U S WEST, Inc.
Suite 700
1020 Nineteenth Street, NW
Washington, DC 20036
202 429-3134
FAX 202 296-5157

Elridge A. Stafford
Executive Director-
Federal Regulatory

EX PARTE OR LATE FILED

USWEST

Written Ex Parte

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 20, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222, SC-1170
Washington, DC 20554

RE: CC Docket No. 96-98 and CC Docket No. 95-185/ Implementation of Local Competition and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers

Dear Ms. Salas:

On January 29, 1998, U S WEST filed with the Commission an Application For Review ("Application") in the proceeding with the file number CPD 97-24. A copy of that Application is attached to this letter. The information contained in this Application is also material to matters pertaining to CC Docket No. 96-98 and CC Docket No. 95-185.

Please include this letter and the attachment in the record for these two dockets.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this letter and the attachment are being filed with your office.

Please call me if you have any questions.

Sincerely,

Elridge Stafford

Attachment

cc: Mr. A. Richard Metzger
Ms. Ruth Milkman
Ms. Carol Mattey

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

In the Matter of	)	
	)	
Requests for Clarification of the	)	
Commission's Rules Regarding	)	CPD 97-24
Interconnection Between LECs	)	
and Paging Providers	)	
	)	

APPLICATION FOR REVIEW

Laurie J. Bennett
Jeffery Brueggeman
U S WEST, Inc.
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2763

Attorneys for

U S WEST, Inc.

Of Counsel
Dan L. Poole

January 29, 1998

SUMMARY

U S WEST files this Application for Review of the Commission's December 30, 1997 letter in which the Common Carrier Bureau concludes that LECs may not charge paging providers for dedicated facilities used to deliver traffic to paging providers. The Commission should reverse the Letter for the following reasons.

The Bureau's conclusions contravene the Communications Act. The Act's section 251(b)(5) reciprocal compensation requirement does not apply to one-way paging because (i) paging providers do not transport or terminate LEC-originated traffic; (ii) facilities, not the transmission of traffic that is governed by mutual compensation principles, are at issue in this proceeding; and, (iii) the Act's reciprocal compensation requirements apply only where -- unlike LEC-paging interconnection -- there is reciprocal exchange of traffic.

If the Commission upholds the Letter, it should make clear that the policy adopted may be implemented only through the Act's negotiation and arbitration regime and does not automatically alter the terms of LEC-paging interconnection arrangements. Moreover, the Commission should act to avoid the confiscatory effect of the policy in the likely event that LECs cannot recover the costs of providing paging providers dedicated facilities for free.

Finally, a policy on dedicated facilities cannot legitimately be developed in isolation from a fuller consideration of LEC-paging provider interconnection. The one-way nature of LEC-paging traffic means that many policies appropriate for two-way traffic are not reasonable and do not serve the public interest when applied to one-way paging services. U S WEST urges the Commission to reverse the Letter and to consider these issues in a comprehensive rulemaking proceeding.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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Interconnection Between LECs	)	
and Paging Providers	)	
	)	

To: The Commission

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules, U S WEST, Inc. ("U S WEST"), hereby files this Application for Review by the full Commission of the December 30, 1997 letter, DA 97-2726 (the "Letter"), issued by the Chief, Common Carrier Bureau (the "Bureau" or "CCB"), in the above-captioned proceeding. U S WEST previously participated in this proceeding by filing comments on June 13, 1997 and on June 27, 1997.

INTRODUCTION

The Chief of the CCB issued the Letter in response to letters from Southwestern Bell Telephone dated April 25, 1997 and from AirTouch Communications, Inc., AirTouch Paging, AT&T Wireless Services, Inc., and PageNet, Inc. dated May 16, 1997. These letters asked the Bureau to determine whether a local exchange carrier ("LEC") may charge a provider of paging services for the cost of LEC transmission facilities (as opposed to the cost of delivery of traffic) that are used on a dedicated basis to deliver to the paging providers local

telecommunications traffic that originates on the LEC's network.[1] In the Letter, the Bureau concludes that a LEC may not charge for such dedicated facilities.

U S WEST asks the Commission to grant this Application for Review and to reverse the Letter's holdings. The Bureau's conclusions are contrary to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act").[2] Section 251(b)(5) of the Act, on which the Bureau relies in the Letter, is merely a general statement requiring reciprocal compensation when two carriers terminate each other's traffic. *See* 47 U.S.C. § 251(b)(5). It does not address the question of who pays for dedicated facilities that one carrier orders from another in conjunction with interconnection. It certainly cannot be read to require a LEC to provide free and unlimited interconnection facilities to an entity -- here, a paging provider -- that does not even transport or terminate the LEC's traffic and that provides no traffic for the LEC to transport or terminate. Finally, section 251 of the Act imposes no duty absent a negotiated or arbitrated interconnection agreement pursuant to sections 251 and 252, and, to the extent that the Letter departs from the statutory scheme in this regard, it is invalid.

The Bureau's conclusion also should be reversed because it is likely to have an unconstitutional confiscatory effect. In concluding that a LEC must bear all costs for these dedicated facilities in its capacity as originator of calls, the Bureau is attributing to the LEC

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[1] *See Pleading Cycle Established for Comments on Requests for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers*, DA 97-1071 (rel. May 22, 1997).

[2] This Application for Review thus falls squarely within Section 1.115(b)(2)(i), of the Commission's rules, 47 C.F.R. § 1.115(b)(2)(i), warranting Commission consideration of the questions presented where "[t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy."

exclusive responsibility for all costs associated with these facilities. While the LECs may be able to mitigate some of the costs by planning their networks efficiently and selecting configurations that best serve the needs of their customers, this will have only a limited impact. The rule set forth in the Letter effectively still will require LECs to provide facilities to paging providers with no means of recovering the substantial costs of those facilities.

It is not sound public policy to address this issue of charges for dedicated facilities in isolation from other unique and extensive interconnection issues raised by one-way paging services. To adopt a definitive ruling with respect to dedicated facilities in the absence of full consideration of the broader issues would be arbitrary and contrary to the public interest in coherent policy. Moreover, adoption of this new policy exceeds the Bureau's delegated authority. The Bureau characterizes the Letter as a "clarification" of existing rules, but the rules and policies that the Bureau purports to clarify contain virtually no consideration of the critical distinctions between one-way and two-way CMRS traffic. In fact, the Bureau here has promulgated a new rule on its own, an action that is flatly inconsistent with the prohibition against initiation of a rulemaking pursuant to delegated authority.[3] For these reasons, the Commission should reverse the conclusions reached by the Bureau and should initiate a much-

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[3] *See* 47 C.F.R. § 0.291(g) (Chief, Common Carrier Bureau "shall not have authority to issue notices of proposed rulemaking"). The fact that the Bureau arrived at the decision contained in the Letter through a notice and comment proceeding underscores the rulemaking nature of the Bureau's action. In this respect, this Application for Review falls within Section 1.115(b)(2)(i) of the Commission's rules, 47 C.F.R. § 1.115(b)(2)(ii), warranting Commission consideration of the questions presented where "[t]he action involves a question of law or policy which has not previously been resolved by the Commission."

needed broader rulemaking to consider the interconnection issues raised by one-way paging services.

ARGUMENT

I. THE BUREAU INCORRECTLY CONSTRUED THE COMMUNICATIONS ACT AND THE COMMISSION'S RULES.

The Commission should grant U S WEST's Application for Review because the Letter is contrary to the Act and unreasonably interprets the Commission's rules, as applied to the one-way paging traffic at issue in this proceeding. The Bureau incorrectly applies section 251(b)(5) of the Act -- which requires LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications -- to distinctly nonreciprocal LEC-paging interconnection. The Bureau also relies on an incorrect application of section 51.703(b) of the Commission's rules -- which states that a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network. The Bureau extrapolates that this prohibition against assessing charges not only relates to the incremental costs of terminating traffic but also precludes LECs from charging paging providers to recover the costs of facilities that permit paging providers to interconnect to the LEC network, including the dedicated facilities at issue in this proceeding.

Congress set forth in section 251(b)(5) a very general requirement of "reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). For several reasons, the terms of this general requirement and the Commission's rules interpreting this provision cannot be read to prohibit a LEC from charging paging providers for dedicated facilities between the LEC's switch or end office and the paging terminal.

A. Section 251(b)(5) of the Act and Section 51.703(b) of the Rules Do Not Apply Because Paging Providers Do Not Transport or Terminate LEC-Originated Traffic.

Section 251(b)(5) does not apply to paging providers because they do not "transport" or "terminate" LEC-originated traffic.[4] The Commission's rules define "transport" as "the transmission and any necessary tandem switching of local telecommunications traffic . . . from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC." 47 C.F.R. § 51.701(c). In the case of paging service, a LEC customer originates a call by dialing the number assigned to the paging company and associated with a specific paging device; that voice call ends at the paging terminal, which records the dialed number and the caller's message. After the caller hangs up, the paging terminal generates a new call, typically an alphanumeric message, and broadcasts it to the appropriate paging device. Thus, the paging provider does not transmit a LEC-originated voice call from an interconnection point to a called party; nor does the paging provider even have the capability to switch the call at its terminal. Rather, the provider originates and transmits a second message to the paging device entirely within the paging network.

Nor does the paging provider engage in "termination" of LEC-originated traffic. The Commission's rules define "termination" as "the switching of local telecommunications traffic . . . and delivery of such traffic to the called party's premises." 47 C.F.R. § 51.701(d).

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[4] U S WEST addresses herein only traditional one-way paging, in which a caller dials the telephone number assigned to a paging device and then enters a message, which, subsequent to the call's disconnect, is transmitted via radio signals from a paging terminal to that paging device.

Paging providers similarly fail to satisfy this definition because they do not switch or deliver LEC-originated traffic. LEC-originated calls to paging providers do not terminate at the paging device; the caller is never connected to the paging device, and the call never reaches the "premises" of the called party. This is in contrast with other types of LEC-CMRS interconnection, in which a LEC-originated caller is connected directly to a called party on the interconnecting CMRS network.

The Letter also misapplies the Commission's rules for two-way LEC-CMRS interconnection to the one-way paging context. The rules -- if they are to be valid -- must be read to be consistent with a lawful construction of the terms of the statute. Section 51.703(b) of the Commission's rules, on which the Bureau relies, is one of the rules specifically implementing the reciprocal compensation requirement of section 251(b)(5) of the Act. The Commission defines "reciprocal compensation" to mean "that compensation flows in both directions between interconnecting networks,"[5] which can mean only that the traffic for which such compensation is due also flows in both directions. It is in this two-way context that section 51.703(b) states that a "LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). The related passage in the *Local Competition Order* on which the Bureau also relies similarly relates to the reciprocal compensation context and states that "a LEC must cease charging a CMRS

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16044-45 n.2634 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *modified*, 1997 U.S. Appeal, LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted*, 66 USLW 3387 (U.S. Jan. 26, 1998) (Nos. 97-826, *et al.*).

provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."[6] Again, because a paging provider does not terminate LEC-originated traffic, and because there is no reciprocal exchange of traffic, section 51.703(b) -- a reciprocal compensation rule applicable to situations in which an interconnector terminates LEC traffic -- cannot govern here.

B. There Is No Basis for Applying Reciprocal Compensation Rules to the Cost of Dedicated Facilities for One-way Paging Interconnection.

Indeed, the error in the Bureau's reasoning is particularly egregious insofar as charges for facilities specifically are at issue in the Letter. Section 251(b)(5) speaks in terms of compensation for "transport" and "termination" of traffic, not for the facilities themselves. Even where applicable, Congress clearly intended the compensation scheme mandated by section 251(b)(5) to encompass only the incremental costs incurred by each carrier in terminating the traffic of the other: to be just and reasonable, mutual compensation must reasonably approximate "the additional costs of terminating such calls." 47 U.S.C. 252(d)(2)(A)(ii). Thus, even if a paging provider were deemed to terminate LEC-originated calls, section 251(b)(5) at most could be construed to mean only that a LEC could not charge the LEC's incremental costs associated the calls thus terminated.

Who pays for the provision of dedicated facilities, especially "gold plated" ones ordered by interconnecting carriers, is not remotely related to this rule. Various federal and state laws and regulations govern what LECs can charge for these dedicated facilities, but the reciprocal compensation provision of the Act is not among them. In many instances, the

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[6] *Local Competition Order*, 11 FCC Rcd at 16016.

dedicated facilities at issue in this proceeding constitute the means of "interconnection" between a LEC network and a paging system.[7] The Act expressly authorizes LECs to charge for the costs of interconnection provided pursuant to section 251(c).[8] While paging providers are not entitled to interconnection rights pursuant to section 251(c)(2) because they do not provide exchange or exchange access service,[9] it would be absurd to construe the Act to mean that exchange or exchange access providers may be required to pay for interconnection facilities but paging providers need not pay.

The Bureau's misinterpretation of the Commission's rules is so far afield that it amounts to the promulgation of a new rule. The Commission has not yet expressly considered the relationship between the general reciprocal compensation requirement and the nonreciprocal interconnection that exists in one-way paging, nor how the evident distinctions between one-way and two-way CMRS impact the general interconnection rights and obligations. Nowhere do the Commission's rules state that a LEC is prohibited from charging an entity for dedicated facilities that entity orders, where the entity provides no traffic for the LEC to terminate. The Bureau

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[7] In the context of one-way paging connection to the LEC's network, "interconnection" is qualitatively different from two-way interconnection, which involves reciprocal transport and termination.

[8] *See* 47 U.S.C. §§ 251(c)(2) (ILEC duty to provide interconnection for telephone exchange service and exchange access); 252(a)(1) (interconnection agreement to include detailed schedule of itemized charges for interconnection); 252(c)(2) (state commission to establish rates for all costs of interconnection); 252(d)(1) (cost-based pricing standards for interconnection pursuant to 251(c)(2)).

[9] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19538 n.700 (1996).

alone has adopted that rule, an action that far exceeds the Bureau's delegated authority. 47 C.F.R. § 0.291(g) (Chief, Common Carrier Bureau, lacks authority to initiate rulemaking). For this reason as well, the Commission should reverse the Letter pending the completion of a proper rulemaking.

C. To Require LECs To Comply with the Letter Outside the Interconnection Negotiation and Arbitration Process Would Be Entirely Inconsistent with the Act.

To the extent that the Commission upholds the Letter, the obligations set forth therein must be understood to apply only within the context of the Act's clear negotiation and arbitration regime. The Letter asserts that a LEC is not allowed to charge a paging provider for LEC facilities used on a dedicated basis to deliver traffic that originates on the LEC's network. *See* Letter at 3. This conclusion may be upheld under section 251, if at all, only if it is intended, as it must be, to inform the negotiations process rather than to impose an obligation on LECs outside that process. The Act mandates that interconnection arrangements between carriers be made through private bilateral negotiations and, if necessary, state arbitration. *See* 47 U.S.C. §§ 251(c)(1) (duty to negotiate interconnection requests in good faith); 252(a) (agreements through negotiations); 252(b) (agreements through arbitration). It was Congress's "intent that carriers be encouraged to negotiate and resolve interconnection issues,"[10] and the statutory scheme in sections 251 and 252 is "intend[ed] to encourage private negotiation of interconnection agreements."[11] Thus, any obligations adopted in the Letter and upheld by the Commission must

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[10] S. Rep. No. 23, 104th Cong., 1st Sess., at 20 (1995).

[11] *Id.* at 19.

be construed as parameters for interconnection arrangements to be negotiated between LECs and paging providers, not as an immediate and automatic prescription of the terms under which LECs must provide dedicated facilities to paging interconnectors prior to reaching any interconnection agreements with the individual requesting providers.[12]

Indeed, the Commission has recognized that until a LEC negotiates a new interconnection agreement with a requesting carrier, the LEC may continue to charge that carrier for interconnection according to the terms of the preexisting interconnection agreement the LEC and that carrier already have in place (including, presumably, a tariffed interconnection arrangement).[13] The rule that the Commission adopted in this regard illustrates the Commission's sound view that existing interconnection arrangements could continue during the negotiation process, even if they contained terms that a LEC might be required to abandon in the context of a new negotiated interconnection agreement pursuant to sections 251 and 252. Thus, the section 251 obligations -- whatever they may be -- clearly are not triggered until an agreement is reached.

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[12] The Commission recognized this proper relationship between its rules and the negotiation process when it made clear that the rules requiring LECs to provide competing carriers with access to OSS functions created an "obligation [that] arises only if a telecommunications carrier has made a request for access. . . . and the actual provision of access to OSS functions by an incumbent LEC must be governed by an implementation schedule established through negotiation or arbitration." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Order on Recon., 11 FCC Rcd 19738, 19742 (1996).

[13] *See* 47 C.F.R. § 51.715(a)(1); *Local Competition Order*, 11 FCC Rcd at 16029. The Eighth Circuit held this rule invalid because it is part of the Commission's flawed approach to pricing issues and not for any reason that contradicts this view of the negotiation process.

Moreover, it is unclear that the Bureau, or indeed the Commission, has the right to dictate the specific price -- *i.e.*, zero -- that LECs may charge for interconnection facilities and in this way predetermine the outcome of the section 251/252 arbitration process. As the Eighth Circuit succinctly ruled, "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of rates involved in the implementation of the local competition provisions of the Act."[14] While section 332 of the Act, 47 U.S.C. § 332(c)(3), provides the Commission with preemption authority, this applies specifically to the rates charged by CMRS providers -- *see id.* § 332(c)(3) -- or to "reasonable" requests for physical interconnection -- section 332(c)(1)(B) -- neither of which are at issue in the Letter. Indeed, consistent with the Commission's approach in the *Local Competition Order*,[15] the Letter does not even reference section 332, but relies entirely on section 251. That section permits the Commission at most to interpret the general guidelines that should apply to interconnection negotiations, not to set pricing for LEC interconnection facilities.

Without waiving its position that the Commission lacks jurisdiction over pricing of LEC facilities and that the Letter's conclusion in any event is relevant only with respect to negotiated or arbitrated agreements, U S WEST intends as a show of good faith to adjust its tariffs to be responsive to its customers' needs and the Commission's expectations. As an interim measure pending final resolution of issues relating to paging interconnection and in an effort to

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[14] *Iowa Utils. Bd. v. FCC*, 120 F.3d at 753, 796 (8th Cir. 1997), *modified*, 1997 U.S. Appeal, LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted*, 66 USLW 3387 (U.S. Jan. 26, 1998) (Nos. 97-826, *et al.*).

[15] *See Local Competition Order*, 11 FCC Rcd at 16005.

short-circuit endless controversy during the period preceding negotiated agreements with paging providers, U S WEST plans to offer paging providers a basic interconnection option at no charge to replace their existing arrangements with U S WEST or until new ones are reached. In keeping with the Bureau's classification of a LEC as the sole party responsible for the dedicated facilities ordered by the paging provider and for the "originating traffic,"[16] U S WEST is conducting network planning to formulate the most efficient and cost-effective ways to provide such interconnection to paging providers.[17] This basic option will be provisioned in accordance with U S WEST's network planning and will not encompass unlimited dedicated facilities.[18] To the extent that a paging provider wishes to obtain facilities beyond those required by U S WEST's network planning, these would of course be available where possible, and the provider would be charged for such additional facilities in accordance with tariffed rates.[19] Under a negotiated agreement pursuant to section 252, the paging provider and U S WEST could reach different appropriate terms. Notwithstanding this interim accommodation, U S WEST will continue to

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[16] By requiring a LEC to absorb all costs of dedicated facilities, the Letter effectively places on the LEC alone all responsibility for paging traffic that originates on its network.

[17] U S WEST notes that a significant number of calls that it transmits to paging terminals do not originate on U S WEST's network. Accordingly, U S WEST expects to charge paging providers the portion of the costs for transiting traffic that originates on a third-party network.

[18] In many instances, the configurations requested by the paging providers clearly will not be the most reasonable and efficient ways for a LEC to handle the traffic for which it is exclusively responsible. For example, whether the basic system would provide a connection from a U S WEST serving wire center to a paging terminal via an analog Network Access Channel component or a higher capacity T-1 facility would depend on U S WEST's traffic projections.

[19] *Cf. Local Competition Order*, 11 FCC Rcd at 15603 (a requesting carrier that wishes technically feasible but expensive interconnection would be required to bear the full cost of that interconnection).

seek reversal of the policy adopted by the Bureau and to revise or withdraw this basic option in the future consistent with further elucidation of the LEC-paging provider interconnection rules.

II. THE COMMISSION HAS A CONSTITUTIONAL OBLIGATION TO ESTABLISH A COST-RECOVERY FRAMEWORK THAT WILL ENABLE LECS TO RECOVER THE COSTS OF PAGING INTERCONNECTION.

If the Letter ultimately is upheld and is interpreted to require LECs to bear all the costs of dedicated facilities ordered by paging providers, the Commission must provide a means of compensating LECs for those costs. Failure by the Commission to establish a cost-recovery framework would present a clear case of confiscation in violation of the Just Compensation Clause of the Fifth Amendment. *See* U.S. Const. amend. V. By prohibiting LECs from charging those costs to paging providers and failing to establish any other means of recovery of the costs, the Commission's rules contained in the Letter would accomplish an unconstitutional taking of LECs' property. It is well-established that the Just Compensation Clause requires a utility to be permitted to charge rates that will allow it to recover its costs.[20] Yet there is a serious risk that the effect of the Letter will be to require LECs to provide facilities to paging providers for free, with no realistic ability to obtain state authorization to recover the costs of such facilities from LEC ratepayers. Under established principles of statutory construction, the Act must be interpreted to avoid the constitutional question that would arise if Congress had authorized such

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[20] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (the rate must permit the utility to maintain its financial integrity, to attract capital, and to compensate its investors for the risk they have assumed)).

a result.[21] The full Commission should, in the course of reviewing the Letter, act to avert such an unconstitutional implementation of the Act.

This Application for Review and the underlying proceeding arise in the following factual context. U S WEST and other LECs historically have provided the dedicated facilities at issue in this proceeding to paging providers on request and subject to state tariffs or contracted intrastate rates.[22] A paging provider typically uses dedicated facilities provided by a LEC to connect its paging terminal to the LEC's serving wire center or end office switch serving that paging terminal. The paging provider frequently also utilizes blocks of telephone numbers from an NXX in a LEC central office (or an entire NXX code placed in the paging terminal). The provider associates these numbers with the paging devices it issues to its subscribers.

Paging providers often order facilities in addition to this basic interconnection between a LEC's network and the paging terminal. These include dedicated interoffice facilities from the serving wire center to other LEC central offices, where the paging providers order additional numbers. Obtaining such additional facilities and numbers enables callers at a distant

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[21] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *United States v. Security Indus. Bank*, 459 U.S. 70, 78-80 (1982) (interpreting statutes to avoid takings).

[22] Under either the state tariff or contract scenario, U S WEST is under a state law common carrier obligation to provide such dedicated facilities under nondiscriminatory terms and conditions. Provision of such facilities to paging providers for free -- as the Bureau apparently envisions -- would force U S WEST either (i) to violate its state law nondiscrimination obligation with respect to other entities properly purchasing the same dedicated facilities under tariff or contract, or (ii) to let those other entities also take such facilities at a zero price, so U S WEST can avoid discriminatory treatment. This conundrum reflects the impermissible intrusion into what are essentially state law pricing determinations that the Letter represents. *See, e.g., Iowa Utils. Bd. v. FCC*, No. 96-3321, *et al.*, slip op. (8th Cir. Jan. 22, 1998).

location to page a paging subscriber in that subscriber's "home" exchange by means of a local call.[23] The paging subscriber thus obtains a "presence" at the distant location without the need for the paging provider to establish its own presence in that exchange.[24]

To the extent that paging providers interpret the Letter now to require a LEC to supply all dedicated interoffice facilities requested by paging providers for free, such providers would have every incentive to order the most sophisticated and extensive facilities conceivable so as to "gold plate" their systems. These gold-plated arrangements may be very different from what the LEC would put in place if it were planning its network from the perspective of efficiency and reasonable costs to its customers. For example, a paging provider might order installation of a new fiber optic link between the LEC's serving wire center and the paging terminal (expecting that it would not to be charged for construction), whereas the LEC's network planning would deem copper wire adequate to carry the traffic originated by the LEC. Or the paging provider might order a T-3 link between LEC switches where by normal measures a T-1 or Network Access Connection would suffice. In the case of two-way traffic, by contrast, such a result would be unlikely, or could be reciprocal, with both carriers deciding to order advanced

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[23] 94% of U S WEST's business lines and 96% of its residence lines are flat rated. Increased usage of U S WEST's network attributable to these arrangements does not translate into increased revenue for U S WEST, because its current rate structure (including any measured service arrangements) does not recover costs beyond the end office where the numbers reside.

[24] The alternative ways to obtain this type of "presence" generally require payment to a LEC. A paging carrier can obtain such "presence" through the purchase of either foreign exchange service ("FX") on a mileage-sensitive basis or unbundled network elements. In either case, the provider would purchase such components, which are necessary to establish its network. The paging provider similarly should pay a LEC for dedicated facilities used to accomplish the same purpose; any other result is simply nonsensical.

configurations from one another. Because the carriers exchanging two-way traffic obtain services from each other, neither carrier has the incentive to order facilities that it is not prepared to provide to the other. No such check would constrain paging providers from ordering whatever facilities they potentially could desire, or from tying up numbers or facilities simply to interfere with their competition.

Under the Letter, LECs have no mechanism to recover any of the costs of providing dedicated facilities by which they interconnect with paging providers. The construction and maintenance of such facilities involve substantial costs. Neither local exchange rates nor toll rates capture those costs. While LECs may be able to mitigate their costs to a limited extent through approaches such as U S WEST's interim measure described in Part I.C. above, the entire costs of the basic system of interconnection still will shift from paging providers to LECs. Accordingly, if the full Commission upholds the Letter, the Commission must take action to avoid the plain confiscatory effect of this shift. Insofar as the Commission's policies bar LECs from recovering the relevant costs from paging providers, those policies also must chart a realistic alternative course for the LECs to recover the costs.

U S WEST previously suggested two options:[25] A surcharge on paging callers would be the logical source of this cost recovery. Alternatively, LECs could raise their state rates for local exchange service to defray the costs of paging interconnection. In view of the

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[25] *See* U S WEST June 13, 1997 Comments at 8. The Letter fails to acknowledge or address these critical issues of cost recovery.

resistance of state regulators to rate increases,[26] implementing the latter option would likely require explicit direction from the Commission to the states.[27] While both options have serious drawbacks, the Commission must devise some solution along these lines if it upholds the Letter in order to avoid implementing the Act in a manner that imposes unrecoverable costs on LECs. Otherwise, the Letter will effect an unconstitutional confiscation and is unlawful as an unreasonable construction of the Act.

III. THIS MAJOR POLICY CHANGE SHOULD NOT BE ADOPTED WITHOUT EVALUATION OF OTHER RELATED LEC-PAGING INTERCONNECTION ISSUES.

The question of cost recovery for dedicated facilities is one of many issues raised by the nonreciprocal nature of LEC-paging interconnection. This question thus cannot reasonably be addressed in isolation. The Commission should conduct a rulemaking to fashion a policy appropriate to such one-way traffic, including a policy ensuring cost recovery for dedicated facilities. It simply makes no sense to apply a cookie-cutter version of reciprocal compensation to one-way paging, which involves no reciprocal traffic. Until that rulemaking is complete, the Commission should vacate the Bureau holding promulgated in the Letter.

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[26] *See Local Competition Order*, 11 FCC Rcd at 16037-38 (California criticizes the principle of mutual compensation for LEC-CMRS interconnection because such a policy would lead to a calling-party pays system, which in turn could lead to an increase in the cost of basic telephone service).

[27] Given the entirely intrastate nature of basic local exchange rates, it is not at all clear that the Commission would have the authority effectively to direct state commissions. *But see Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) (electric utility required by FERC to buy power at wholesale rates must be permitted to incorporate those prices into state-regulated retail rates).

A. Because Traffic Volume Is Not a Proxy for the Benefits to the Parties of LEC-Paging Interconnection, the Commission Should Adopt Special Rules for This One-Way Setting.

Because paging providers accrue substantial benefits from LEC interconnection, and there is no reciprocal exchange of traffic to serve as a proxy for those benefits, compensation arrangements between LECs and paging providers must be structured to reflect those benefits in other ways. Paging providers and their customers benefit substantially from their interconnection with LECs -- without that interconnection, paging could not exist as a service. A cost-recovery approach based solely on relative traffic volumes where the volume in one direction is zero fails to recognize -- and require compensation for -- the benefit that paging providers derive from their interconnection with LEC networks. It is wholly unreasonable for the LECs and their customers to bear the entire cost of interconnecting with paging providers, because LECs do not receive the entire benefit of that interconnection and because paging providers and their subscribers would receive their sizable benefit for free.

Nothing in the Act requires that interconnection charges be determined solely on the basis of traffic volumes. Section 252(d)(1) establishes the overriding principle that interconnection charges should be based on cost, including a reasonable profit. 47 U.S.C. § 252(d)(1). Even if section 251(b)(5), dealing with reciprocal compensation arrangements, were deemed to be applicable, it does not prescribe a single traffic-based approach but instead anticipates varied "arrangements." 47 U.S.C. § 251(b)(5). The Joint Explanatory Statement of the conferees notes that the House bill intended reciprocal compensation to include "a range of

compensation schemes,"[28] and the Senate intended it to include "in-kind exchange of traffic or traffic balance measures."[29]

Given this congressional expectation of a range of compensation schemes, it would be arbitrary and unreasonable for the Commission to persist in treating one-way paging interconnection in exactly the same way as interconnection in a two-way wireless or wireline setting. The Commission can and should develop compensation rules specifically applicable to LEC-paging interconnection that reflect the relative benefits of that interconnection to both parties. Those rules should address specifically the issue of cost recovery for dedicated facilities used in one-way interconnection.

There is Commission precedent for tailoring compensation arrangements to suit varying factual circumstances. Even for two-way traffic, the Commission correctly recognized a need for varied approaches when, in addressing interconnection between LECs and cellular (and other wireless) providers in 1987, it concluded that "the principle of mutual switching compensation should apply to Type 2 but not to Type 1 service."[30] The Commission declined to require mutual compensation for Type 1 service because of factors analogous to those before the Commission today:

> Under Type 1 interconnection, the telephone company owns the switch serving the cellular network. Therefore, it performs the origination and termination of both incoming and outgoing calls.

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[28] House Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 120 (1996).

[29] *Id.* at 118.

[30] *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2915 (1987).

> Under Type 2, by contrast, the cellular carrier owns the switch, enabling it to originate calls and terminate incoming calls.[31]

The Commission's 1987 reasoning relates in several ways to the issue in this proceeding. The reasoning applies directly insofar as many one-way paging providers use only Type 1 interconnection. More importantly, the Commission's 1987 analysis with respect to Type 1 interconnection applies by analogy to all paging traffic, because paging providers do not terminate LEC-originated calls and do not originate calls to LEC networks.

B. Pending Resolution of These Issues, Paging Providers Should Not Be Permitted to Disregard Their Obligations to Comply with Sections 251 and 252 of the Act and with Applicable Tariffs.

Some paging providers have been acting in utter disregard of their obligations to comply with sections 251 and 252 of the Act and with applicable tariffs. As noted above, Congress intended the interconnection rights and obligations under section 251 of all parties to be implemented through the commercial negotiation (and, if necessary, arbitration) regime of section 252. Yet some paging providers have insisted on an immediate and automatic right to dedicated facilities and other interconnection rights free of charge based on sections 251(a) and 251(b)(5) while refusing to enter into negotiations for purposes of the requested interconnection.[32] This violates the statutory duty to negotiate in good faith to which both LECs and interconnecting carriers are subject.

The Act imposes on both an incumbent carrier and an interconnector -- such as a paging provider -- an explicit duty to negotiate in good faith. 47 U.S.C. § 251(c)(1) ("The

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31/ *Id.*

32/ *See* U S WEST June 27, 1997 Reply Comments at 7-8.

requesting telecommunications carrier also has the duty to negotiate in good faith the terms of such agreements."). Negotiations are to commence upon a LEC's receiving a request pursuant to section 251 for interconnection or services. 47 U.S.C. § 252(a)(1). The fact that either party to negotiations may request state mediation or arbitration underscores the bilateral nature of the rights and obligations in the statutory scheme for negotiated agreements. 47 U.S.C. §§ 252(a)(2), 252(b)(1).

There is no justification for paging providers unilaterally to opt out of the negotiation process. The terms of the statute make clear that Congress adopted this framework to govern all parties involved in interconnection pursuant to section 251. It makes no sense to conclude that Congress intended to grant paging providers the same interconnection rights as other carriers under section 251(a) and (b) but somehow did not intend paging providers to be bound by the negotiation duties imposed by that same section. Moreover, these good faith requirements go to the substance, not the form, of interconnection negotiations. Some paging carriers have claimed that their requests for interconnection do not constitute requests for interconnection negotiations pursuant to section 252. This elevation of form over substance is flatly inconsistent with section 252(a)(1), which says that negotiations may begin "[u]pon [a LEC's] receiving a request for interconnection . . . pursuant to section 251." 47 U.S.C. § 252(a)(1). The Commission should make clear that a paging provider must comply with its statutory duty to negotiate interconnection agreements once that provider has requested interconnection.

To make matters worse, these providers also refuse to pay for facilities they have ordered in accordance with U S WEST's tariffs. In the absence of a negotiated interconnection