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BEFORE THE ARIZONA CORPORATION COMMISSION

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JAMES M. IRVIN
Chairman
TONY WEST
Commissioner
CARL J. KUNASEK
Commissioner

ORIGINAL

DOCUMENT CONTROL

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-1051B-96-0417

DOCKETED

MAY 25 1999

DOCKETED BY *Jr*

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

U S WEST COMMUNICATIONS,
INC.'S REPLY IN SUPPORT OF
APPLICATION FOR EXPEDITED
STAY OF DECISION NO. 60353

U S WEST Communications, Inc. ("U S WEST") replies in support of its Application to stay the obligations imposed by Arizona Corporation Commission ("Commission") Decision No. 60353 and the resulting provisions of the Interconnection Agreements between U S WEST and AT&T Communications of the Mountain States, Inc. ("AT&T") and MCIMetro Access Transmission Services, Inc. ("MCI") until the FCC issues new rules defining network elements that must be provided to CLECs by incumbent LECs.

I. PROCEDURAL BACKGROUND

Following the enactment of the Telecommunications Act of 1996 (the "Act") in August 1996, the Federal Communications Commission ("FCC") issued its First Report and Order, which contained the

1 FCC's rules implementing incumbent LECs' duties to provide CLECs
2 with unbundled access to network elements. Almost immediately,
3 the rules were the subject of several judicial challenges.

4 On July 18, 1997, following consolidation of the various
5 judicial challenges, the Eighth Circuit Court of Appeals vacated
6 the rules in part. Iowa Util. Bd. v. Federal Communications
7 Comm'n, 120 F.3d 753 (8th Cir. 1997), aff'd and rev'd in part by
8 AT&T Corp. v. Iowa Util. Bd., 119 S. Ct. 721 (1999). The Eighth
9 Circuit upheld FCC Rule 51.319, which required incumbent LECs to
10 provide CLECs with unbundled access to a minimum of seven defined
11 network elements. 120 F.3d at 808-10. However, the Eighth
12 Circuit vacated FCC Rules 51.315(b)-(f). 120 F.3d at 813. With
13 regard to FCC Rule 51.315(b), which prohibited an incumbent LEC
14 from separating network elements that the incumbent currently
15 combined unless requested to do so by the CLEC, the Eighth Circuit
16 held that this Rule was contrary to § 251(c)(3) of the Act, which
17 requires incumbent LECs to provide access to network elements only
18 on an unbundled, as opposed to a combined, basis. Id. With
19 regard to FCC Rules 51.315(c)-(f), which required incumbent LECs,
20 rather than the requesting CLECs, to recombine network elements
21 purchased by the CLECs, the Eighth Circuit held that these rules
22 also could not be squared with § 251(c)(3) of the Act, because
23 that section "unambiguously indicates that requesting carriers
24 will combine the unbundled elements themselves." Id.

25 Following the Eighth Circuit's decision, the Commission
26 issued Decision No. 60353 on August 29, 1997. In that Decision,

1 the Commission ordered that the parties' Interconnection
2 Agreements include language requiring U S WEST to "offer each
3 Network Element individually and in Combinations as required by
4 law" and "not separate network elements that are currently
5 combined."¹ On October 24, 1997, U S WEST filed an Application
6 for Expedited Relief from this Decision. Because the parties were
7 aware that the Eighth Circuit's decision was to be considered by
8 the United States Supreme Court, the parties asked the Hearing
9 Division to defer any ruling on U S WEST's Application until the
10 Supreme Court issued its opinion on the FCC rules.

11 On January 25, 1999, the Supreme Court issued its ruling in
12 AT&T Corp. v. Iowa Util. Bd., 119 S. Ct. 721 (1999). Unlike the
13 Eighth Circuit, the Supreme Court held that the FCC had gone too
14 far in defining the seven minimum network elements an incumbent
15 LEC must provide to CLECs on an unbundled basis and therefore the
16 Court vacated FCC Rule 51-319. 119 S. Ct. at 734-36. The Court
17 directed the FCC on remand to give some substance to the Act's
18 requirements that access to a network element be "necessary" and
19 that failure to provide access would "impair" the CLECs' ability
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21

22 ¹ The Commission based its Decision on its finding that "Rule 51.315(b)
23 allows a CLEC to order as combined those elements which an ILEC
24 currently combines." Decision No. 60353, p. 7. However, as set forth
25 above, the Eighth Circuit already had vacated Rule 51.315(b) by the
26 time of the Decision. Nonetheless, the Commission concluded that
"[t]he Decision of the Eighth Circuit Court of Appeals allowed Rules
51.315(a) and (b) to remain in effect, but vacated Rules 51.315(c)-
(f)." Decision No. 60353, p. 4.

1 to provide service in determining what network elements must be
2 made available. Id.

3 With regard to FCC Rule 51.315(b), which the Eighth Circuit
4 had vacated, the Supreme Court reversed the Eighth Circuit and
5 held that this rule was a reasonable interpretation by the FCC of
6 the Act. 119 S. Ct. at 736-38. In reinstating FCC Rule
7 51.315(b), however, the Supreme Court expressly noted that because
8 it had vacated FCC Rule 51.319, "[i]f the FCC on remand makes
9 fewer network elements unconditionally available through the
10 unbundling requirement," the incumbent LECs' concerns about FCC
11 Rule 51.315(b) may be rendered "academic." 119 S. Ct. at 736,
12 737. The Court's opinion in AT&T Corp. is devoid of any mention
13 of FCC Rules 51.315(c)-(f), which the Eighth Circuit had vacated.

14 In light of AT&T Corp. and the uncertainty that has resulted
15 from the Supreme Court's vacating of the FCC's definition of
16 network elements that must be provided to CLECs, U S WEST filed
17 its instant Application to Stay Decision No. 60353 and the
18 resulting provisions of the Interconnection Agreements (the
19 "Application") until the FCC complies with the Supreme Court's
20 directive and issues new rules defining what network elements must
21 be provided by incumbent LECs. Despite the fact that such a stay
22 is by far the most practical solution for the Commission, the
23 parties and, ultimately, the parties' customers, AT&T and MCI,
24 nonetheless have opposed the Application on a number of grounds.
25 As set forth more fully below, each of the bases for AT&T's and
26 MCI's opposition must be rejected.

1 II. ANALYSIS

2 A. FCC Rules 51.315(c)-(f) Are Invalid.

3 As set forth above, the Eighth Circuit vacated FCC Rules
4 51.315(c)-(f), which had required incumbent LECs, rather than
5 CLECs, to combine unbundled network elements that are requested by
6 CLECs. Iowa Util. Bd., 120 F.3d at 813. The Supreme Court did
7 not address FCC Rules 51.315(c)-(f) anywhere in its opinion in
8 AT&T. Accordingly, U S WEST noted in the Application that the
9 Supreme Court left intact the Eighth Circuit's decision
10 invalidating these rules.

11 Incredibly, AT&T and MCI take issue with this basic premise
12 and contend that even though the Supreme Court made no such
13 pronouncement, the same rationale applied by the Supreme Court in
14 upholding FCC Rule 51.315(b) also should apply to FCC Rules
15 51.315(c)-(f). AT&T and MCI attempt to sustain this point by
16 means of a tortured analysis of the jurisdictional arguments made
17 by the parties before the Eighth Circuit and the Supreme Court.
18 However, the Eighth Circuit's basis for vacating FCC Rules
19 51.315(c)-(f) was not that the FCC lacked jurisdiction to issue
20 these rules, but that these rules could not be squared with the
21 express language of the Act requiring CLECs, not incumbent LECs,
22 to recombine network elements purchased by CLECs. Iowa Util. Bd.,
23 120 F.3d at 813. The Supreme Court in no way overturned the
24 Eighth Circuit's analysis of this point.

25 Indeed, at least one court that has reviewed the complicated
26 procedural history of the Eighth Circuit and Supreme Court

1 decisions expressly has agreed with U S WEST's conclusion that FCC
2 Rules 51.315(c)-(f) remain invalid:

3 The Eighth Circuit vacated paragraphs (b) through (f)
4 of Rule 315 because it believed those provisions
5 conflict with the text and overall design of the
6 Act....

7 In AT&T, the Supreme Court partly reversed the Eighth
8 Circuit, reinstating Rule 315(b).... However, the
9 Eighth Circuit's decision vacating paragraphs (c)
10 through (f) of Rule 315 was not appealed, hence those
11 paragraphs continue to be void.

12 U S WEST Communications, Inc. v. AT&T Communications of the Pac.
13 Northwest, Inc., ___ F. Supp.2d ___, ___, 1999 WL 274112 at *7 (D.
14 Or. May 3, 1999).

15 FCC Rules 51.315(c)-(f), which had required incumbent LECs,
16 rather than CLECs to recombine network elements are therefore void
17 and cannot be the basis for requiring U S WEST to combine network
18 elements for AT&T and MCI. As the Eighth Circuit aptly noted in
19 vacating these rules, the plain language of § 251(c)(3) of the Act
20 requires requesting CLECs, not incumbent LECs such as U S WEST, to
21 combine unbundled network elements themselves. Accordingly,
22 Decision No. 60353 and the resulting provisions of the
23 Interconnection Agreements unlawfully require U S WEST to provide
24 combination of network elements and their application should be
25 stayed.

26 B. There is No Current Valid Definition of What Network
Elements Must Be Provided.

As set forth above, the Supreme Court vacated FCC Rule 51.319
and remanded to the FCC for a determination of what network
elements satisfy the "necessary and impair" requirements of

1 § 251(d)(2) of the Act. AT&T Corp., 119 S. Ct. at 734-36.
2 Accordingly, the list in FCC Rule 51.319 of the seven minimum
3 network elements that must be made available through the
4 unbundling requirement is no longer in effect and presumably will
5 be replaced by a new, narrower list soon to be promulgated by the
6 FCC.

7 In the absence of this defined list of what constitute
8 "network elements," AT&T's and MCI's plea that the Commission
9 nonetheless enforce the provisions of the Interconnection
10 Agreements requiring U S WEST to "offer each Network Element
11 individually and in Combinations as required by law" and "not
12 separate network elements that are currently combined" possesses
13 an element of gamesmanship. It is difficult, if not impossible,
14 to fathom how U S WEST should be expected to respond to a request
15 by a CLEC for a particular "element" or preassembled platform of
16 "elements" in the absence of any definitive understanding of what
17 "network elements" are subject to these requirements.

18 AT&T and MCI incorrectly contend that even though the FCC
19 rules no longer provide a list of minimum network elements, the
20 parties' Interconnection Agreements describe a set of network
21 elements that could be used to define the elements U S WEST must
22 provide.² This contention conveniently overlooks the fact that

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25 ² Simultaneously, however, AT&T and MCI maintain that this initial set
26 of network elements listed in the Interconnection Agreements are not
all the possible "network elements" they might request.

1 Section 24.3 of the parties' Interconnection Agreements expressly
2 contemplates a revision of the Agreements in the event the FCC
3 rules applicable to the Agreements are held invalid. The Supreme
4 Court's vacating of FCC Rule 51.319, then, not only deprives the
5 parties of a list of minimum network elements that are provided by
6 law, it also has the same effect on the definition of network
7 elements contained in the Interconnection Agreements.³

8 A stay of Decision No. 60353 and the resulting provisions of
9 the Interconnection Agreements until the FCC issues new rules
10 defining the network elements that must be made available through
11 the unbundling requirement is the only practical means to avoid
12 the potential of ultimate disruption to customers' service. In
13 the event the Commission rejects U S WEST's application for a
14 stay, the very real possibility exists for U S WEST to be called
15 upon to provide what AT&T and MCI claim are "network elements,"
16 either alone or in combination, which in turn will be provided to
17 AT&T's and MCI's end users as part of their services, only to have
18 those end users' services disrupted when the FCC issues new rules
19 that make clear U S WEST is not, and never was, required to
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22 ³ U S WEST anticipates that AT&T and MCI may respond that Section 24.3
23 of the Interconnection Agreements requires U S WEST to renegotiate any
24 provisions of the Interconnection Agreements that are thus affected by
25 the invalidity of FCC rules. However, the parties did meet in the
26 winter of 1997 to renegotiate the parties' Interconnection Agreements,
but those negotiations were unsuccessful, thus accounting for the
Application to the Commission.

1 provide what AT&T and MCI hope to characterize as "network
2 elements."⁴

3 C. U S WEST Has Not Been Inconsistent in its
4 Representations.

5 Finally, AT&T and MCI erroneously maintain that U S WEST's
6 request for a stay is inconsistent with U S WEST's statement in a
7 letter to the FCC and U S WEST's Section 271 filing with this
8 Commission. In its letter to the FCC, U S WEST agreed to honor
9 existing contracts with respect to the availability of "unbundled
10 network elements[.]" Likewise, in its Section 271 filing, U S
11 WEST confirmed that it provides nondiscriminatory access to
12 "network elements." It was U S WEST's intent in both these
13 statements to demonstrate its good faith commitment to continue to
14 provide the seven minimum network elements previously defined by
15 FCC Rule 51.319 until the FCC issues new rules defining network
16 elements, even though the Supreme Court had vacated this rule and
17 U S WEST therefore is no longer required to provide these
18 elements. It was not, and never has been, U S WEST's intent to
19 promise to provide combinations of these elements to CLECs rather
20 than requiring CLECs to recombine these elements themselves in
21 accordance with § 251(c)(3) of the Act. Indeed, both AT&T and MCI

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23 ⁴ AT&T's and MCI's claim that they have not yet requested U S WEST to
24 combine network elements that are presently separated is disingenuous.
25 As demonstrated in recent correspondence from MCI to U S WEST
26 requesting ostensible "unbundled network elements," MCI has not been
restrained in its requests. See letter to Beth Halvorson from Michael
A. Beach, attached as Exhibit 1.

1 reneged on that arrangement because they were not supposed to
2 request combinations if U S WEST agreed to provide the elements
3 previously defined in FCC Rule 51.319.

4 Indeed, if any party were to be viewed as inconsistent in its
5 approach to the issues raised by the Supreme Court's decision, it
6 must be AT&T. While AT&T stoutly opposes U S WEST's Application
7 for a Stay by this Commission until the FCC issues new rules
8 defining network elements, AT&T did not oppose U S WEST's request
9 that the New Mexico Public Regulation Commission vacate its Order
10 requiring U S WEST to provide shared transport as a network
11 element until the FCC determines on remand whether shared
12 transport is a network element that incumbent LECs must provide to
13 CLECs.⁵ Why AT&T is willing to concede the necessity for further
14 guidance from the FCC on the definition of network elements in New
15 Mexico, but not in Arizona, is beyond U S WEST's comprehension.

16 III. CONCLUSION

17 For the foregoing reasons, U S WEST respectfully requests
18 that the Commission stay the obligations imposed by Decision No.
19 60353 and the resulting provisions of the Interconnection
20 Agreements until the FCC issues new rules defining the network
21 elements that must be provided to CLECs by incumbent LECs.

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25 ⁵ See AT&T Response to U S WEST Motion to Vacate Shared Transport
26 Requirement and Submission of Shared Transport Cost Study, Docket No.
96-310-TC, attached as Exhibit 2.

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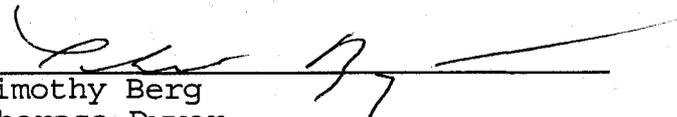
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RESPECTFULLY SUBMITTED this 25th day of May, 1999.

Thomas M. Dethlefs
U S West Law Department
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Denver, Colorado 80202

AND

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Attorneys for
U S WEST Communications, Inc.

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

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

FOUR COPIES of the foregoing
hand-delivered this 25th day of May, 1999, to:

Jerry L. Rudibaugh, Chief Hearing Officer
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 25th day of May, 1999, to:

Paul Bullis, Chief Counsel
ARIZONA CORPORATION COMMISSION
Legal Division
1200 West Washington
Phoenix, Arizona 85007
.

1 Ray Williamson, Acting Director
ARIZONA CORPORATION COMMISSION
2 Utilities Division
1200 West Washington
3 Phoenix, Arizona 85007

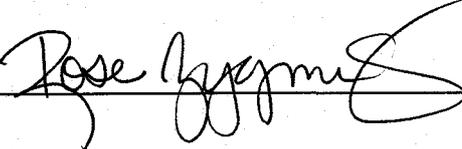
4 COPY of the foregoing mailed
this 25th day of May, 1999, to:

5 Mary B. Tribby
6 AT&T
1875 Lawrence St., Suite 1575
7 Denver, Colorado 80202

8 Thomas F. Dixon
MCI Telecommunications
9 Corporation
707 17th Street, Suite 3900
10 Denver, Colorado 80202

11 Joan S. Burke
12 Osborn Maledon, P.A.
2929 N. Central Avenue
13 21st Floor
P.O. Box 36379
14 Phoenix, Arizona 85067-6379

15 Thomas H. Campbell
Lewis & Roca
16 40 North Central Avenue
Phoenix, Arizona 85004-0001

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FROM US WEST LEGAL DEPT

(TUE) 5.11.99 9:16/ST. 9:16/NO. 4860631447 P 3

MCIWORLD.COM

Vice President
West TeleLine Cost Management

May 4, 1999

SENT VIA FAX AND U S MAIL

Beth Halverson
Vice President, Wholesale Major Markets
U S WEST
200 S. 5th Street, Suite 2300
Minneapolis, MN 55402

Dear Beth:

On September 4, 1997 MCI_m wrote requesting that U S WEST comply with our Interconnect Agreements with respect to the pricing of connections you provide between MCI_m local service customers and the MCI_m point of presence. Our Interconnect Agreements require that these connections be provided and priced as combined network elements. U S WEST refused at that time to do as MCI_m requested and has continued to price these connections under the U S WEST access tariffs. Jasmín Espy of U S WEST wrote to MCI_m, indicating that the U S WEST refusal was "Based on the 8th Circuit rehearing decision of October 14, 1997....."

On February 1, 1998, following the Supreme Court Order rejecting U S WEST's position and requiring, among other things, that U S WEST supply MCI_m with combined network elements Tom Friday wrote asking for U S WEST's plans for complying with that Order. U S WEST's answer indicated that a response was premature as U S WEST had not yet completed its review of the Order.

More than sufficient time has elapsed to allow full U S WEST review of the Order. Thus, I am making the following requests of U S WEST.

First, all U S WEST services presently provided to MCI_m in the states of Arizona, Colorado, Minnesota, Oregon and Washington that are used to provide customer connections for local service should immediately be re-priced at the proper unbundled network element rates contained in our Interconnect Agreements. This would include all end user connections provided by U S WEST using the ACNA of WUA. Any future billing rendered to MCI_m by U S WEST. These connections should be at the proper rate for unbundled loops combined with unbundled transport, not at the special access channel termination and interoffice mileage rates from your access tariffs.

Second, U S WEST should provide credit to MCI_m for the difference between the access tariff rate previously billed for these circuits and the proper unbundled network element rates, effective as of the date of our initial request, September 4, 1997. This should also

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Denver, CO 80202-3400
303 390 8272
Fax 303 390 6222

May 4, 1999
Page 2

include credit for any circuits that were installed but subsequently disconnected during this prior period.

Finally, all new orders for customer connections submitted by MCI using the WUA ACNA should also be priced by U S WEST at the correct rates for combined network elements contained in the Interconnect Contract.

I would appreciate your written confirmation within the next 10 days that these steps will be taken by U S WEST.

Sincerely,



Michael A. Beach
Vice President
West Telco/Line Cost Management

Cc: Wayne Rehberger, MCIW
Paula Rice, MCIW
Steve Gilstrap, USW
Gary Knudson, USW

2

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE)	
CONSIDERATION OF THE ADOPTION)	
OF A RULE CONCERNING COSTING)	DOCKET NO. 96-310-TC
METHODOLOGIES)	
)	
IN THE MATTER OF THE)	
IMPLEMENTATION OF NEW RULES)	
RELATED TO THE RURAL, HIGH COST,)	
AND LOW INCOME COMPONENTS OF)	DOCKET NO. 97-334-TC
THE NEW MEXICO UNIVERSAL)	
SERVICE FUND)	CASE NO. 2917

AT&T RESPONSE TO U S WEST MOTION TO VACATE SHARED
TRANSPORT REQUIREMENT AND SUBMISSION OF SHARED TRANSPORT
COST STUDY

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby responds to U S WEST's Motion to Vacate Shared Transport Requirement and Submission of Shared Transport Cost Study ("U S WEST's Motion").

In its December 31, 1998 decision in this docket, the New Mexico State Corporation Commission (now known as the New Mexico Public Regulation Commission, hereafter referred to as the "Commission"), determined that shared transport is an unbundled network element ("UNE"). To support its decision, the Commission cited the Federal Communication Commission's ("FCC") Third Order on Reconsideration¹, where it held that shared transport is a UNE, and the Eighth Circuit Court of Appeals' decision² upholding the FCC's finding that shared transport is a

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98. Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (August 18, 1997) ("Third Order on Reconsideration").

² *Southwestern Bell Telephone v. FCC*, 153 F.3d 597 (8th Cir. 1998).

network element that incumbent local exchange carriers ("LECs") must provide to requesting competitive local exchange carriers ("CLECs"). Order at ¶¶ 163, 164 and 173; *see also* this Commission's previous Order in this docket, Order on Motion for Reconsideration, at 12-13 (August 25, 1998). The Commission rejected U S WEST's argument that setting a price for shared transport should be delayed and required U S WEST to submit a pricing proposal for the UNE by April 15, 1999. Order at ¶¶ 174 and 175. The Commission noted that AT&T had requested shared transport from U S WEST in the arbitration docket, Docket No. 96-411-TC. Order at ¶ 173.

On the basis of the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Bd.*, ___ U.S. ___, 119 S.Ct. 721 (1999), U S WEST now moves this Commission to vacate its Order requiring U S WEST to provide shared transport and to delay consideration of shared transport prices. AT&T disagrees with U S WEST's analysis of the issue. AT&T believes that the FCC will ultimately determine on remand that shared transport is a UNE that incumbent LECs must provide to CLECs under the federal Act. However, for purposes of this case only, AT&T does not oppose U S WEST's request to delay its decision on the price of shared transport until after the FCC has taken action on remand.

DATED this 15th day of April 1999.

AT&T COMMUNICATIONS OF THE
MOUNTAIN STATES, INC.

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By:

(s/original signed)

Steven Asher