game that does  
18 nothing to further the development of local service competition.

19 <sup>2</sup>In the Special Working Session, several Commissioners expressed concerns that  
20 it might be anticompetitive for AT&T and MCImetro to have to bear these costs  
21 of combining network elements into finished services. But, as noted in the  
22 text, the Eighth Circuit made clear that these are simply the ordinary costs  
23 of doing business under the Act's unbundling provisions. See Iowa Utilities,  
24 1997 WL 403401 at \*26. Congress chose to leave those costs and risks on the  
25 new entrant, and hence they are not perils from which AT&T and MCImetro must  
26 (or even may) be saved. In asking the Commission to be faithful to the Eighth  
Circuit's opinion, U S WEST is not claiming the right to rip apart its network  
node from node and artificially inflate its competitors' costs; rather, it is  
simply asking that AT&T and MCImetro bear the costs and business risks of  
planning their own networks and combining specific elements and transport  
capacity sufficient to meet their business plans, just as every facilities-  
based service provider - including U S WEST - must do. If they do not want to  
bear these costs and risks, they may always purchase U S WEST's finished  
services at a significant discount under the resale rules.

1 In addition, events since the Commission's Decision have proved  
2 that U S WEST's fears of rampant regulatory arbitrage are well-  
3 founded: shortly after the Commission's Decision, MCImetro took  
4 its test orders for resold U S WEST services and restyled them as  
5 requests for rebundled network elements. MCImetro has changed  
6 nothing about the service it is requesting except its label, but  
7 under the Commission's Decision, the mere act of doing so  
8 entitles MCImetro to a hefty extra discount and allows the  
9 carrier to escape contributing to universal service. For  
10 example, U S WEST receives about \$39 per month in revenue  
11 including access charges for each resold 1FB, but will receive  
12 only approximately \$25 per month from the same service  
13 provisioned as recombined elements. This is a difference of \$14  
14 per month per line.<sup>3</sup>

15 **II. THE COMMISSION SHOULD AT LEAST VACATE ITS DECISION AND**  
16 **WAIT FOR THE EIGHTH CIRCUIT TO CLARIFY ITS HOLDING ON**  
17 **ELEMENT COMBINATIONS, WHICH IT WILL DO IMMEDIATELY.**

18 U S WEST believes that the Eighth Circuit's ruling that  
19 incumbent carriers cannot be required to combine network elements  
20 for their competitors is clear and unmistakable. Other state  
21 commissions, both within and outside U S WEST's service region,  
22 have agreed. These commissions - unlike the Arizona Corporation  
23 Commission - have rejected AT&T's and MCImetro's brazen attempts  
24 to use the court's failure to vacate § 51.315(b) as a crowbar to

25 \_\_\_\_\_  
26 <sup>3</sup> AT&T represented different numbers during the open meeting on August 27.  
Although U S WEST requested that AT&T provide documentation for its numbers,  
they have not done so.

1 pry loose its explicit ruling on element combinations. In U S  
2 WEST's region, for example, the Nebraska Public Service  
3 Commission considered the very same question before the Arizona  
4 Commission and ruled the other way, holding that, "[w]hile the  
5 court did not mention 47 C.F.R. 51.315(b), it clearly stated that  
6 incumbents must provide network elements to requesting carriers  
7 on an 'unbundled basis' and that it is then the duty of the  
8 requesting carriers to combine the elements." Clarification  
9 Order at 1, Application No. C-1385 (Sept. 3, 1997) (copy attached  
10 as Exhibit A).<sup>4</sup> Likewise, the New Mexico State Corporation  
11 Commission has ruled that, "[i]n light of the Eighth Circuit  
12 Court's decision, we find that U S WEST is not required to  
13 combine unbundled network elements. Rather, U S WEST is required  
14 to provide elements in a manner that enables AT&T to combine  
15 them." Order on Motion for Rehearing, Dkt. No. 96-411-TC (Aug.  
16 1, 1997) (relevant sections attached as Exhibit B).<sup>5</sup>

17           Nevertheless, in light of AT&T's and MCImetro's  
18 persistent attempts in every state to use § 51.315(b) as a back  
19 door for reinstating the FCC's vacated rules on element  
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21 <sup>4</sup>U S WEST notes that in Nebraska, AT&T quoted extensively from the Arizona  
22 Arbitrators' August 15, 1997 Proposed Order and specifically urged the  
23 Nebraska Public Service Commission to follow that decision. The Nebraska  
24 Public Service Commission obviously declined, although it did not discuss the  
25 Proposed Order (which this Commission had signed by the time the Nebraska PSC  
26 ruled) in its final opinion.

24 <sup>5</sup>To be sure, this consensus is not unanimous. After limited briefing, an  
25 arbitrator for the Idaho Public Utilities Commission has tentatively agreed  
26 with the Commission's reading of § 51.315(b); however, U S WEST has petitioned  
the full Idaho PUC to reconsider this preliminary decision after full  
briefing. See Third Arbitration Order, Dkt. No. USW-T-96-15 (Aug. 24, 1997).

1 combinations, U S WEST petitioned the Eighth Circuit to consider  
2 the regulation head on and clarify its mandate by vacating or  
3 explicitly limiting the rule. Importantly, U S WEST notes that  
4 it is not the only party asking the court to revisit its holdings  
5 on element combinations: after the Special Working Session/Open  
6 Meeting on August 26-27, U S WEST learned that while the sessions  
7 were taking place, AT&T and MCI also petitioned the Eighth  
8 Circuit to rehear its decision on network element combinations,  
9 asking the court to reverse its decision to vacate sections  
10 51.315(c)-(f) of the FCC rules. See Petition for Rehearing, Iowa  
11 Utilities Bd. v. FCC, No. 96-3321 (8th Cir., filed Aug. 26,  
12 1997).

13           Given that both sides in the Eighth Circuit litigation  
14 have now asked the court to issue further guidance on the issues  
15 surrounding rebundled combinations of unbundled network elements,  
16 and given that this Commission's interpretation of the Eighth  
17 Circuit's mandate appears to be out of step with what other  
18 states have concluded, it would make sense for the Commission -  
19 at the very least - to vacate its August 27 Decision and withhold  
20 final resolution of the question of element combinations until  
21 the Eighth Circuit issues its expected guidance on the subject.  
22 Temporarily withholding judgment on the issue will not prevent  
23 AT&T and MCImetro from using significantly discounted resale to  
24 enter the local service market in Arizona or proceeding with  
25 their preparations to use other entry strategies. On the other  
26 hand, immediate implementation of the Commission's Decision

1 threatens to allow these carriers to begin at once to reduce  
2 their contributions to universal service through regulatory  
3 arbitrage because unbundled elements must be offered to CLECs at  
4 cost-based rates whereas the resale alternative, although  
5 discounted, would still be priced above cost and provide some  
6 contribution. If the Eighth Circuit ultimately clarifies that  
7 U S WEST's interpretation of its mandate is correct (as U S WEST  
8 fully expects it will do), it will be difficult to unscramble the  
9 damage worked by the Commission's Decision in the interim.

10 **III. IF THE COMMISSION WILL NOT VACATE ITS DECISION, IT**  
11 **SHOULD STAY FURTHER PROCEEDINGS PENDING THE EIGHTH**  
12 **CIRCUIT'S CLARIFICATION.**

13 If the Commission is unwilling to vacate its decision  
14 pending the Eighth Circuit's clarification of its opinion, U S  
15 WEST requests that the Commission at least stay further  
16 proceedings in this docket, including implementation of its  
17 Decision. For all of the reasons outlined above, proceeding  
18 under the existing Decision yields no benefit and has the  
19 potential to cause great harm.

#### 20 CONCLUSION

21 For the foregoing reasons, U S WEST respectfully asks  
22 the Commission to reconsider its August 27 Decision to adopt the  
23 Arbitrators' Proposed Order on element combinations. Even if the  
24 Commission does not choose to decide the rebundling issue finally  
25 in U S WEST's favor at this time, at the very least, it should  
26 still vacate the August 27 Decision and defer resolution of the  
issue until the Eighth Circuit responds to the petitions for

1 rehearing that both sides in the litigation have filed. In the  
2 alternative, if the Commission is unwilling to vacate its  
3 Decision, U S WEST requests that it stay implementation of the  
4 Decision until the Eighth Circuit clarifies its opinion.

5 DATED this 18th day of September, 1997.

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17 and

18 FENNEMORE CRAIG

19 By   
20 Timothy Berg  
21 Mary Beth Phillips  
22 Attorneys for U S WEST  
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24 ORIGINAL and 10 copies of the  
25 foregoing filed this 18<sup>th</sup> day of  
26 September, 1997, with:

Arizona Corporation Commission  
Docket Control  
1200 West Washington Avenue  
Phoenix, Arizona 85005

Four copies of the foregoing hand

1 delivered this 18<sup>th</sup> day of  
2 September, 1997, to:

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18 COPY of the foregoing mailed this  
19 18<sup>th</sup> day of September, 1997, to:

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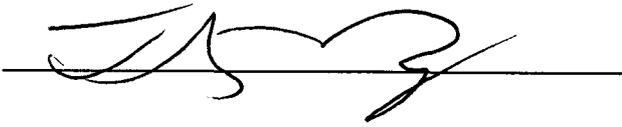
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**A**

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of AT&T Communications of ) Application No. C-1385  
the Midwest, Inc. of Denver, Colorado, )  
Petitioning for Arbitration Pursuant to )  
Section 252(b) of the Telecommunica- ) Clarification Order  
tions Act of 1996 to establish an )  
interconnection agreement with US West )  
Communications. ) Entered: Sept. 3, 1997

BY THE COMMISSION:

AT&T Communications of the Midwest, Inc. (AT&T) filed a motion requesting clarification of the Commission's August 5, 1997 Order in this docket. US West Communications (USW) filed its opposition to the motion on August 29, 1997. AT&T requests the Commission review the sections of the interconnection agreement that pertain to combining unbundled network elements, specifically, the fifth paragraph of Section 44 of the main agreement and Section 2.1 of Attachment 5 of the agreement. AT&T alleges that since the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, 1997 WL 403401 (8th Cir. 1997), failed to vacate 47 C.F.R. Section 51.315(b), it is, therefore, in effect. Accordingly, AT&T states USW shall not separate requested network elements that it currently combines. USW has replied stating AT&T is asking the Commission to reverse itself and to ignore what the Eighth Circuit decided.

O P I N I O N   A N D   F I N D I N G S

The Telecommunications Act of 1996 provides in Section 251(c)(3) that incumbent local exchange carriers shall provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide telecommunications services (emphasis added). Further, the Eighth Circuit vacated 47 C.F.R. Section 51.315(c)-(f) and explained in detail that requesting carriers will combine the unbundled elements to provide finished services. "While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements." Iowa Utilities Board, 1997 WL at 25. While the court did not mention 47 C.F.R. 51.3115(b), it clearly stated that incumbents must provide network elements to requesting

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1385

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carriers on an "unbundled basis" and that it is then the duty of the requesting carriers to combine the elements. At this time, for the above reasons, we find the language proposed by AT&T in its motion must be rejected. We accept the language proposed by USW in its reply of opposition.

Lastly, we note that USW, along with other incumbent carriers, have petitioned the Eighth Circuit to clarify its decision by vacating or expressly limiting the 47 C.F.R. Section 51.315(b). If the Eighth Circuit's clarification is contrary to the decision made herein, we will reverse our ruling.

O R D E R

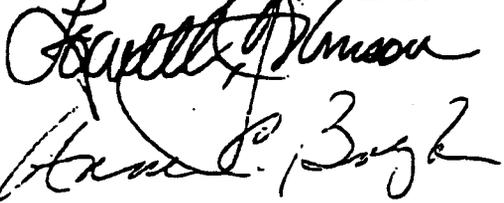
IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the language submitted by AT&T Communications of the Midwest, Inc. in its motion for clarification is rejected.

IT IS FURTHER ORDERED that the language proposed by US West Communications for the fifth paragraph of Section 44 of the main agreement and Section 2.1 of Attachment 5 be incorporated into the interconnection agreement.

MADE AND ENTERED at Lincoln, Nebraska this 3rd day of September, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONER CONCURRING:



//s//Rod Johnson  
//s//Frank E. Landis

Chairman



ATTEST:



Executive Director

**B**