ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

- Within thirty days from the date hereof, U.S. WEST COMMUNICATIONS, INC., and AT&T OF THE MOUNTAIN STATES, INC., and U.S. WEST COMMUNICATIONS, INC., and MCImetro ACCESS TRANSMISSION SERVICES, INC., pursuant to UCA §54-8b-2.2 (1)(d), § 252 (e) of the 1996 Act and ¶ 17.1 of the interconnection agreements approved herein, shall separately submit for this Commission's approval amendments to the above-referenced interconnection agreements which embody the decisions made herein.

DATED at Salt Lake City, Utah, this 9th day of June, 1998.

Stephen F. Mecham, Chairman

Constance B. White, Commissioner

Clark D. Jones, Commissioner

Attest:

Julie Orchard
Commission Secretary

ATTACHMENT 34

Office of the Secretary

Service Date

December 1, 1997BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF AT&T COMMUNICA TIONS OF THE MOUNTAIN STATES, INC. PETITION FOR ARBITRATION PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICA TIONS ACT OF 1996 OF THE RATES, TERMS, AND CONDITIONS OF INTERCONNECTION WITH U S WEST.	)))))))	**CASE NO. USW-T-96-15** **ATT-T-96-2** **ORDER NO. 27236**

This is an arbitration proceeding initiated by AT&T Communications of the Mountain States, Inc. (AT&T) under provisions of the federal Telecommunications Act of 1996 (Act). The Act was enacted by Congress to foster competition in local telecommunications service markets. It enables potential competitors to enter local markets in any of three ways: by purchasing unbundled network elements from the incumbent local exchange carrier (LEC), by reselling the incumbent LEC's retail services purchased at wholesale rates, or by constructing their own facilities.

The first two methods for a competitor's market entry can be accomplished only with an agreement between the competitor and the incumbent LEC, and even a facilities-based competitor may need an agreement to provide for the exchange of customer traffic. The Act establishes certain duties for telecommunications carriers to facilitate the reaching of an agreement and requires active negotiation by the parties to precede an arbitration to resolve disputed issues. 47 U.S.C. •• 251, 252. If the parties are unable to negotiate a final agreement, either party may request arbitration by a state utilities commission to resolve the open issues. AT&T initiated this arbitration as part of its effort to negotiate an interconnection agreement with U S WEST Communications, Inc. (U S WEST), to enable AT&T to enter the local telecommunications market in Idaho.

PROCEDURAL BACKGROUND

The procedural history of this case is lengthy and is briefly summarized in Order No. 27050 issued by the Commission on July 17, 1997. The Commission appointed an arbitrator to resolve the disputed issues and facilitate the completion of an agreement by the parties. Following extensive discovery, the presentation of evidence at an arbitration hearing and the filing of post-hearing briefs, the arbitrator issued on March 24, 1997 a First Order Addressing Substantive Arbitration Issues (First Order). After more discussions, hearings and formal briefing, the arbitrator issued a Second Arbitration Order on June 9, 1997. The Commission then reviewed the record and the arbitrator's decisions and issued

Order No. 27050 "as the resolution by arbitration of disputed issues pursuant to Section 252(b) of the Telecommunications Act." Order No. 27050, p. 5.

The parties were unable, however, to reach agreement on some contract issues that had not been presented to the arbitrator. In addition, the United States Court of Appeals for the Eighth Circuit on July 18, 1997 issued its decision in an appeal challenging the authority of the Federal Communications Commission (FCC) to specify certain terms for interconnection agreements. *See Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753 (8th Cir. 1997). The Court's decision potentially impacted several issues between U S WEST and AT&T. To resolve the remaining issues and consider the effect of the *Iowa Utilities Board* decision, the arbitrator participated in further discussions with the parties and accepted additional briefing. On August 26, 1997, the arbitrator filed a Third Arbitration Order. Finally, following the presentation of additional issues, the arbitrator filed a Fourth Arbitration Order on September 8, 1997. [The arbitrator provided facsimile copies of the Fourth Order to the parties on September 5, 1997, presumably so that any issues resulting from the Fourth Order could be included in the parties ' petitions for review filed with the Commission on September 8, 1997.]

AT&T and U S WEST each filed a Petition for Review on September 8, 1997. Both Petitions requested review of issues decided in the four arbitration orders as well as our Order No. 27050. This, however, did not mark the end of the process to present the disputed issues to the Commission. As discussions for the interconnection agreement continued, the parties again could not agree on certain issues, mainly dealing with the price lists for services or products provided by U S WEST, and returned to the arbitrator for assistance. The arbitrator accordingly issued on October 6, 1997 his Fifth Arbitration Order. The Commission provided the parties an opportunity to raise issues for review based on the Fifth Order, and U S WEST filed a Supplemental Memorandum in Support of its Petition for Review on October 14, 1997.

This would have completed the presentation of issues for the Commission's review but for additional action, also occurring on October 14, 1997, by the Eighth Circuit Court of Appeals. The Court, granting petitions for review filed in the *Iowa Utilities Board* case, issued an amendmentto its decision. The Court vacated an additional FCC rule relating to the purchase of unbundled network elements by a competitor LEC. Believing the amendment to the *Iowa Utilities Board* decision to be directly relevant to issues presented in this arbitration, U S WEST requested an opportunity to file an additional brief with the Commission, and AT&T requested an opportunity to respond. U S WEST thus on October 27, 1997, filed a Second Supplemental Memorandum in Support of its Petition for Review, and AT&T filed its Memorandum in Response on November 7, 1997.

Before we begin our discussion of particular issues, it is worthwhile to set forth the standards and policies that guide our review in this case. This is an arbitration rather than a full-scale adversarial proceeding brought to an administrative hearing before the Commission. This arbitration is brought after and in the midst of lengthy discussions by the parties to reach an agreement, and its purpose is to decide only those issues on which the parties are unable to reach an accommodation. In fact, although the issues presented in the arbitration are significant and numerous, many issues were voluntarily negotiated by the parties. The goal of this process is an interconnection agreement the parties are willing to sign.

The distinction between this arbitration and the usual adversarial proceeding is significant to the process for completing the case. For one, the usual appeal to the Idaho Supreme Court afforded by *Idaho Code* • 61-627 is not available, as the Act makes clear that a state court does not have

jurisdiction to review an interconnection agreement. *See* 47 U.S.C. • 252(e)(4). Rather than an appeal, any party aggrieved by approval of an interconnection agreement can file "an action in an appropriate federal district court to determine whether the agreement . . . meets the requirements of Section 251 and this section [Section 252]." 47 U.S.C. • 252(e)(6).

Our review of the issues is guided by the standards of Sections 251 and 252 of the Act, as well as rules promulgated by the FCC to implement the Act's goals. However, the terms of the Act do not and cannot dictate specific results in each of the hundreds or thousands of details and complex issues that make up an interconnection agreement. This is especially true in light of the *Iowa Utilities Board* decision that rejected some of the FCC rules that specified results for significant issues, including pricing of unbundled network elements and wholesale rates. Instead, the Act provides parameters outside of which terms of an interconnection agreement may not go. On individual issues, any of several results can be permissible under the Act and FCC regulations,and this arbitration will decide those issues if the parties cannot. Thus, the Act encourages the parties to voluntarily negotiate the terms of their agreement, but creates the arbitration process for the Commission to decide those issues, consistent with the terms of the Act and applicable regulations, on which the parties cannot or will not agree.

The nature and purpose of this arbitration and the requirements of the Act guide our resolution of the petitions for review. Because the goal is to provide terms for the completion of an agreement, we need not discuss issues on which the parties have agreed, or which have already been decided in a manner consistent with the Act and applicable regulations. We will address only those issues that remain open for decision or that may have been decided improperly in light of the Act, or where clarification will assist the parties' efforts to reach a final agreement.

A. ISSUES RAISED IN U S WEST'S PETITION FOR REVIEW

1. Unbundled Network Elements.

Prior to the arbitrator's Third Order, U S WEST argued that the Act prohibits what U S WEST refers to as "sham unbundling." This issue, listed as issue 25 in the First Order, is stated in that Order as follows:

U S WEST observes that the separate pricing methods that apply to access to network elements and to services bought for resale can produce inequitable and unsound results in the case where AT&T purchases access to and recombines U S WEST elements without adding its own physical network elements. Specifically, U S WEST considers it inappropriate to allow AT&T to buy access to U S WEST switching and loops at element rates that, when combined, produce a price that would be substantially below the price that AT&T would pay for U S WEST retail services that it resells.

First Order, p. 11.

U S WEST raised the issue again following the *Iowa Utilities Board* decision, and the arbitrator revisited the issue in the Third Order at page 8-10. The arbitrator concluded that "the Eighth Circuit's opinion does not fundamentally alter the right of AT&T to take from U S WEST elements in an unseparated fashion." Third Order, p. 9. U S WEST in its initial petition for review memorandum did not identify a particular contract term it believes must be changed, but asked the Commission to "bar the practice of sham unbundling, and . . . clarify that U S WEST need only provide network elements to AT&T on an <u>unbundled</u> basis." U S WEST Petition, p. 7.

The spotlight focused again on AT&T's ability to purchase unbundled network elements following the Eighth Circuit Court's amendment to its *Iowa Utilities Board* decision. The Court struck down an additional FCC regulation promulgated to clarify the duty of incumbent LECs to provide unbundled network elements to competitor providers. U S WEST argues in its last memorandum that it "cannot be required to recombine unbundled network elements for any [competitor] LEC," and contends that "the proposed interconnection agreement between AT&T and U S WEST must therefore be modified to delete any requirement that U S WEST provide elements in a combined state for AT&T." U S WEST Second Supplemental Memorandum, p. 3, 5. Thus, U S WEST's argument regarding what it terms "sham unbundling" has changed during the course of events. Initially, U S WEST argued that AT&T should not be permitted to purchase all network elements required to provide local service at unbundled rates and thereby avoid purchasing packaged services at presumably higher wholesale rates. U S WEST now contends that it cannot be required to provide *any* combined elements to AT&T, because the Act requires AT&T to recombine elements it purchases as unbundled network elements.

In its Responsive Memorandum, AT&T contends that neither Section 251(c)(3) nor the Eighth Circuit Court's decision restrict the ability of a competitor LEC to purchase unbundled elements and recombine them in order to provide service. AT&T also contends that "simply eliminating language regarding combinations as proposed by U S WEST will render the agreement fatally incomplete and create significant barriers to entry." AT&T Responsive Memorandum, p. 7. According to AT&T,

because the agreement in this case contemplated that U S WEST would provide elements in combination if requested by AT&T, the agreement contains no provisions for how U S WEST will uncombine, or how AT&T will combine, those elements. Further, it provides no information regarding exactly how AT&T will gain nondiscriminatory access to U S WEST's network to accomplish the combination of elements U S WEST chooses to separate. In addition, the agreement does not detail how customer outages and service quality concerns raised by the separation of elements will be eliminated or at least minimized.

AT&T Responsive Memorandum, p. 7.

AT&T also argues that state law can be applied to uphold the arbitrator's decision to prevent U S WEST from "tear[ing] apart its network elements so that new entrants must recombinethem" and "to uphold the arbitrator's decision that U S WEST must provide AT&T combinations of network elements." AT&T Responsive Memorandum, p. 8, 11. AT&T asks the Commission to approve the arbitrator's decision on access to unbundled network elements. Alternatively, because U S WEST must provide nondiscriminatory access to its network so that AT&T can recombine network elements, AT&T contends "the parties must be given an opportunity to negotiate terms and conditions for combining elements, bring any unresolved issues to arbitration and have contract language reviewed and approved by this Commission." AT&T Responsive Memorandum, p. 11.

To resolve these issues regarding access to unbundled network elements, we turn to the provisions of the Act, as well as the clarifications provided by the *Iowa Utilities Board* decision. Section 251(c)(3) of the Act describes the duty of an incumbent LEC to provide unbundled access as follows:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, non discriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and non discriminatory in accordance with the terms and conditions of the agreement and the requirements of

this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

The *Iowa Utilities Board* decision rejected several FCC rules promulgated to implement the unbundling requirements of Section 251(c)(3). Initially, the Court vacated 47 C.F.R. • 51.315(c)-(f), FCC rules that required incumbent LECs to recombine network elements that are purchased by the competitor carrier on an unbundled basis. The Court noted that the last sentence of Section 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utilities Board*, 120 F.3d at 813. In its amended decision, the Eighth Circuit Court also vacated 47 C.F.R. • 51.315(b), which provides that "except upon request, an incumbent LEC shall not separate requested network elements that the LEC currently combines."

The following requirements, stated in terms applicable to this case, are quite clearly enunciated by the Act and the *Iowa Utilities Board* decision: (1) U S WEST must provide to AT&T access to unbundled network elements; (2) AT&T can purchase any or all of the network elements it needs as unbundled elements; (3) U S WEST need not combine unbundled elements for AT&T, but U S WEST must provide the access AT&T needs to U S WEST's network in order to recombinethe unbundled elements. Other than broadly defining the term "network elements" to be unbundled, the Act does not provide guidance to incumbent LECs in determining the points at which elements must be unbundled, and the FCC rule prohibiting the decombining of currently combined elements has been vacated. However, the Act does not *prohibit* the sale of unseparated components as part of unbundled network elements.

With these rules in mind, we turn to the arguments presented by U S WEST. The first has been fairly well answered by the Eighth Circuit Court of Appeals in its conclusion that the Act does not restrict a competitor LEC from purchasing whatever element it needs on an unbundled basis. The Eighth Circuit stated that "the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network." *Iowa Utilities Board*, 120 F.3d at 814. The Court rejected the argument that the ability to select unbundled access over resale as the preferred route to enter the local telecommunications markets will nullify the resale provisions. The Court noted that "unbundled access has several disadvantages that preserve resale as a meaningful alternative." 120 F.3d at 815. For example, "with resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements." *Id.* Thus, the initial "sham unbundling" argument made by U S WEST was directly rejected by the *Iowa Utilities Board* decision.

U S WEST also argues too broadly the effect of the Eighth Circuit Court's amendment to the *Iowa Utilities Board* decision. U S WEST contends that the Court's rejection of the rule preventing an incumbent LEC from separating network elements that it currently combines means that the interconnection agreement cannot require U S WEST to provide *any* elements in a combined state to AT&T. The problem with U S WEST's argument is that it goes too far. If an incumbent LEC were actually prohibited from providing any combined components to a requesting carrier, the access to unbundled elements requirement would be so impractical as to become meaningless. U S WEST would be required to break down each network element into countless physical components, and also provide access to its network at innumerable points so that AT&T could reconstruct them. Fully implemented, this result would add tremendous financial and technical burdens to both companies to the extent that the unbundled access requirement of Section 251(c)(3) would never be realized.

We do not believe Congress, or the Eighth Circuit Court, had this result in mind for the unbundled access requirement. By rejecting 47 C.F.R. 51.315(b), the Court did no more than recognize the distinction between the incumbent LEC's duty under Section 251(c)(3) to provide access to unbundled network elements and its duty under Section 251(c)(4) to offer its retail services at wholesale rates. The FCC rule was "contrary to 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis," and thereby "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4)." *Iowa Utilities Board*, 120 F.3d at ___. It does not necessarily follow from the Court's rejection of the rule that the Act prohibits a LEC from permitting components that necessarily comprise unbundled network elements from remaining in their unseparated state as part of an interconnection agreement. Requiring a competing LEC to recombine the elements it purchases on an unbundled basis is not the same as saying the incumbent LEC can never leave unseparated components in their combined state.

We have reviewed the arbitrator's Third Order regarding access to unbundled elements, as well as Attachment 3 to the draft interconnection agreement. Section 1.2.1 of Attachment 3 identifies the unbundled network elements U S WEST will provide to AT&T, and Section 1.2.2 makes it clear that AT&T has the burden to recombine the unbundled elements. These provisions are consistent with Section 251(c)(3). U S WEST in its Second Supplemental Memorandum does not identify particular elements that it believes are impermissibly combined, but only argues that the interconnection agreement should "be modified to delete any requirement that U S WEST provide elements in a combined state for AT&T." The Act does not require the sweeping prohibition requested by U S WEST, and without more particular identification of the component combinations U S WEST believes are impermissible, we will not disturb the arbitrator's decision regarding access to unbundled elements.

2. Shared Transport.

Local telephone calls are transmitted over facilities that are either dedicated or common. Common local transport, or shared transport, is an interoffice transmission path between an incumbent LEC's end offices that is shared by other carriers. Shared transport also means that the route of a call is not necessarily predetermined. Instead, "for each call, the LEC must use its own routing table to determine which trunks to use, depending on the call's destination and the currentavailability of circuits." U S WEST Second Supplemental Memorandum, p. 7. Because the LEC determines the most efficient route for each call at the time it is made, it is not necessary for the "requesting carrier to choose particular interoffice facilities or to specify the routing instructions for the call." U S WEST Petition, p. 7.

The arbitrator determined that "shared transport (between all U S WEST switches, but not between U S WEST and incumbent switches, or between U S WEST switches and serving wire centers) is an unbundled network element [and] should be included in the final agreement." Third Order, p. 11. U S WEST contends in its Petition for Review that shared transport is not, or should not be, available as an unbundled network element. U S WEST renews its argument in its Second Supplemental Memorandum, contending that the October 14, 1997 amendment to the *Iowa Utilities Board* decision supports its position. Because the transmission of a call requires access to several different network components, U S WEST argues that shared transport cannot itself be an unbundled network element.

U S WEST concedes, however, that FCC rules left undisturbed by the *Iowa Utilities Board* case require incumbent LECs to provide shared transport as an unbundled network element. *See*, FCC

Local Interconnection Order, CC Docket No. 96-98, • 439; FCC Third Order on Reconsideration, • 44. Also, although shared transport was not specifically discussed in the *Iowa Utilities Board* decision, the Court upheld the FCC's broad determination of network elements subject to unbundling requirements. *See, Iowa Utilities Board*, 120 F.3d at 808-09. ("We believe that the FCC determination that the term 'network element' includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference").

We find that providing shared transport as an unbundled network element is reasonable and consistent with the requirements of the Act. First, as we discussed in the previous section, Section 251(c)(3) does not prohibit the use of unseparated components in unbundled network elements. If it did, every unbundled element would necessarily be broken down into numerous physical components. In the case of shared transport, a breakdown into the smallest identifiable components would not be possible until after the call is made, because by definition the route of the call is not specified in advance. The practical effect of U S WEST's interpretation of 251(c)(3) would be to make shared transport unavailable to competing LECs. Indeed, U S WEST argues thatit "cannot be required to provide unbundled access to transmission facilities between end offices." U S WEST Second Supplemental Memorandum, p. 9.

Second, requiring AT&T to designate in advance the routes for its customers' calls would greatly increase AT&T's costs to provide service. The arbitrator found that "foreclosing AT&T's use of the U S WEST transport element in a manner such as U S WEST uses them itself would build into AT&T's operations a significant cost disadvantage." Third Order, p. 11. To implement the unbundled elements requirements and determine which network elements should be made available, the Act directs the FCC to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(B). The FCC determined that the requesting carrier's ability to provide a service would be impaired "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." First Report and Order, • 285. The *Iowa Utilities Board* decision specifically upheld this standard for determining whether a network element should be made available to the competitor LEC

If the quality of the service declines or the cost of providing the service rises as a result of a requesting carrier's inability to gain access to a network element, then the requesting carrier's ability to provide the service has been made worse. The FCC's interpretation of the "impairment" standard is reasonable, and we give it deference.

Iowa Utilities Board, 120 F.3d at 812 (citations omitted). By this standard, AT&T's ability to provide local telecommunications service is impaired if shared transport is not available as a network element. We thus find it appropriate that the interconnection agreement should make shared transport available to AT&T as an unbundled network element, and we approve the arbitrator's resolution of the shared transport issue.

3. Points of Interconnection.

Both U S WEST and AT&T request review of the arbitrator's decision regarding points of interconnection, i.e., those places where a competitor LEC can interconnect with the incumbent's network. The Act requires that an incumbent LEC provide interconnection with its network "at any technically feasible point within the carrier's network." 47 U.S.C. • 251(c)(2). The First and Second Orders authorize AT&T's interconnection at any technically feasible point, but also authorizethe ADR

process to adjust interconnection cost responsibilities where U S WEST can demonstrate that a substantially more economical means for connecting at an equally effective point exists.

In their Petitions, U S WEST argues that it should have greater latitude to control points of interconnection based on considerations of economy or efficiency, while AT&T contends that these considerations have no role in determining technical feasibility for points of interconnection. Order No. 25070 approved the resolution of these positions in the First and Second Orders, and we again approve the arbitrator's decision relative to points of interconnection. The arbitrator provided for AT&T's interconnection at any technically feasible point, as Section 251(c)(2) requires, but also provided an opportunity for the parties to adjust the costs of a particular interconnection if U S WEST can demonstrate that an equally effective but more economical interconnection point exists. This practical result is consistent with the terms of Section 251(c)(2). *See, Iowa Utilities Board*, 120 F.3d at 810.

4. Physical Collocation.

U S WEST in its Petition argues that the arbitrator did not limit AT&T's ability to physically collocate equipment on U S WEST premises. Section 251(c)(6) places a duty on U S WEST to allow AT&T to physically collocate its equipment on the premises of U S WEST. U S WEST may provide virtual rather than physical collocation upon proof to the Commission "that physical collocation is not practical for technical reasons or because of space limitations."

We believe the resolution of this collocation issue in the First Order is consistent with the requirements of Section 251(c)(6), and we thus decline to disturb the arbitrator's resolution.

5. Non-Recurring Charges.

The Fifth Order resolved pricing issues for loop unbundling, collocation charges, and certain nonrecurring charges. U S WEST does not object to the arbitrator's resolution of the first two issues, but does dispute the resolution for non-recurring charges.

The nonrecurring charges at issue apply to the ordering and installation of loops, ports, and signaling links. This issue was presented late in the arbitration. The arbitrator in his Fifth Order reviewed the record for these nonrecurring charges, and concluded that U S WEST's evidence that the range of $100 to $500 for these charges was essentially unrebutted, but that AT&T's evidence that the costs were "close to nothing" was also essentially unrebutted. Fifth Order, p. 3. The arbitrator, unable to undertake his own independent review of the U S WEST cost studies withoutadditional hearings, concluded that U S WEST "shall be entitled to charge 10 percent of the nonrecurring charges that its final price lists includes for loops, ports, and signaling links." Fifth Order, p. 5. However, the arbitrator also provided a means for the rates to be adjusted: "These charges shall be subject to true-ups retroactively to the commencement of service under the interconnection agreement, in the event that these charges are changed by later Idaho proceedings." *Id.*

It is evident in the Fifth Order that the arbitrator's substantial concerns about U S WEST's cost studies in support of nonrecurring charges left him unsatisfied that the evidence was reliable enough to finally determine the appropriate charges. Rather than delay the already lengthy proceedings any further, the arbitrator allowed the charges at amounts lower than requested by U S WEST and higher than argued by AT&T, and recognized that the amounts could be adjusted, and applied retroactively, in a subsequent proceeding. We find this to be an appropriate compromise solution for these charges,

and we approve this resolution for the interconnection agreement. If either party finds after AT&T begins providing service under the agreement that the approved amounts are inappropriate, the parties should renegotiate the charge amounts. Should good faith efforts to change the amounts prove unsuccessful, either party may resolve any remaining disagreement through the agreement's dispute resolution procedure, or as part of a proceeding subsequently filed with the Commission.

6. Other Issues.

U S WEST identifies other issues for review, some of which were decided in the Third and Fourth Orders, some of which were agreed to by the parties somewhat at variance to language in the First and Second Orders, and some of which are merely points of clarification. We have reviewed these additional issues and have determined that adjustments to the arbitrator's resolution are not necessary, other than to clarify certain contract requirements.

As matters of clarity, the following is provided to assist in preparation of the final agreement:

(a) Issue 46, interim number portability pricing, the reference to "gross revenues" at page 33, Second Order, to apportion number portability costs refers to all intrastate and interstate revenues generated within the state of Idaho. This issue is further discussed in the next section of the Order.

(b) Issue 63, Quality Standards. Incumbent LECs are not required by the Act "to provide its competitors with superior quality interconnection", or to provide to requesting carriers "superior quality access to network elements on demand." *Iowa Utilities Board*, 120 F.3d at 812-13. Accordingly, the contract need not require more of U S WEST than the Act requires.

We have reviewed each issue raised by U S WEST in its Petition for Review. The adjustments and clarifications we make in this Order are consistent with the requirements of the Act. The issues that we did not discuss or alter are determined by the Commission to be properly resolved by the arbitration process.

B. ISSUES RAISED IN AT&T'S PETITION FOR REVIEW

1. Costs and Rate Issues.

The first four issues identified in AT&T's Petition relate to costs and rates. AT&T contends (1) the Commission should vacate its adjustment to the wholesale rate, (2) that adjustments should be made to the approved costs of loop unbundling, loop unloading and loop conditioning, (3) that the Commission should adopt AT&T's collocation rates, and (4) that the Commission should not adopt the approved rates and prices for the entire three-year term of the interconnection agreement.

These issues all were decided in the Commission's review of the First and Second Orders, and we are not persuaded that adjustments should be made to the approved resolution. The record on these cost and price issues is complex, extremely detailed and lengthy, and the evidence could be construed to support various specific results, including those advocated by AT&T. It is clear in the First and Second Orders that the arbitrator carefully considered all the evidence presented in resolving these issues. The Commission did the same in making two adjustments to produce a better overall balance among the competing and conflicting arguments and evidence the parties presented on the issue of the wholesale discount. AT&T does not contend that the resolution of these issues is incompatible with the terms of the Act, and we thus decline to make adjustments regarding the resolution of these issues.

2. Number Portability Costs.

AT&T contends that the arbitration orders regarding cost allocations for implementing number portability are "inconsistent with the Act and the FCC's Number Portability Order." AT&T Petition, p. 20. The First Order provides that U S WEST and AT&T should "track their costs ofproviding interim number portability until a definitive method for allocating the cost is determined." First Order, p. 39. It is this allocation solution that AT&T contends is inconsistent with the Act and FCC requirements because it "is really not a standard at all." AT&T Petition, p. 20.

As AT&T concedes, however, the Second Order does contain a specific method for allocating number portability costs—"apportionment according to gross revenues of AT&T and U S WEST, less charges paid to other carriers." AT&T Petition, p. 17; Second Order, p. 33. AT&T nonetheless also objects to this approach as inconsistent with the methods recommended by the FCC.

We believe the Second Order's method of allocating number portability costs is consistent with recommendations of the FCC. The FCC specifically permits the use of gross revenues less payments to other carriers as an allocator. The Second Order provides that AT&T will pay number portability costs according to its share of gross revenues, less payments to other carriers (as compared with the same measure of U S WEST revenues). AT&T's Petition for Review recognizes that such a method is permitted by the FCC. Specifically, paragraph 136 of the FCC's July 2, 1996 First Report and Order and Further Notice of Proposed Rulemaking (CC Docket No. 95-116; RM 8535) cites MFS Illinois plans as one of those currently in use that satisfies the FCC's competitive neutrality criteria. That approach, as described in the FCC Order, appears to do exactly what the arbitrator did here; i.e., to apportion costs according to the gross revenues of the single incumbent and the single competitor involved in that situation.

We find that the Second Order's treatment of interim number portability costs is appropriate. To the extent, however, that the Second Order is unclear, the Commission makes it explicit that the share of costs that AT&T is required to pay for U S WEST's costs to make interim number portability available in Idaho is its gross revenues, less payments to other carriers, divided by the sum of its and U S WEST's gross revenues, less payments to other carriers.

Both AT&T and U S WEST note that the Second Order does not state explicitly whether the revenue base that is to be used to allocate number portability costs includes interstate revenues. Footnote 380 of the July 2, 1996 FCC Order addresses the issue of the costs to be included when gross revenues serve as the allocation basis. That footnote requires that the calculation of gross revenues meet two criteria—it must be limited to the revenues generated in the state involved and it must include intrastate and interstate revenues. Therefore, according to the FCC requirement, theAT&T and U S WEST gross revenues that are to be used to calculate the apportionment of interim number portability costs are the intrastate and interstate revenues generated in Idaho.

3. Possible Rebundling Charge.

AT&T argues that the provision in the First Order that contemplates an opportunity for U S WEST in the future "to propose for combined switching and loop element prices a surcharge that will promote facilities-based competition" is inappropriate. *See*, First Order, p. 14. AT&T contends that such a surcharge would violate terms of the Act.

The First and Second Orders, which were approved in Order No. 25070, do not authorize a surcharge for combining switch and loop elements. The arbitrator merely indicated that circumstances might develop where such a price surcharge could be appropriate. By approving the arbitrator's recommendation that U S WEST be afforded an opportunity to demonstrate the appropriateness of price adjustments under certain circumstances, the Commission was not indicating approval of any specific adjustment or surcharge. Accordingly, we do not find that any adjustment must be made regarding this issue.

4. Operating Support System Development and Implementation Costs.

At page 31-32 of its Petition, AT&T addresses an issue relating to costs for developing and implementing an operational support system (OSS). An OSS is a computer application that provides gateways for competitor LECs to access where necessary U S WEST's computer operating systems. AT&T contends that the agreement should only address OSS development costs for the Idaho jurisdiction, and requests that "it be made clear that only the Idaho proportionate share of the total gateway development costs . . . be considered in this arbitration agreement." AT&T Petition, p. 31.

We agree that this point can benefit from clarification. The agreement between U S WEST and AT&T, over which this Commission has jurisdiction, relates to services within Idaho. Accordingly, it is appropriate that the OSS costs covered by the agreement are limited to Idaho-specific costs and to the Idaho proportionate share of regional costs. The agreement should specify that the competing carrier's responsibility for OSS development and implementation costs is limited to the Idaho proportionate costs.

5. Other Issues.

(a) Issue 29—use of ADR process rather than BFR process.

AT&T asks clarification of the means to resolve disputes over existing tariff conditions or restrictions. AT&T Petition, p. 52. The First Order provides that tariff disputes will be resolved through a "Bona Fide Request" (BFR) process rather than an ADR process.

We believe an ADR process is better to resolve disputes over tariff conditions and restrictions, and the interconnection agreement should include this modification from the First Order.

(b) Issue 17-NID indemnification clause.

AT&T objects to the specific NID indemnification provisions required by the First Order, citing a conflict with the general indemnification language in another part of the agreement. There can be, however, a valid need for a separate indemnification provision for a specific circumstance, in which case the general provision would be controlled by the specific. The First Order addresses situations where AT&T must provide additional protectors to use the U S WEST NID. AT&T has the alternative of making a NID-to-NID connection, in which case the general indemnification clause would apply. Once AT&T chooses to make physical changes to the U S WEST NID, which it would presumably do to save costs, it is appropriate to assign to it the greater risks involved.

We have reviewed each of the issues raised by AT&T in its Petition for Review, and have discussed only those issues on which adjustment or clarification should be made. It is the Commission's

understanding that with this Order all disputed issues have been resolved by the arbitration process. The parties should be able to complete their final agreement and submit it to the Commission pursuant to 47 U.S.C. •252(c).

ORDER

IT IS HEREBY ORDERED that the five orders of the arbitrator, as modified or clarified by this Order or Order No. 27050, constitute the resolution by arbitration of disputed issues pursuant to Section 252(b) of the Telecommunications Act. This Order also resolves all issues raised by AT&T and U S WEST in their Petitions for Review.

THIS IS A FINAL ORDER ON ARBITRATION. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* • 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this day of December 1997.

DENNIS S. HANSEN, PRESIDENT

RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

Vld/O:USW-T-96-15.ws3

CALIFORNIA PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS DIVISION
INITIAL STAFF REPORT

Pacific Bell (U 1001 C) and Pacific Bell Communications
Notice of Intent to File Section 271 Application
For InterLATA Authority in California

July 10, 1998

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CHAPTER I: INTRODUCTION

A. EXECUTIVE SUMMARY

Telecommunication Division staff (staff) presents this Initial Staff Report addressing Pacific Bell's (Pacific's) compliance with the requirements of section 271 of the Federal Telecommunication Act of 1996 (FTA96 or Act).[1] This report was produced as directed by the June 26, 1998, Joint Managing Commissioner's and Administrative Law Judge's Ruling (June 26th Ruling) regarding Pacific's draft 271 application before the Commission.

To develop this report, staff relied on the extensive record in the proceeding and the relevant guidelines provided by the Federal Communications Commission (FCC) and the U.S. Department of Justice (DOJ). Based on its assessment of the record, staff believes that Pacific has provided evidence that it has complied with three items of the 14-point checklist in section 271 of the Act. Specifically, staff believes that Pacific has satisfactorily complied with the following checklist items: (3) Access to Rights-of-Way; (9) Access to Telephone Numbers; and (12) Dialing Parity.

Staff commends Pacific for its recent efforts to improve services to CLECs. However, Pacific has not provided evidence that it has complied with the remaining 11 checklist items. This is primarily a result of problems with Pacific's ability to provide adequate Operations Support Systems (OSS) and collocation to CLECs. These problems and other specific checklist problems are discussed in more detail in Chapters II and III of this report. Further, staff found that Pacific has not provided evidence that it is in compliance with section 272 of the Act regarding its separate affiliates that will provide interLATA service. This assessment is presented in Chapter IV.

Chapter II of the report contains the staff analysis of OSS and collocation issues. The report finds that Pacific does not offer competitors OSS on the same level of mechanization as its retail operations. The current OSS is largely manual, which increases the possibility of error. Staff has determined that Pacific's OSS needs to provide all functionalities to CLECs at parity with its own retail operations. In developing and implementing its OSS, Pacific has regarded the CLECs more as competitors than as wholesale customers. While Pacific recently deployed new OSS interfaces, staff and parties have not had an opportunity to evaluate the new OSS.

In the area of collocation, Pacific has denied competitors physical collocation in a number of its offices, due to a reported lack of space. While Pacific has made efforts to find collocation space, CLECs are unable to obtain collocation spaces in key central offices in the state.

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[1] Pacific Bell and Pacific Bell Communications (hereinafter referred to collectively as Pacific) on their own behalf and behalf of their subsidiaries and affiliates.

Staff's initial report hereby identifies specific issues that will be addressed during the Collaborative Workshops which will begin later this month, as directed in the June 26th Ruling. In accordance with the June 26th Ruling, Following the collaborative workshops, staff will draft a Final Staff Report that will enumerate compliance solutions, implementation goals, and potential sanctions in the event of non-compliance.

B. PROCEDURAL BACKGROUND

On March 31, 1998, Pacific filed its draft 271 application with this Commission in response to a Joint Managing Commissioner's and Administrative Law Judge's (ALJ) February 20, 1998, Ruling. The February 20th Ruling directed Pacific to file a draft application at the California Public Utilities Commission (Commission) at least 90 days in advance of filing at the FCC. The purpose of the advance filing was to ensure that this Commission would have adequate time to review and evaluate the application.

Subsequent to Pacific's filing, staff held formal weekly meetings with Pacific, CLECs, and other interested parties to clarify issues in the filings. Because of the size and complexity of the record, the Managing Commissioner and assigned ALJ issued a ruling on May 20, 1998, revising the process and altering the procedural schedule. Under the new schedule, staff was directed to prepare a staff report to be released for comment. The report, and parties' comments, would be used by the assigned ALJ to draft a proposed decision for the Commission's consideration.

On May 27, 1998, shortly after the May 20th Ruling was issued, Pacific filed a motion seeking to further revise the procedure for addressing its draft application. Pacific requested "a more collaborative workshop type process that will enable the staff and the parties to work through the issues." (Pacific Bell Motion, p 2.) Parties responded to Pacific's motion on June 4, 1998. On June 26, 1998, the Managing Commissioner and assigned ALJ jointly ruled on Pacific's motion to further revise the 271 procedure. The June 26th Ruling adopted a collaborative approach to processing Pacific's application. Specifically, rather than having staff issue a comprehensive report assessing its findings and evaluations, the ruling proposes a "collaborative process" in which Pacific, the CLECs, interested parties, and staff work together to develop solutions for each problem.

To this end, staff has been directed to issue an Initial Staff Report on its findings. At the end of the collaborative process, staff is directed to prepare a Final Staff Report which will be released for comments. That report is intended to outline steps that Pacific must take to correct the specific problems described in the Initial Staff Report. It will also include an implementation schedule for each item. It is anticipated that the report may include sanctions for future noncompliance to ensure that corrective measures do not

deteriorate over time.[2] The assigned ALJ is expected to use the Final Staff Report and parties' comments to prepare a decision for the Commission's consideration.

Adoption of the collaborative process was inspired, in part, by similar actions of the New York and Texas commissions. Both New York and Texas responded to 271 applications by asking the BOC to collaborate on solutions to competitive complaints of market participants. New York sponsored a series of collaborative sessions and then issued a staff report, while in Texas the Commission ordered parties to participate in a collaborative process. Both states outlined areas of non-compliance, recommended solutions, set out implementation goals, and proposed sanctions in the event of future noncompliance.

In determining compliance with the 14-point checklist, staff was constrained by the instant record per FCC guidance. In its Ameritech/ Michigan decision, the FCC mandates a "snapshot" approach for 271 applications: Applications must represent present compliance only; applications, once submitted, cannot be augmented with additional information; and promises of future compliance are considered irrelevant. (Ameritech, ¶55) The record for this proceeding therefore presents a snapshot of Pacific's 271 compliance as of the filing date, March 31, 1998.

However, staff recognizes that time does not stand still, and that much has happened since Pacific's initial filing. For example, Pacific has instituted new OSS interfaces. It has also made some policy changes, such as allowing collocation of Remote Switching Modules, and is revising its treatment of collocation. The snapshot approach mandated by the FCC does not allow inclusion into the record of evidence provided after the original filing. However, because staff will shortly be entering into a collaborative process with parties, this report attempts to reflect changes that have occurred since March 31, 1998. Staff proposes to explore the implications of those changes as part of the collaborative process.

C. STAFF REPORT CONTENTS

The Staff Report consists of an analysis of each of the 14 checklist items, as well as analysis of two "multiple-issue" items, OSS and collocation. Each checklist item is dealt with in a similar manner: the item is identified; the issues, if any, are outlined; and staff lists the issues that will be discussed within the collaborative process. For OSS, in the hope that specific requirements will narrow the scope of issues to be discussed, staff has made further recommendations relating to baseline requirements.

[2] Joint Managing Commissioner's and Administrative Law Judge's Ruling on Pacific Bell's Motion to Further Revise the 271 Procedure, P. 9.

Along with this Introduction, the Staff Report contains a discussion of each of the following:

- requirements, issues, and recommendations for Operations Support Systems (OSS) (See Chapter II, Section A);
- requirements and issues for collocation (See Chapter II, Section B);
- requirements and issues for each checklist item from the section 271 14-point checklist (See Chapter III);
- requirements and issues for section 272 compliance (See Chapter IV, Section A);
- presence of a facilities-based competitor (See Chapter IV, Section B);
- the state of local competition (See Chapter IV, Section C).

D. DESCRIPTION OF THE COLLABORATIVE PROCESS

Criteria Applied for Identifying Issues

Before determining which issues to include in the collaborative process, staff thoroughly researched and analyzed the extensive record of the proceeding. To identify issues and concerns appropriate for the collaborative process, staff applied the following criteria. To be included within the collaborative process, an issue had to fit in one or more of the following categories:

- Ubiquitous. Is the issue identified as a problem by more than one CLEC? Or, if identified by only one CLEC, does it appear to have more general impact?
- Timely. Is this a continuing problem or has it been resolved? Was this a one-time occurance?
- Significant. Does the issue present a barrier to entry, does it significantly impact the ability of one or more CLECs to compete, and/or does it indicate discriminatory behavior?

In addition, certain issues which parties raised, e.g., pricing of UNEs and reciprocal compensation to CLECs with Internet Service Provider customers, were not included in the collaborative process because they are being addressed in other Commission proceedings.

Staff has not determined whether or not it would be feasible to explore performance measures, an issue being addressed in the OSS OII, in the collaborative process.

Goal of the Collaborative Process

The goal of the collaborative process is three-fold: to develop solutions for identified problem areas, to establish implementation goals, and provide safeguards (e.g., penalties and assurance mechanisms) that will ensure that corrective measures will not deteriorate over time.

The outcome of the collaborative process will form the basis for the Final Staff Report.

E. FEDERAL GUIDELINES CONSIDERED

The guidelines for the 271 process are codified within sections 271 and 272 of FTA96. Further guidance is provided by the FCC in its four orders addressing prior applications of BOCs for section 271 authority. Section 271 makes numerous references to sections 251 and 252 of FTA96. These sections have been addressed by the FCC in numerous orders including the First, Second and Third Report and Order on Interconnection. The DOJ has also given BOCs guidance in its reports on the four prior requests of BOCs for interLATA authority.

Basic Guidelines

On or after the date of enactment of the FTA96, a Bell Operating Company (BOC) or its affiliate may apply to the FCC for authorization to provide interLATA services originating in any in-region State. (FTA96, 271(d)(1)) The FTA96 outlines the following general procedures for evaluation of 271 applications:

- consultative roles are created for the Department of Justice and the pertinent state commission, (271)(d)(2)(A) & (B);.
- the FCC shall issue a written determination not later than 90 days after receiving an application, (271)(d)(3);
- the requested authorization must be carried out in accordance with the requirements of section 272[3], (271)(d)(3)(B);
- the requested authorization must be consistent with the public interest, convenience, and necessity, (271)(d)(3)(C).

[3] Section 272 outlines requirements for separate affiliate safeguards.

The 14-Point Checklist

In order to gain FCC approval of its application -- and approval of the DOJ and the pertinent state commission, in their respective consultative roles -- the BOC must prove that it is providing each of the14 checklist items listed in Section 271(c)(1)(B) of the Act to competitors in a nondiscriminatory manner, and at parity with its own use.

Role of State Commissions

FTA96 section 271 (d)(2)(B) describes the role of state commissions as follows: "Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."

The FCC finds that it will consider carefully those state commission findings that are supported by a detailed and extensive record. (LA Order ¶9.) It also states "(b)ecause it is the Commission's statutory duty to determine whether the requirements of section 271 have been satisfied, the Commission is not limited to considering only the issues and facts that were presented in the state commission proceeding." The FCC stresses, however, that parties should make every effort to present their views in the state forum. (SC Order, ¶ 27.)

General FCC Guidelines for the 271 Process

The FCC offers the following as guidelines for the 271 application process:

1. ***Burden of Proof***

   The FCC states that "the BOC applicant retains at all times the ultimate burden of proof that its application satisfies section 271." (Ameritech, ¶44.)

2. ***Complete Applications***

   In its Ameritech/Michigan decision, the FCC stresses that, because of the truncated time frame for 271 evaluations, a "BOC's section 271 application must be complete on the day it is filed." (¶ 50. See also SC Order ¶¶ 37, 57.)

3. *No Paper Promises*

   In its Ameritech/Michigan decision, the FCC is very clear that "paper promises" can hold no bearing on whether a BOC passes a checklist item:

"We find that a BOC's promises of future performance to address particular concerns raised by commenters have no probative value in demonstrating its present compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof." (¶55.)[4]

4. ***Obligation to Present Evidence and Arguments Clearly***

   The FCC finds that BOCs bear the burden of presenting their arguments and evidence clearly and concisely, and that the significance of the evidence must be readily apparent. (¶¶ 60-61.)

General FCC Guidelines for Evaluating Checklist Compliance

Within its 271 application orders, the FCC offers the following guidance in determining compliance with each checklist item:

1. ***Available as a Practical and Legal Matter***

   In its Ameritech/Michigan 271 order, the FCC provided a yardstick to use in determining what it means to "provide" a particular checklist item. The FCC concluded that a BOC provides a checklist item if it makes the item available "as a legal and practical manner." (Ameritech, ¶107)

2. ***Preponderance of the Evidence***

   The Act does not prescribe a particular standard of proof for establishing whether a BOC applicant has satisfied the checklist. Since the standard of proof applicable in most administrative and civil proceedings is the "preponderance of the evidence," the FCC adopted that as the appropriate standard for evaluating a BOC 271 application. (Ameritech, ¶45)

3. ***Access Must Be Non-Discriminatory and Provided at Parity***

   The FCC determined that the BOC is required to provide access to its competitors that is equivalent to the level of access it provides to itself, its customers, or its affiliates. The FCC construes equivalent access broadly to include comparisons of analogous functions between competing carriers and the BOC, even if the actual mechanism used to perform the function is different for competing carriers than for the BOC's operations. (Ameritech, ¶139)

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[4] The FCC finds, however, that they can and will look at past behavior in evaluating 272 (affiliate safeguards) compliance: " (W)e will look to past and present behavior of the BOC as the best indicator of whether the BOC will carry out the requested authorization in compliance with the requirements of section 272." (Ameritech/ Michigan, ¶111.)

DOJ Guidelines for Evaluating Checklist Compliance

In its evaluation of the Ameritech/Michigan application, the DOJ found that Ameritech failed to show that the local markets in Michigan were "irreversibly opened to competition." The DOJ termed this to be its competitive standard for evaluating section 271 applications. (DOJ, Ameritech - Michigan, June 25, 1997)