It is apparent, however, that the Commission's decision was based in significant part on the CRSTTA's refusal to waive its sovereign immunity. In its decision, the Commission made the following Findings of Fact:

> CRSTTA maintains that if the sale of the [exchanges] to CRSTTA were allowed, the Commission would lose all regulatory control over the . . . exchange[s].
>
> * * *
>
> CRSTTA <u>has refused to waive its sovereign immunity</u> in order to provide the Commission with its statutorily mandated regulation of telecommunications services provided by a telecommunications company within the state of South Dakota.
>
> CRSTTA <u>has refused to waive its sovereign immunity</u> with regard to the gross receipts tax agreement that it had proposed to enter into negotiations with the state of South Dakota.
>
> * * *
>
> If the sale of the [exchanges] to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the Timber Lake exchange.
>
> * * *
>
> <u>As CRSTTA has declined to waive its sovereign immunity, the Commission similarly declines to give up its jurisdiction</u>.

SR at 10928-29, 10964-65 and 11215-16 (emphasis added). These findings clearly reveal that the Commission's decision was predicated in significant part on the CRSTTA's refusal to waive its sovereign immunity.

The question then is whether the Commission may so condition its approval upon a waiver of tribal sovereignty immunity. <u>See</u> <u>Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.</u>, 476 US 877, 106 SCt 2305, 90 LEd2d 881 (1986). <u>Wold Engineering</u> arose under a state statute which provided that the Three Affiliated Tribes of the Fort Berthold Reservation "could not avail itself of state court jurisdiction unless it consented to waive its sovereign immunity

and to have any civil disputes in state court to which it is a party adjudicated under state law." Wold Engineering, 476 US at 878. The United States Supreme Court concluded that such a condition was "unduly burdensome on the federal and tribal interests." Id. at 888. The Supreme Court noted that: North Dakota's requirement "serve[d] to defeat the Tribe's federally conferred immunity from suit;" that "[t]he common law sovereign immunity possessed by the Tribe [wa]s a necessary corollary to Indian sovereignty and self-governance;" and, that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." Id. at 890-91.

Here the Commission's decision rather clearly implies that in the absence of a waiver of sovereign immunity by the CRSTTA, the Commission would decline to approve the sale. Because common law sovereign immunity is a necessary corollary to tribal sovereignty and self-governance, the Commission's refusal to approve the sale in the absence of a waiver of the CRSTTA's sovereign immunity collides with strong tribal and federal interests. Wold Engineering, 476 US at 890. Consequently, to the extent the Commission conditioned its approval upon a waiver of the CRSTTA's sovereign immunity, that condition is unduly burdensome on federal and tribal interests. Id. at 888. The Commission's decision is remanded for reconsideration without conditioning its decision on the CRSTTA's refusal to waive its sovereign immunity.[17]

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[17] That is not to say that the Commission may not consider the effects of immunity if relevant under the statutory criteria.

III. DID THE COMMISSION'S DISAPPROVAL OF THE SALE DENY THE CRSTTA OF EQUAL PROTECTION?

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[18] USConstAmend 14, § 1. "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises." Plyler v. Doe, 457 US 202, 216, 102 SCt 2382, 72 LEd2d 786, 799 (1982). In determining whether state legislation is in violation of the Equal Protection Clause, the level of scrutiny applied depends on the type of classification employed by the legislation.[19] However, before equal protection scrutiny is necessary, it must first be shown that the government action or legislation contains arbitrary classifications. Sedlacek v. S.D. Teener Baseball Program, 437 NW2d 866, 869 (SD 1989) (unless a statute contains arbitrary classifications, a court "need not decide" what level of scrutiny is necessary).

On its face, SDCL 49-31-59 contains no arbitrary classification of groups or individuals.[20] SDCL 49-31-59 applies to "[a]ny sale of a telecommunications

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[18] Similarly, the South Dakota Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities upon which the same terms shall not equally belong to all citizens or corporations." SDConstArt VI, § 18.

[19] Counsel for CRSTTA conceded at oral argument that rational basis scrutiny applies here.

[20] Compare Loving v. Virginia, 388 US 1, 87 SCt 1817, 18 LEd2d 1010 (1967) (holding statutes which prohibited a "white person" from marrying a "colored person" unconstitutional); Harper v. Virginia State Board of Elections, 383 US 663, 86 SCt 1079, 16 LEd2d 169 (1966) (holding states cannot require payment of a tax

exchange" without regard to race, the type of governmental entity involved, or sovereign immunity. SDCL 49-31-59 (emphasis added). Because SDCL 49-31-59 does not contain any arbitrary classification, "on its face," equal protection scrutiny is unnecessary.

The CRSTTA and US West, however, argue that the Commission's application of SDCL 49-31-59 has resulted in an improper classification that denied the CRSTTA of equal protection. They contend that it is illegal, and therefore improper, for the Commission to consider the CRSTTA's refusal to waive its sovereign immunity while not imposing that same consideration on other purchasers.

This Court has previously concluded that the Commission may not condition its approval upon a waiver of sovereign immunity by the CRSTTA. This Court has also instructed that on remand, the Commission may not apply SDCL 49-31-59 in that manner. Therefore, the CRSTTA's "as applied" argument is not ripe for review.

IV. DID THE APPLICATION OF SDCL 49-31-59 SUBSTANTIALLY IMPAIR THE CRSTTA AND US WEST'S CONTRACTUAL RELATIONSHIP?

The Commission disapproved the sale of the three exchanges under the March 30, 1995 statute. Before that enactment, Commission approval of local

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to vote); Mississippi Univ. for Women v. Hogan, 458 US 718, 102 SCt 331, 73 LEd2d 1090 (1982) (holding statute that excluded males from enrolling in a state-supported nursing school was unconstitutional); Clark v. Jeter, 486 US 456, 108 SCt 1910, 100 LEd2d 465 (1988) (holding six-year period for illegitimate children to establish paternity unconstitutional).

exchange sales was not explicitly required. The CRSTTA and US West contend that application of the March 30, 1995 statute to their December 7, 1994 contract violated Article VI, § 12 of the South Dakota Constitution. That section provides that "[n]o ex post facto law, or law impairing the obligation of contracts or making any irrevocable grant of privilege, franchise or immunity, shall be passed." SDConstArt VI, § 12. The United States Constitution also provides that "[n]o State shall . . . pass any . . . law impairing the obligation of contracts . . . ." USConstArt. I, § 10.

"Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves v. Kansas Power & Light Co., 459 US 400, 410, 103 SCt 697, 704, 74 LEd2d 569, 580 (1983) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 US 398, 434, 54 SCt 231, 239, 78 LEd 413 (1934)). In deciding whether it is unconstitutional for the Commission to apply SDCL 49-31-59 to the 1994 contract, this Court must "first ask whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'" General Motors Corp. v. Romein, 503 US 181, 186, 112 SCt 1105, 1109, 117 LEd2d 328, 337 (1992) (quoting Allied Structural Steel Co. v. Spannaus, 438 US 234, 244, 98 SCt 2716, 2722, 57 LEd2d 727, 736 (1978)). "This inquiry has three components: whether there is a contractual relationship, whether a change[21]

[21] A credible argument can be made that the Commission had implicit authority over the sale under its preexisting authority to generally regulate local

in law impairs that contractual relationship, and whether the impairment is substantial." General Motors Corp., 503 US at 186. Because the parties have conceded that a contractual relationship existed, this Court will only consider the second and third components.

Before discussing the latter two components, it is important to identify the regulatory environment in which the parties operated and the specific terms of their contract. These "parties [were] operating in a heavily regulated industry." Energy Reserves, 459 US at 413. Telecommunications regulation is no less pervasive than natural gas regulation. Compare Communications Act of 1934 and The Telecommunications Act of 1996 with Energy Reserves, 459 US at 413-14 ("At the time of the execution of [the Kansas contracts, the government] did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.").

It is also important to note that the terms of the parties' contract specifically contemplated Commission approval. In this regard, the United States Supreme Court has held that "contracts [which] expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law . . . are . . . interpreted to incorporate all future state price regulation, and thus dispose of [any] Contract Clause claim." Energy

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exchange service. This Court, however, will assume without deciding that there was a "change" in the law.

Reserves, 459 US at 416. When a contract is specifically subject to future regulatory conditions:

> "[the] contractual rights [a]re subject to alteration by state . . . regulation. * * * [R]egulation existed and was foreseeable as the type of law that would alter contract obligations. * * * In short, ERG's reasonable expectations have not been impaired by the Kansas Act.

Id. (emphasis added).

Under Energy Reserves, SDCL 49-31-59 did not substantially impair the contractual relationship between the CRSTTA and US West. First, like the parties in Energy Reserves, the CRSTTA and US West were "operating in a heavily regulated industry." Energy Reserves, 459 US at 413. Local exchange service was subjected to the highest level of Commission oversight and regulation under SDCL Chapter 49-31.

Furthermore, the language of the contract specifically provided that the agreement would be subject to Commission approval. Sections 3.1 and 3.2 of the purchase agreement provided:

> 3.1 Conditions to Buyer's Obligations. The obligation of Buyer to consummate the Transactions shall be subject to the satisfaction, on or prior to the Closing Date, of each the of the following conditions, any of which may, to the extent allowed by law, be waived in writing by Buyer:
>
> * * *
>
> > C. Consents. All authorizations, consents and approvals of, filings and registrations with, and notifications to (collectively "Governmental Approvals") any United States, state, or local governmental entity or municipality or subdivision thereof or any authority, department, commission, PUC, board, bureau, agency, court or instrumentality thereof or the FCC (collectively, "Governmental Authorities"), or any third parties, necessary to consummate the Transactions and thereafter for Buyer to operate the Exchanges and Business on the terms and

conditions contemplated by the Transaction Documents, including the FCC filings as specified in Section 6.3(E), shall have been obtained or made, shall be acceptable in all material respects to Buyer in its reasonable discretion and shall be in full force and effect.

* * *

3.2 Conditions to Seller's Obligations. The obligations of Seller to consummate the Transactions shall be subject to the satisfaction, on or prior to the Closing Date, of each of the following conditions, any of which may, to the extent allowed by law, be waived by Seller:

* * *

C. Consents. All Governmental Approvals of any Governmental Authority or any third parties necessary to consummate the Transactions shall have been obtained or made and shall be in full force and effect. The terms and conditions of such approvals shall be acceptable in all material respects to Seller in its reasonable discretion, including, but not limited to, regulatory treatment of the Gain which shall allow for all of the Gain to be retained by Seller's shareholders and preclude the PUC from including the Gain, or any part of it, in any further regulatory proceeding for ratemaking or any other purpose. Notwithstanding anything to the contrary, in the event the Seller elects not to consummate the Transactions because the conditions set forth in this Section 3.2(C) are not satisfied on or before the Closing Date, the Earnest Money and the interest thereon shall be returned to Buyer.

SR at 241-43 and 247-48 (emphasis added). In the glossary to the agreement, "PUC" and "PUC Approval" are defined in the following manner:

"PUC" means the Public Utility Commission in the State of South Dakota.

"PUC Approval" means the issuance of the PUC consent or order of its grant of consent to the assignment of the PUC Authorities.

SR at 307 (emphasis added). These provisions subjected the parties' contract to approval by the Commission. See Energy Reserves, 459 US at 416. Under the

circumstances, "[the CRSTTA and US West's] reasonable expectations were not impaired by [SDCL 49-31-59]." Id.

Moreover, even if this Court were to assume that there has been an impairment of the parties' contractual rights, the preceding terms foreclose a conclusion that there has been a "substantial" impairment. The parties specifically conditioned the proposed sale upon Commission approval. Therefore, Commission approval was not unforeseeable. Furthermore, SDCL 49-31-59 does not forbid the sale of the exchanges contemplated in the December 7, 1994 contract. Rather, the statute merely provides that the sale of each exchange must be approved by the Commission after consideration of five factors. Because the parties were operating in a heavily regulated industry, and because they utilized contractual language specifically contemplating Commission approval, the additional considerations imposed by SDCL 49-31-59 did not substantially impair the contractual rights of the CRSTTA and US West.

V. WOULD APPROVAL BY THE COMMISSION RESULT IN AN IMPROPER DELEGATION OF AUTHORITY?

The Commission concluded that approval of the proposed sale would constitute an improper delegation of its authority in violation of SDCL 49-1-17. That statute provides that:

> [i]t is a Class 2 misdemeanor for the public utilities commission to delegate any of the powers conferred upon it, or the performance of the duties imposed upon it by law, to any other person except in cases where express authority has been given by statute.

SDCL 49-1-17 (emphasis added). The CRSTTA and US West argue that approval of the sale by the Commission would not violate SDCL 49-1-17. This Court agrees.

"The construction of a statute is a question of law." Wiersma v. Maple Leaf Farms, 1996 SD 15, ¶4, 543 NW2d 787. Courts "interpret statutes in accord with legislative intent." Id. "Such intent is derived from the plain, ordinary and popular meaning of statutory language." Id. Furthermore, "'[i]ntent must be determined from the statute as a whole, as well as enactments relating to the same subject.'" Id. (quoting Whalen v. Whalen, 490 NW2d 276, 280 (SD 1992)).

Here, the Commission interpreted the meaning of SDCL 49-1-17 without giving effect to all of the statute's language and without consideration of other enactments relating to the same subject. When all of the language of SDCL 49-1-17 is considered together with related enactments (SDCL 49-31-59), it is apparent that the former statute does not prohibit the Commission from approving the sale of these exchanges.

Although SDCL 49-1-17 generally prohibits the delegation of Commission powers and duties, the prohibition does not apply "where express authority has been given by statute." SDCL 49-1-17. SDCL 49-31-59 is a statute which gives the Commission express authority to approve the sale of local telephone exchanges. Because SDCL 49-31-59 gives the Commission "express authority" to approve sales, SDCL 49-1-17 does not prohibit that authority.

The Commission's disapproval was based in part on its erroneous conclusion that an approval would constitute an improper delegation of authority in violation

of SDCL 49-1-17. The Commission's decision is remanded for reconsideration without this erroneous interpretation of SDCL 49-1-17.

VI. ARE THE COMMISSION'S FINDINGS OF FACT AND CONCLUSIONS OF LAW CLEARLY ERRONEOUS, ARBITRARY AND CAPRICIOUS, OR CHARACTERIZED BY AN ABUSE OF DISCRETION?

The CRSTTA and US West contend that the Commission's decision must be reversed because the Commission's conclusion "that the sales would result in the loss of significant tax revenue for cities, counties, and school districts located within these exchanges is clearly erroneous in light of the entire record, [is] arbitrary and capricious, and [is] characterized by an abuse of discretion." Appellants' Joint Brief at 50.

The Commission's finding that an approval of the proposed sale would result in significant loss of tax revenue is not clearly erroneous. The administrative record reflects that Corson County would lose $50,238.19 in annual property tax revenue, which is approximately 6.6% of that county's total annual property tax receipts. The City of McIntosh would lose $5,044.30 in annual property tax receipts, which is approximately 11.6% of its total property tax revenues. It would also lose approximately $657.28 in annual sales tax revenue, which is about 4.5% of its total annual sales tax receipts. Finally, there is evidence that the Corson County Commission and the McIntosh City Council could not afford to lose this tax revenue due to tight budget constraints and an already eroded tax base.

There is no dispute that the CRSTTA does not pay, nor can it be required to pay property taxes, gross receipts taxes, or similar taxes previously paid by US

West on the telephone exchanges. SR at 10928, 10964 and 11215. Furthermore, at the time of the Commission's decision, the CRSTTA had not entered into a tax agreement with the State of South Dakota. SR at 10928, 10964 and 11215. Under those circumstances, there is substantial evidence in the record to support the Commission's tax loss findings.

This Court also concludes that the Commission's decision is not "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." SDCL 1-26-36(6). The legal test is disposed of by this Court's decision that the Commission had jurisdiction to consider the proposed sale. With respect to the factual test, the previous circumstances (indicating a substantial tax loss) establish that the Commission's decision was "supported by evidence and [was not] arbitrarily or capriciously made or . . . clearly unreasonable in light of the evidence . . . ." Iversen, 522 NW2d at 193.[22]

CONCLUSION

The Commission had jurisdiction to consider the proposed sale of US West's local exchanges to the CRSTTA. The Commission's jurisdiction has not been pre-empted by federal law, and exercise of jurisdiction by the Commission does not unlawfully infringe on the right of the CRST to make its own laws and be governed by them. The application of SDCL 49-31-59 does not result in a denial of equal

[22] The CRSTTA also contends that the Commission abused its discretion by placing too much emphasis on taxes while not giving adequate consideration to the other factors listed in SDCL 49-31-59. Because this matter is being remanded so the Commission may enter findings on all factors, appellate review of this issue is premature.

protection of the law, nor does it unconstitutionally impair the contractual relationship between the CRSTTA and US West. The Commission's finding that the proposed sale would result in a significant tax loss to various governmental entities is not clearly erroneous, nor is it arbitrary, capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. The Commission's decision is, however, reversed and remanded on the record because the Commission improperly conditioned its approval upon the CRSTTA's refusal to waive its sovereign immunity, because the decision was based upon the Commission's erroneous conclusion that SDCL 49-1-17 prohibited approval of the proposed sales, and because the Commission did not enter findings of fact on each of the statutory factors listed in SDCL 49-31-59. Counsel for US West should prepare an order of remand consistent with this opinion.

Dated this 21st day of February, 1997.

BY THE COURT:

Steven L. Zinter
Circuit Court Judge

ATTEST:

Clerk of Courts
By
Deputy
(SEAL)

CC: Lawrence E. Long, Esq.
Camron Hoseck, Esq.
Steven Aberle, Esq.
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE SALE OF CERTAIN TELEPHONE EXCHANGES BY U S WEST COMMUNICATIONS, INC. TO CERTAIN TELECOMMUNICATIONS COMPANIES IN SOUTH DAKOTA	))))))	**AMENDED DECISION AND ORDER REGARDING SALE OF THE MORRISTOWN EXCHANGE; NOTICE OF ENTRY OF ORDER TC94-122**

PRELIMINARY STATEMENT

On December 20, 1994, a Joint Application was filed by U S WEST Communications, Inc. (U S WEST), and twenty telecommunications companies (Buyers) requesting that the South Dakota Public Utilities Commission (Commission) approve the sale by U S WEST of 67 local telecommunications exchanges to the Buyers or their affiliates. Specifically, the filing sought:

1. A declaration that the sale and transfer of the exchanges do not require Commission approval or in the alternative that the Commission knows of no reason why the sale and transfer should not occur; and

2. An order from the Commission that U S WEST's gain from the sale be booked to Account 7350 of the Uniform System of Accounts (USOA) as nonoperating income not available for ratemaking purposes.

The Commission assumed jurisdiction over this docket pursuant to its authority under SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, and 49-31-20. The Commission set an intervention deadline of January 25, 1995. Subsequently, the following parties applied for and were granted intervention: AT&T Communications of the Midwest, Inc. (AT&T); South Dakota Radio Common Carriers [composed of Pierre Radio Paging and Telephone, Inc.; Vantek Communications, Inc.; B&L Communications; Mitchell Two Way Radio; Nelson Electronics, Inc.; Booker Communications; Dakota Electronics; Rees Communications; A & M Radio, Inc.; Frey's Electronics; and Milbank Communications]; Roger D. McKellips; City of Mobridge; Walworth County; Doug Scott; Alcester Telephone System User's Group [composed of Phyllis Bergdale; Bernard Bergdale; Jay Clark; Cleo Clark; Wendell Solbert; Kathy Solbert; Dennis Jones; Robin Jones; Ronald Treiber; Becky Treiber; Gary McKellips; Deb McKellips; David Broadwell; Kathy Broadwell; Donowan Larson; Marlys Larson; Glenice Pilla; and Larry Pilla]; Midco Communications; LDDS; TeleTech; TCIC; FirsTel; TelServ; MCI; Corson County Commission; Thomas Brunner; Gary Brunner; Deanna J. Mickelson; Marjorie Reder; Duane Odle; Baltic Telecom Cooperative; Barbara Mortenson as an individual and a group of telephone users known as the Henry Users Citizens Group. LDDS later filed a petition to withdraw as an intervenor which was granted by the Commission. On March 30, 1995, Senate Bill 240, later codified as SDCL 49-31-59, became effective. The Commission added this statute to the other statutes under which it had asserted its jurisdiction.

On March 29, 1995, the Commission issued an Order for and Notice of Hearing for six regional evidentiary hearings to be held at various locations throughout the state of South Dakota. Notice of said hearings was given to the public by newspaper publications and radio announcements; personal notice was given to all parties to the docket. Pursuant to said Order of the Commission, and subsequent amended Orders, the following regional evidentiary hearings were held:

1. April 17, 1995, at the City Auditorium, 212 Main Street, Mobridge, South Dakota, for public testimony on the sale of the Selby, Gettysburg, Roscoe, Onida, Bowdle, Morristown, Timber Lake, Lemmon, Eureka, Ipswich, McIntosh, and Mobridge exchanges.

2. April 18, 1995, at the Community Center, 1401 LaZelle, Sturgis, South Dakota, for public testimony on the sale of the Nisland, Newell, and Hermosa exchanges.

3. May 1, 1995, at the St. Mary's Hall, 305 West Third, Winner, South Dakota, for public testimony on the sale of the Winner, Burke, Bonesteel, Reliance, Murdo, Lake Andes, Wagner, Gregory, Witten, Clearfield, Presho, and Platte exchanges.

4. May 3, 1995, at the Lake Area Technical Institute, Student Lounge, 230 11th Street NE, Watertown, South Dakota, for public testimony on the sale of the Webster, Clark, Florence, Hayti, Bradley, Willow Lake, Waubay, Castlewood, Summit, Peever, Veblen, Wilmot, Howard, Oldham, Revillo, and South Shore exchanges.

5. May 4, 1995, at the Johnson's Fine Arts Center, Room 134, Northern State University Campus, Aberdeen, South Dakota, for public testimony on the sale of the Britton, Pierpont, Roslyn, Wessington Springs, Mellette, Bristol, Frederick, Hecla, Doland, Wolsey, and Cresbard exchanges.

6. May 5, 1995, at the Alcester High School Gymnasium, Fifth and Iowa, Alcester, South Dakota, for public testimony on the sale of the Marion, Tyndall, Centerville, Viborg, Lesterville, Tabor, Hudson, Tripp, Parkston, Salem, Alcester, Bridgewater, and Canistota exchanges.

On May 1, 1995, U S WEST and the Buyers filed an amended Joint Application. In its amended Joint Application, U S WEST and the Buyers stated that since the filing of the Joint Application in December, "the sale of several exchanges to certain buyers has been reevaluated by the Buyers." They requested the following changes:

1. In the Agreement with Golden West Telephone Properties, Inc., delete in Exhibit A the Newell exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly;

2. In the Agreement with West River Cooperative Telephone Company, Inc. (Bison), delete in Exhibit A the McIntosh exchange

and add the Newell and Nisland exchanges, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly; and

3. In the Agreement with Cheyenne River Sioux Tribe Telephone Authority, delete in Exhibit A the Nisland exchange and add the McIntosh exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly.

Due to the amended application, the Commission set a new intervention deadline of May 12, 1995. Subsequently, the city of McIntosh and Corson County applied for and were granted intervention. Because the application had been amended, the Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, McIntosh, South Dakota, for public testimony.

At each regional evidentiary hearing, representatives from U S WEST and each purchasing company were present to testify and were available for cross-examination.

On April 5, 1995, the Commission issued a Notice of Hearing setting the final hearing for June 1-2, 1995. All prefiled testimony was required to be filed by May 25, 1995. A prehearing conference was held on May 22, 1995.

The final hearing was held on June 1-4, 1995. At said final hearing, 42 witnesses testified and were available for cross-examination, 126 exhibits were offered and received into the record at the hearing, and an additional 19 exhibits were filed by June 19, 1995, which was the deadline set by the Commission for late-filed exhibits.

On June 7, 1995, the Commission issued a Post-hearing Order requesting briefs on certain issues and allowing the submission of proposed Findings of Fact and Conclusions of Law. On June 19, 1995, the parties submitted late-filed exhibits. On June 23 and July 3, 1995, the parties filed their post-hearing briefs and proposed Findings of Fact and Conclusions of Law.

On July 13, 1995, at a duly noticed meeting, the Commission unanimously voted to not approve the sale of the Morristown exchange to Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) which proposed to purchase the Morristown exchange through its subsidiary, Owl River Telephone, Inc. (Owl River). The Commission issued a written Order on July 31, 1995.

U S WEST and CRSTTA appealed the Commission's decision. By Order dated February 21, 1997, the Honorable Steven L. Zinter, Circuit Court Judge, issued his Memorandum Decision. The Circuit Court ordered the Commission to enter Findings of Fact on each of the statutory factors listed in SDCL 49-31-59. The Circuit Court also reversed and remanded the Commission's decision because the Commission improperly conditioned its approval upon CRSTTA's refusal to waive its sovereign immunity. The Circuit Court also found that the Commission erred in concluding that SDCL 49-1-17 prohibited approval of the proposed sales. The Notice of Entry of Order of Remand was filed on March 6, 1997.

On April 2, 1997, Commission Staff filed a Motion on Remand asking that the Commission consider the remand on the record and set a procedural schedule for the submission of proposed Findings of Fact and Conclusions of Law by the parties. On April 14, 1997, the Commission received CRSTTA's Response to Motion on Remand. In its Response, CRSTTA opposed the Motion on Remand and asked that the Commission reopen the record for consideration of new evidence. CRSTTA requested that the record be reopened due to changed circumstances, including the enactment of the Telecommunications Act of 1996, the election of a new Commissioner to the Commission, a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe, and the Telephone Authority's efforts to comply with regulatory requirements. On April 14, 1997, the Commission received U S WEST's Joinder in Response to CRSTTA's Response to the Motion on Remand. By Order dated May 9, 1997, the Commission found that, consistent with the Circuit Court's opinion, it would not reopen the record since the Circuit Court specifically stated that the case was remanded to the Commission on the record. In that Order, it was also noted that Commissioner Nelson had decided to abstain from voting on matters related to this case since she was not a Commissioner when the hearings on the docket were held.

The Commission received proposed Findings of Fact and Conclusions of Law from intervenor Doug Scott, Commission Staff, Corson County Commission and the City of McIntosh, U S WEST, and CRSTTA. On June 2, 1997, the Commission received a Motion to Take Judicial Notice from CRSTTA and U S WEST. CRSTTA and U S WEST requested that the Commission take judicial notice of a dispute resolution mechanism adopted by the Telephone Authority and a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe. On June 4, 1997, the Commission received Staff's Resistance to Motion to Take Judicial Notice. On June 16, 1997, the Commission received CRSTTA's and U S WEST's Reply to the Resistance to Take Judicial Notice and a Joint Brief in Response to the Proposed Findings of Fact and Conclusions of Law of Intervenor Doug Scott.

On July 15, 1997, at its regularly scheduled meeting, the Commission voted to deny the Motion to Take Judicial Notice. The Commission found that since the Circuit Court specifically remanded the case back to the Commission "on the record" that taking judicial notice of these resolutions would supplement the record in contravention of the Circuit Court's Order. In addition, the Commission found that the dispute resolution and provisional certificate are not the type of facts which should be judicially noticed after the record has been closed. Parties should have the opportunity to cross-examine witnesses concerning these types of documents.

At the July 15, 1997, meeting, the Commission also voted to deny the sale of the Morristown exchange because the sale was contrary to the public interest.

Based on the evidence presented on the record and the decision of the Circuit Court the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. U S WEST is a Colorado corporation providing local exchange telecommunications services, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

2. On or about December 7, 1994, U S WEST entered into purchase agreements for the sale of 67 local exchanges with 20 local exchange telecommunications companies. On December 20, 1994, U S WEST and the Buyers filed a Joint Application for a Commission Declaration on the Sale and for Proper Accounting Treatment of any Gain. Exhibit 29. U S WEST and the Buyers filed all 20 purchase agreements along with the Joint Application. Exhibits 31-50. One of the purchase agreements entered into was between U S WEST and CRSTTA. Exhibit 32.

3. CRSTTA is a telecommunications company and a division of the Cheyenne River Sioux Tribe. CRSTTA currently provides telecommunications services in South Dakota. Exhibit 22 at page 119.

4. Owl River is a wholly-owned subsidiary of CRSTTA incorporated under the laws of the Cheyenne River Sioux Tribe. Exhibit 22 at page 119. Owl River has no license to do business in the state of South Dakota. Exhibit 22 at pages 145-146.

5. The purchase agreement entered into between CRSTTA and U S WEST states as follows:

> Seller and Buyer agree to promptly file any required application and to take such reasonable action as may be necessary or helpful (including, but not limited to, making available witnesses, information, documents, and data requested by the PUC) to apply for and receive approval by the PUC for the transfer of Assets and Authorities to Buyer.

Exhibit 32, Section 6.3, subparagraph D.

6. In the Joint Application filed with the Commission on December 20, 1994, U S WEST and CRSTTA had entered into a purchase agreement where U S WEST proposed to sell the Nisland, Timber Lake, and Morristown exchanges to CRSTTA.

7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, Morristown, and McIntosh exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange. Members of the public testified in opposition to the sale of the Morristown exchange to CRSTTA. The two main concerns of the public were lack of Commission oversight and loss of tax dollars. Exhibit 22 at pages 176-180.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer

be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit 30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied for and were granted intervention. The Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the Morristown exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-727, 732-737, 770-779.

11. The Morristown exchange is located within the boundaries of the Standing Rock Sioux Reservation and in the states of South Dakota and North Dakota. Exhibit 22 at pages 131-132. J. D. Williams, manager of CRSTTA, testified that CRSTTA's subsidiary, Owl River, would be subject to the Commission's jurisdiction in the South Dakota portion of the Morristown exchange, and would be subject to the laws of the Standing Rock Sioux Tribe, and possibly to the laws of North Dakota. Exhibit 22 at pages 131-132.

12. CRSTTA maintains that if the sale of the Morristown exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the Morristown exchange except for the South Dakota portion of the Morristown exchange. Exhibit 22 at pages 131-132.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. Mr. Williams stated that Owl River will pay gross receipts sales tax on the South Dakota portion of the Morristown exchange. Mr. Williams further stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. Local exchange service provided by a telecommunications company is classified as a noncompetitive service. SDCL 49-31-1.1.

17. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

18. If the sale of the Morristown exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the Morristown exchange, except for the South Dakota portion of the Morristown exchange.

19. None of the subscribers of the Morristown exchange would be able to vote for Tribal Council members or elect Board of Directors to Owl River. Exhibit 22, at pages 146-148.

20. CRSTTA currently provides adequate service to its present customers. Exhibit 22 at pages 123-124. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the Morristown exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. This lack of regulatory control by the Commission combined with the lack of the ability of a subscriber to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

21. With respect to the factor of reasonableness of rates for local service, CRSTTA states that it would charge the same rates that U S WEST currently charges. Exhibit 22 at page 174. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

22. On the factor of the provisioning of 911, enhanced 911, and other public safety services, CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

23. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the Morristown exchange. Exhibit 96; Exhibit 28 at pages 126-129; Transcript of Pierre Hearing at pages 707-727. The position of CRSTTA creates conflict and, at a minimum, uncertainty as to the taxability of CRSTTA.

24. With respect to the factor concerning the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will help promote economic development, telemedicine, and distance learning in rural South Dakota, CRSTTA has the ability to provide these services. Exhibit 22 at pages 125-126, 136-137. In addition, CRSTTA has no plans to change existing extended area service. Exhibit 22 at pages 131. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service

arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

25. On the issue of whether the sale is in the public interest, the Commission finds the sale is not in the public interest for the following reasons:

1. Since CRSTTA maintains there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would result in the loss of significant tax revenue for cities, counties, and school districts located within the Morristown exchange;

2. The lack of regulatory control by the Commission would mean that the Commission would be unable to set conditions of sale that must be followed by CRSTTA.

3. The Commission is unable to require as a condition of the sale that CRSTTA offer all existing services currently offered by U S WEST;

4. The Commission is unable to require as a condition of the sale that CRSTTA honor all existing U S WEST contracts and agreements;

5. The lack of regulatory control and the lack of the ability of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service;

6. The Commission is unable to require as a condition of sale that CRSTTA not increase the current local rates for 18 months;

7. The Commission is unable to require as a condition of the sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission; and

8. The Commission is unable to require CRSTTA to make any improvements necessary for the public's safety, convenience, and accommodation as allowed by SDCL 49-31-7.

26. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the Morristown exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and

49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59. In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held by the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.

3. The Commission lacks the authority to enter into a tax agreement with a tribal entity.

4. The Commission finds that CRSTTA currently provides adequate service to its present customers. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the Morristown exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. Further, the lack of regulatory control by the Commission and the lack of the ability of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

5. The Commission finds CRSTTA plans to charge the same rates that U S WEST currently charges. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

6. The Commission finds CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

7. The Commission finds that approval of the sale of the Morristown exchange would have significant, adverse tax consequences to the taxpayers located in the cities, counties, and school districts within the Morristown exchange due to CRSTTA's position that the state lacks the authority to enforce the collection of taxes on the Reservation.

8. The Commission finds that CRSTTA has the ability to provide modern, state-of-the-art telecommunications services. In addition, CRSTTA has no plans to change existing extended area service. However, unlike other sales, the Commission is unable to require

as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

9. The Commission finds the sale is not in the public interest for the reasons listed in Finding of Fact 25.

10. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

Pursuant to SDCL Chapter 1-26, the Commission hereby enters its final decision in this docket. It is therefore

ORDERED that the sale of the Morristown exchange to the Cheyenne River Sioux Tribe Telephone Authority, through its subsidiary Owl River Telephone, Inc. is not approved; and it is

FURTHER ORDERED that the proposed Findings of Fact and Conclusions of Law submitted by the parties are rejected.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 22nd day of August, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 22nd day of August, 1997.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 8/22/97

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner, abstained

LASKA SCHOENFELDER, Commissioner

RECEIVED
AUG 25 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE SALE OF CERTAIN TELEPHONE EXCHANGES BY U S WEST COMMUNICATIONS, INC. TO CERTAIN TELECOMMUNICATIONS COMPANIES IN SOUTH DAKOTA	))))))	AMENDED DECISION AND ORDER REGARDING SALE OF THE MCINTOSH EXCHANGE; NOTICE OF ENTRY OF ORDER TC94-122

PRELIMINARY STATEMENT

On December 20, 1994, a Joint Application was filed by U S WEST Communications, Inc. (U S WEST), and twenty telecommunications companies (Buyers) requesting that the South Dakota Public Utilities Commission (Commission) approve the sale by U S WEST of 67 local telecommunications exchanges to the Buyers or their affiliates. Specifically, the filing sought:

1. A declaration that the sale and transfer of the exchanges do not require Commission approval or in the alternative that the Commission knows of no reason why the sale and transfer should not occur; and

2. An order from the Commission that U S WEST's gain from the sale be booked to Account 7350 of the Uniform System of Accounts (USOA) as nonoperating income not available for ratemaking purposes.

The Commission assumed jurisdiction over this docket pursuant to its authority under SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, and 49-31-20. The Commission set an intervention deadline of January 25, 1995. Subsequently, the following parties applied for and were granted intervention: AT&T Communications of the Midwest, Inc. (AT&T); South Dakota Radio Common Carriers [composed of Pierre Radio Paging and Telephone, Inc.; Vantek Communications, Inc.; B&L Communications; Mitchell Two Way Radio; Nelson Electronics, Inc.; Booker Communications; Dakota Electronics; Rees Communications; A & M Radio, Inc.; Frey's Electronics; and Milbank Communications]; Roger D. McKellips; City of Mobridge; Walworth County; Doug Scott; Alcester Telephone System User's Group [composed of Phyllis Bergdale; Bernard Bergdale; Jay Clark; Cleo Clark; Wendell Solbert; Kathy Solbert; Dennis Jones; Robin Jones; Ronald Treiber; Becky Treiber; Gary McKellips; Deb McKellips; David Broadwell; Kathy Broadwell; Donowan Larson; Marlys Larson; Glenice Pilla; and Larry Pilla]; Midco Communications; LDDS; TeleTech; TCIC; FirsTel; TelServ; MCI; Corson County Commission; Thomas Brunner; Gary Brunner; Deanna J. Mickelson; Marjorie Reder; Duane Odle; Baltic Telecom Cooperative; Barbara Mortenson as an individual and a group of telephone users known as the Henry Users Citizens Group. LDDS later filed a petition to withdraw as an intervenor which was granted by the Commission. On March 30, 1995, Senate Bill 240, later codified as SDCL 49-31-59, became effective. The Commission added this statute to the other statutes under which it had asserted its jurisdiction.

ATTACHMENT

On March 29, 1995, the Commission issued an Order for and Notice of Hearing for six regional evidentiary hearings to be held at various locations throughout the state of South Dakota. Notice of said hearings was given to the public by newspaper publications and radio announcements; personal notice was given to all parties to the docket. Pursuant to said Order of the Commission, and subsequent amended Orders, the following regional evidentiary hearings were held:

1. April 17, 1995, at the City Auditorium, 212 Main Street, Mobridge, South Dakota, for public testimony on the sale of the Selby, Gettysburg, Roscoe, Onida, Bowdle, Morristown, Timber Lake, Lemmon, Eureka, Ipswich, McIntosh, and Mobridge exchanges.

2. April 18, 1995, at the Community Center, 1401 LaZelle, Sturgis, South Dakota, for public testimony on the sale of the Nisland, Newell, and Hermosa exchanges.

3. May 1, 1995, at the St. Mary's Hall, 305 West Third, Winner, South Dakota, for public testimony on the sale of the Winner, Burke, Bonesteel, Reliance, Murdo, Lake Andes, Wagner, Gregory, Witten, Clearfield, Presho, and Platte exchanges.

4. May 3, 1995, at the Lake Area Technical Institute, Student Lounge, 230 11th Street NE, Watertown, South Dakota, for public testimony on the sale of the Webster, Clark, Florence, Hayti, Bradley, Willow Lake, Waubay, Castlewood, Summit, Peever, Veblen, Wilmot, Howard, Oldham, Revillo, and South Shore exchanges.

5. May 4, 1995, at the Johnson's Fine Arts Center, Room 134, Northern State University Campus, Aberdeen, South Dakota, for public testimony on the sale of the Britton, Pierpont, Roslyn, Wessington Springs, Mellette, Bristol, Frederick, Hecla, Doland, Wolsey, and Cresbard exchanges.

6. May 5, 1995, at the Alcester High School Gymnasium, Fifth and Iowa, Alcester, South Dakota, for public testimony on the sale of the Marion, Tyndall, Centerville, Viborg, Lesterville, Tabor, Hudson, Tripp, Parkston, Salem, Alcester, Bridgewater, and Canistota exchanges.

On May 1, 1995, U S WEST and the Buyers filed an amended Joint Application. In its amended Joint Application, U S WEST and the Buyers stated that since the filing of the Joint Application in December, "the sale of several exchanges to certain buyers has been reevaluated by the Buyers." They requested the following changes:

1. In the Agreement with Golden West Telephone Properties, Inc., delete in Exhibit A the Newell exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly;

2. In the Agreement with West River Cooperative Telephone Company, Inc. (Bison), delete in Exhibit A the McIntosh exchange