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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

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OPPOSITION OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES TO US WEST's MOTION FOR STAY

Pursuant to Rule 1.45(d) of the Commission's Rules, the Association for Local Telecommunications Services ("ALTS")[1] hereby opposes the motion of US WEST for a stay pending judicial review of the Commission's order released August 8, 1996, in the above proceeding. Because US WEST endorses the motion for stay filed August 28, 1996, by GTE and SNET, ALTS hereby references its filing of September 4, 1996, opposing GTE and SNET's motion.

I. US WEST HAS FAILED TO SHOW ANY LIKELIHOOD THAT IT WILL PREVAIL ON THE MERITS OF ITS CLAIM.

In addition to endorsing GTE and SNET's motion, US WEST makes two specific claims: "the provisions in the Order for (a) default proxy pricing and (b) term-by-term 'most favored nation' rights for each would-be interconnector are wholly inconsistent with the Act's explicit requirement that terms for interconnection be set by negotiation of a 'binding agreement'

[1] ALTS is the national trade association of over thirty facilities-based competitive providers of access and local exchange services.

between the parties" (US WEST Motion at 1-2). For the reasons discussed below, US WEST's quarrel is entirely with the statutory regime created by Congress, and not the Commission's implementing regulations.

A. The Commission's Interconnection Rules in General -- and Its Proxy Rules in Particular -- Do Not Interfere with the Act's Provisions for Negotiated Agreements.

The thrust of US WEST's challenge to the Commission's pricing proxies is simple (Motion at 11-12):

> "The Commission's default pricing levels remove any incentive for a requesting carrier to negotiate with a LEC concerning prices since, as a practical matter, the would-be interconnector has a presumptive price ceiling, the default price. In the absence of such default rules, requesting carriers might agree to a higher interconnection price than the Commission's price in exchange for more beneficial provisions in other areas of the contract relationship; the LEC might similarly agree to a lower price under appropriate conditions."

But the Commission's default pricing rules are not mandatory for any negotiators which do not want those rules to apply. As provided for in Section 252(a) (quoted by US WEST in its Motion at 4), parties are free to negotiate interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251," which include the requirements of the Commission's regulations implementing those sections.

US WEST may well be correct "as a practical matter" that most requesting carriers will indeed invoke their statutory rights to interconnection agreements which comply with Sections 251(b) and 251(c), thereby triggering application of the

Commission's rules. But this is the result of a carrier invoking its statutory rights, not the Commission's implementing regulations. The Commission's discharge of a statutory obligation thus has no bearing on US WEST's desire and opportunity under the Act to pursue a "system of flexible, voluntary, and case-by-case negotiations allow[ing] interconnecting carriers to settle on the most efficient and appropriate terms given their own plans and the particular circumstance they face, just as unregulated enterprises do in a free market" (Motion at 5), provided US WEST can persuade requesting interconnectors of the merits of such a course. If it happens that few interconnectors see any advantage in waiving their rights under Sections 251(b) and 251(c), and pursuing the free and open path advocated by US WEST, US WEST's quarrel is with the 1996 Act, not with the Commission's regulations.

The pertinent legal questions for US WEST's stay request are whether it has shown that the Commission's regulations in general, and its default pricing and Section 252(i) rules specifically, fail to properly implement the 1996 Act. US WEST declines to address these questions. It never challenges, or even refers to the Commission's explanation of the bargaining imbalances that exist between the ILECs and the CLECs (see, e.g., "We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use

of the incumbent LEC's network and services" (Interconnection Order at ¶ 55). Instead of showing how the Commission's reasoning is unsound, US WEST simply assumes a "normal commercial bargaining process" in which "parties may make concessions in one area in exchange for benefits in another" (Motion at 12).[2]

But the Commission expressly rejected US WEST's analogy to a "normal commercial bargaining process" in its Interconnection Order (at ¶ 55):

> "Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations." (Emphasis supplied.)

The Commission thus issued national rules implementing Sections 251(b) and 251(c) to insure that the inequality of bargaining power between ILECs and CLECs did not prevent new entrants from receiving the just and reasonable rates guaranteed

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[2] US WEST similarly relies on Carson v. American Brands, 450 U.S. 79, 86-87 (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971)): "'Consent decrees are entered in to by parties to a case after careful negotiation has produced agreement on their precise terms ... Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.'"

by the 1996 Act in Section 251(c).

In particular, the Commission addressed a timing problem created by Congress' direction that Section 251 regulations be issued withing six months.[3] Because state arbitrations were already moving toward completion when the Commission's regulations implementing its TELRIC cost methodology were issued on August 8, 1996, the Commission was concerned that some states might not be able to perform their own TELRIC cost analysis (at ¶ 619): " ... we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall."

The Commission thus decided to adopt certain proxy measures which states could employ as an alternative until they had completed their own TELRIC analysis. These proxies were created by taking an average of the most sophisticated costing approaches available to the Commission, the most recent Hatfield and Benchmark Cost Methodology studies, calibrating their combined average so as to produce the same results adopted by those states which had completed cost studies analogous to TELRIC, adding a 5% margin, and then applying the result to all jurisdictions (id. At

[3] "... [i]t is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) [allowing RBOCs to file terms and conditions for interconnection for the purpose of Section 271 compliance] shuts." Joint Managers' Statement, S.Conf. Rep. No 104-230, 104th Cong., 2d Sess. 115 (1996).

¶ 794).

None of this history or rationale appears in US WEST's motion for stay. Instead, US WEST simply moans that (at 11): "In the absence of such default rules, requesting carriers might agree to a higher interconnection price than the Commission's price ... The Commission's rules now preempt such discussion about pricing because they effectively impose a price to which all LECs must agree." Because US WEST fails to address either the reasonableness of the Commission proxy calculations, or the need for a proxy under the statutorily-imposed time limits, it has failed to show any chance of success on the merits of this claim.

B. The Commission Has Correctly Interpreted Section 252(i).

US WEST also complains that (Motion at 12): "the Commission's 'most favored nation' rules, which allow requesting interconnectors to pick and choose the most beneficial provisions of an preceding contract with a LEC on a item-by-item basis, will similarly frustrate the negotiation process." While US WEST makes scant reference to the fact these rules are firmly grounded on Section 252(i) (see US WEST Motion at 6, n.1), the Interconnection Order clearly implements the statutory requirement (at ¶ 1310):

> "We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements. As we note above, section 252(i) provides that a 'local exchange carrier shall make available any interconnection, service, or network element provided under

> an agreement ... to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.' Thus, Congress drew a distinction between 'any interconnection, service, or network element[s] provided under an agreement,' which the statue lists individually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words 'any interconnection, service, or network element.'"

US WEST never addresses the Commission' convincing interpretation of Section 252(i). Instead, it first simply asserts that "§ 252(i) only authorizes a would-be interconnector to acquire the same services on the entire set of terms and conditions agreed to by the first requesting carrier" (Motion at 6, n.1; emphasis supplied). US WEST never explains how it can justify inserting "entire" into the statute. Second, it asserts that the statute "nowhere provides that a would-be interconnector is free to walk away once it has entered into a 'binding agreement' with an LEC" (Motion at 6, n. 1).

This is pure invention on US WEST's part, because legal agreements do not have to contain fixed prices in order to be fully binding.[4] An agreement which contains a voluntarily negotiated "most favored nation" is one in which the prices for certain terms could change depending on future events, but it is fully binding. Thus a statutorily-created "most favored nation" clause has no effect on the "binding nature" of a contract.

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[4] The contention that a "most favored nation" clause makes an agreement "non-binding" would certainly come as a revelation to the many vendors and customers which currently have contracts with US WEST containing most favored nations clauses.

As with its other claims, US WEST fails even to mention the Commission's underlying reasoning here (Interconnection Order at ¶ 1312):

> "We also find that practical concerns support our interpretation. As observed by AT&T and others, failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement ... [R]equiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in section 252(i)."

Nor does US WEST question, or even mention, the Commission's conclusions concerning the possible "slowing down" of the negotiating process (id. at ¶ 1313):

> "We also choose this interpretation despite concerns voiced by some incumbent LECs that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements."

Furthermore, even in the absence of Section 252(i)'s clear requirements, other portions of the act would effectively mandate the same result. Section 252(e) requires that states insure that negotiated agreements not discriminate against any other carrier. A ILEC's refusal to grant another CLEC the same individual terms reflected in approved agreements would clearly violate the antidiscrimination language of Section 252(e) and the policy

underlying the 1996 Act even in the absence of Section 252(i).[5]

At bottom, Section 252(i)'s requirement that the same interconnection elements be provisioned at the same price to all requesting carriers, aside from any verified cost differences, reflects the same antidiscrimination requirements that ILECs have operated under for over a hundred years. US WEST has plainly fails to meet its burden of showing that it will prevail on the merits of this issue.

II. US WEST HAS FAILED TO SHOW THAT IT WOULD BE HARMED BY THE ISSUANCE OF A STAY, OR THAT THE PUBLIC INTEREST OR A BALANCING OF HARMS SUPPORTS ISSUANCE OF A STAY.

Nowhere in its motion for stay does US WEST explain how CLECs would not be harmed if they were to lose the benefits of the statute which the Commission's regulations are intended to secure, as described in the Interconnection Order by the Commission. US WEST makes the naked assertion that (Motion at 16): "Congress entrusted the implementation of the new framework for local telephone service to private negotiations between the parties, and those negotiations would simply proceed under the terms of the statute absent the Commission's detailed rules controlling each aspect of the bargaining process." Nowhere does US WEST address how the benefits to competitors assured by these

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[5] The Interconnection Order does not require granular disaggregation of interconnection agreements under Section 252(i), but rather disaggregation at the same level of detail demanded by the statute (see id. at ¶ 1314: "We agree with ALTS that such a view comports with the statute, and lessens the concerns of carriers that argue that unbundled availability will delay negotiations."

implementing regulations would continue unimpaired in their absence. Consequently, it has failed to show any lack of harm to CLECs.

Similarly, US WEST fails to show irreparable harm to itself if a stay does not issue. There is no question that the introduction of competition does -- or should -- have a negative effect on a monopolist's market share. However, the present issue is whether the Commission's regulations, as distinct from the statute itself, imposes particular irreparable harm on the ILECs. US WEST cannot legally ask the Commission to stay the 1996 Act because of any burden the Act's specific requirements might impose. See Johnson v. Robison, 94 S.Ct. 1160, 1166 (1974); GTE v. FCC, 39 F.3d 940, 946 (1994).[6] Instead, it can only complain of any additional harm imposed by the regulations themselves.

The issue of irreparable harm is essentially simple here. ALTS agrees that owning a monopoly may confer more economic benefits than owing a competitive business. In the unlikely event a court rules that the statute did not intend to tear down the local telecommunications monopoly expeditiously, and to create a fair competitive environment, the ILECs will perhaps have suffered a blow. The real issue is how likely it is that a

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[6] An action to stay a portion of the 1996 Act amending the Pole Attachment Act was filed in the United States District Court for the Northern District of Florida on August 16, 1996, entitled Gulf Power Co. v. United States and FCC.

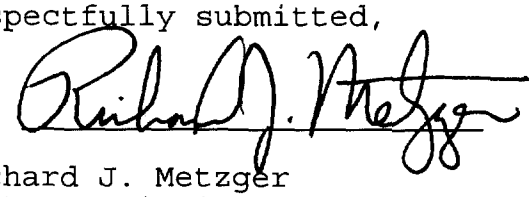
court will overturn the Commission's efforts to implement so clear a competitive mandate from Congress.

In this respect, US WEST's complaints are quite misdirected on the issues of irreparable harm and balancing of harms. US WEST might enjoy an economic benefit if the Commission had not complied with the statutory mandate of Sections 251(b) and 251(c) in its regulations, but Congress has determined that the rights conferred upon interconnectors in those sections, as amplified in the Commission's implementing regulations, best protects the public interest. US WEST's efforts to read the concrete provisions of Sections 251(b) and 251(c) out of the 1996 Act are plainly inconsistent with the public interest and any proper balancing of harms.

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission deny US WEST's motion for stay.

Respectfully submitted,

By: 

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Certificate of Service

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