Although I concur with most of today's order, I respectfully dissent from the majority opinion when it denies granting costs and attorney fees to MCI. I would grant costs and fees to MCI. The majority opinion is inconsistent with the Commission's September 30, 1997 order in Case No. U-11229 (involving the City of Southfield complaint against Ameritech Michigan for inadequate 9-1-1 service), the December 17, 1997 order in Case No. U-11412 (involving Ameritech Michigan's violation of Section 305(3) of the MTA for use of its AmeriChecks promotion), the March 24, 1998 order in Case No. U-11507 (involving Ameritech Michigan's violation of Section 308(3) of the Act due to its failure to notify the Commission of the transfer of assets to an affiliated company), and the May 11, 1998 order in Case No. U-11550 (involving Ameritech Michigan's violation of the Commission's August 1, 1996 order in Case No. U-11038 regarding failure to implement intraLATA primary interexchange carrier change orders in a reasonable manner). It is both surprising and disappointing that this Commission, when faced with a pattern of anticompetitive conditions unilaterally imposed by the incumbent local exchange carrier, would reverse itself by denying reasonable costs and attorney fees to those who are seeking our help. I fear that the wrong message is being sent. Those subjected to the anticompetitive conditions are required to suffer through the long regulatory complaint process, only to be rewarded by having to pay the costs associated with correcting the injustice. This, in fact, rewards those who would impose anticompetitive conditions and penalizes and discourages those who are wronged in the process.

Finally, in my opinion, the Commission should maintain consistency in its approach so that the regulated and non-regulated components of the industry, the incumbents and hopeful competitors, the Commission's Administrative Law Judges and Staff can develop and maintain a sense of regulatory direction from this Commission. For this reason, and the reasons stated above, I respectfully dissent from this portion of the order.

Commissioner

4100

R Wolter
cc: Karen I.

Service Date: April 30, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF The Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc.	))))))	UTILITY DIVISION DOCKET NO. D96.11.200 ORDER NO. 5961d

* * * * *

ORDER ON SUPPLEMENTAL DISPUTED ISSUES

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INTRODUCTION AND BACKGROUND

This proceeding began with a request on November 22, 1996 from AT&T Communications of the Mountain States, Inc. (AT&T) for the Montana Public Service Commission (Commission) to arbitrate pursuant to 47 U.S.C. § 252(b). AT&T had been unable to negotiate all the terms and conditions of interconnection with U S WEST Communications, Inc. (U S WEST) and requested Commission arbitration of the unresolved issues.

The Commission held an arbitration hearing from February 4 through February 14, 1997, and issued its Arbitration Order, Order No. 5961b, on March 20, 1997. Both AT&T and U S WEST petitioned for reconsideration of parts of the Commission's arbitrated decision. The Commission issued its Order on Reconsideration, Order No. 5961c, on July 9, 1997, directing the parties to file a single agreement incorporating the decisions from both orders within 45 days of service of the Order on Reconsideration.

On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued its decision in Iowa Utils. Bd., et al. v. FCC, 120 F.3rd 793 (8th Cir., 1997), *amended on reh'g*, 135 F.3d 535 (Oct. 14, 1997), *cert. granted, sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 683 (1998). This order amending the Court's earlier opinion affected the Commission's decision. Despite the opinion, the parties filed a single agreement on September 4, 1997. However, the agreement was not executed and it included numerous provisions setting forth both sides of issues which arose following the Eighth Circuit's opinion. It also included other issues which arose between the parties from their negotiations following the Eighth Circuit opinion and the Commission's arbitrated decision.

The parties represented to the Commission with the September filing that the juxtaposed language in their unsigned agreement was their respective final proposed language on each remaining unresolved issue. The parties have requested the Commission to decide these issues before they execute their interconnection agreement. Some of these issues were thought to be resolved before the first order in this matter was issued by the Commission.

Shortly after the parties filed their agreement, AT&T asked the Commission for a meeting to present further information explaining many of the still-unresolved issues, stating that this had been done in other U S WEST states. The Commission directed its staff to meet informally with the parties' representatives. This meeting took place on September 25, 1997. Although the parties used this meeting to further explain numerous issues, any information that might be characterized as additional evidentiary information presented by the parties at that time is not used as support for any of the Commission findings in this Order.

The Eighth Circuit reconsidered and clarified its July 18, 1997 opinion in its Order on Petitions for Rehearing dated October 14, 1997. Notably, the Court vacated the Federal Communications Commission's (FCC) rule 51.315(b) which prohibited incumbent LECs from separating existing network element combinations. The parties requested the opportunity to file additional briefs to address the effect of the October 14 order on the network element combination issues still pending before the Commission.

The Commission's decisions are based upon the legal arguments made by the parties in their briefs, the applicable FCC orders and regulations, and upon the record as it existed as of the close of the arbitration hearing on February 14, 1996. The record includes no other evidentiary-type materials presented or available to the Commission subsequent to that hearing.

The Commission's resolution of these additional issues is guided by the provisions of the Telecommunications Act of 1996[1] and the rules developed by the FCC pursuant to the 1996 Act. Where differing results might be acceptable under the 1996 Act, we may also be guided by Montana law and Commission regulations. In addition, we do not consider issues that appeared to be resolved by compromise or otherwise during the informal meeting held on September 25, 1997.

COMMISSION DECISION

A. Part A

1. Issue No. A-1: Combinations - Part A, Definitions, p. 6; Virtual Collocation - Part A, p. 36, Section 40.2.1; Recitals section, Fourth *Whereas* - Part A; Attachment 3 - p. 1, 2, and 4, Section 1.2.2, Section 2.5, and Section 3.3; and Attachment 5 - p. 17, Section 3.2.15.1

1. After the Eighth Circuit issued its July 18, 1997 decision in Iowa Utils. Bd., the parties' interpretations of the Court's holdings differed dramatically. The Court's initial opinion and its October 14, 1997 order on rehearing invalidated certain FCC rules requiring the incumbent local exchange carriers to combine elements for competitive carriers and to provide elements in existing combinations. The Act and the Iowa Utils. Bd. opinions provide the following framework: (1) U S WEST must provide AT&T with access to unbundled network elements (UNEs); (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 to U S WEST's network that AT&T needs in order to recombine

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

the unbundled elements; and (4) although the FCC rule prohibiting the disassembling of currently combined elements (47 C.F.R. § 315(b)) has been vacated, the Act does not prohibit the sale of unseparated components as part of unbundled network elements.

2. U S WEST's advocacy in the pre-arbitration portion of this proceeding and throughout the arbitration hearing and post-hearing briefing period was consistent: U S WEST argued that there must be a "rebundling" charge[2] equal to the difference between the resale price and the unbundled element price, thereby making the charge the same for unbundled elements of a particular service as for resale of that service. The Commission accepted U S WEST's argument and determined that the price for unbundled elements should include the rebundling charge advocated by U S WEST—at least until permanent prices are developed.

3. U S WEST now contends that the Eighth Circuit'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. U S WEST further contends that it may sever existing connections between elements and require AT&T to recombine the elements inside a collocated cage in U S WEST's central office or, if no space is available, by virtual collocation.

4. According to AT&T, the FCC's Third Order on Reconsideration[3] stated that such actions by an incumbent local exchange carrier (ILEC) would impose costs on competitive local exchange carriers (CLEC) that the ILEC would not incur, and thus would violate the requirement

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[2]This has also been referred to as a "glue" charge.

[3]Third Order on Reconsideration, 12 F.C.C.R. 12460, CC 96-98, FCC 97-295 (rel. Aug. 18, 1997).

under § 251(c)(3) of the Act that ILECs provide nondiscriminatory access to unbundled elements. AT&T further asserts that although the Eighth Circuit ruled that a new entrant may achieve the capability to provide telecommunications services completely through access to unbundled elements, U S WEST inconsistently proposes to require AT&T to recombine the network elements it purchases while refusing to grant the access to its facilities that would be necessary with such a requirement.

5. U S WEST's proposed contract language would require all CLECs to own or control facilities to access unbundled elements. U S WEST would require CLECs to collocate equipment in U S WEST's central offices. U S WEST proposes to then unbundle elements that it has provided in combination and require each CLEC that wishes to provide services through unbundled elements to connect to the individual unbundled elements by use of cross-connects between U S WEST's facilities and the CLEC's facilities. If no space is available for a CLEC to do this, then U S WEST would require the CLEC to use virtual collocation to accomplish the element combinations required.

6. However, U S WEST states that it will <u>not</u> combine elements for a CLEC when the CLEC wishes to provide service via virtual collocation. Virtual collocation does not contemplate that a CLEC has access to its own collocated equipment; rather, the ILEC performs all functions for the CLEC with this arrangement. U S WEST's position on this begs the question: If there is no room to physically collocate, how is the CLEC going to physically locate the "cage" in which it will make its cross-connections? The simple answer is that the CLEC will not be able to combine unbundled elements at all and virtual collocation could only be used for pure facilities-based interconnection.

7. AT&T states that U S WEST's proposed resolution of this issue would delete all language in the juxtaposed agreement that deals with combinations. It argues that it is impossible for an interconnection agreement to be complete or to comply with the requirements of the 1996 Act unless it clearly and unambiguously describes how AT&T will be allowed to provide services through combinations of UNEs. It further argues that if the Commission determines that AT&T must combine elements that U S WEST has torn apart, the interconnection agreement must specifically provide: (1) how AT&T will have access to U S WEST's network to obtain and combine UNEs; and (2) the terms and conditions (including price) under which the UNEs will be available. According to AT&T's argument, it is not enough to simply delete provisions from the agreement which require U S WEST to provide elements in existing combinations; it is critical that the agreement contain details of combining and recombining, specific prices, and other particulars for implementation. AT&T states that the agreement as it now exists contemplated that U S WEST would provide UNEs in combination if requested by AT&T; therefore no provisions have been included for U S WEST to uncombine and AT&T to combine elements, and no information to provide for AT&T to gain access to U S WEST's network to accomplish the combination of elements U S WEST chooses to separate. According to AT&T, this would render the agreement fatally incomplete, create significant barriers to entry, and is contrary to the 1996 Act.

8. AT&T further asserts that the sole purpose of U S WEST's present intent to separate elements is to impose additional, artificial costs upon new entrants and their customers and to subject them to service outages of indefinite duration while the incumbent disconnects and the new entrant reconnects network elements that were already connected to each other. In

addition, AT&T argues that this Commission should not permit U S WEST to engage in such "blatantly anticompetitive conduct"--conduct which would violate Montana's prohibition on discriminatory and unreasonable conduct by carriers in § 69-3-321, MCA. It states that the sole purpose and effect of such conduct would be to impose costs on CLECs that U S WEST does not incur, and to ensure that new entrants competing through the purchase of UNEs are unable to provide service at parity with U S WEST.

9. AT&T argues that nothing in the federal Act or Montana law prohibits the Commission from adopting and enforcing under state law any duties that go beyond the minimal and non-exclusive requirements of the Act. It further states that, having successfully argued that state commissions have authority over the pricing rules for UNEs used to provide local service, U S WEST cannot now argue that the Commission lacks authority under 47 U.S.C. § 261(c) to impose additional requirements on U S WEST for the provision of UNEs to further competition. AT&T also cites § 601(c) of the Act as stating that the Act may not be construed to modify, impair, or supersede state or local law unless expressly provided in the Act or any subsequent amendments to the Act. AT&T argues that U S WEST should not be able to successfully contend now that any rule authorized by state law prohibiting it from separating network elements that are already combined is somehow preempted by the Act, when it has relied on these and other sections of the Act to preserve substantial state authority.

10. AT&T argues that a state requirement that imposes a more demanding and pro-competitive requirement on U S WEST than the federal Act does not conflict with the Act, but rather, it reasonably supplements U S WEST's obligations in a manner that complements the purposes of the federal Act. Such a state requirement would only hasten accomplishment of the

Act's primary objective which is to introduce competition into local exchange markets and erode the existing monopolistic nature of the industry. AT&T asserts that the Eighth Circuit has made it abundantly clear that the federal government has a limited role and the states have a significant role in the regulation of local exchange service.

11. The Eighth Circuit did in fact emphasize the significant and substantial role of state commissions under the 1996 Act. The Court stated that § 251 does not apply to state statutes or regulations that are independent from the 1996 Act and noted further that many states had opened local telephone markets to competition prior to the 1996 Act and that § 251(d)(3) was designed to preserve such work of the states. Iowa Utils. Bd., 120 F.3d at 806-07. The Court stated,

> With subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of Part II.

Id., at 807.

12. Montana's markets have always been open to competition. Even before the 1996 Act, pro-competitive statutes had long been in effect that required interconnection and structure sharing. *See, e.g.*, 69-6-101, MCA (repealed in 1997, after Congress passed the Telecommunications Act of 1996). Moreover, the Montana Legislature adopted a pro-competitive stance before the federal Act was enacted. *See, e.g.*, §§ 69-3-801 and 69-3-809, MCA.

13. U S WEST is unwilling to allow CLECs access to its network in any manner except by collocating equipment, which the Court expressly stated CLECs are not required to do. U S WEST's proposed contract terms would require AT&T to recombine elements that it has

chosen to unbundle, without permitting AT&T access to the elements to recombine them. It has taken the Eighth Circuit rulings to an illogical extreme. U S WEST cannot have it both ways--either it permits CLECs to purchase combined elements or it permits access to its network so that CLECs can perform the combinations, without requiring collocation.[4]

14. The record in this proceeding contains no evidence from which the Commission can determine that U S WEST will fulfill its obligation to provide AT&T with access to its network. The Eighth Circuit's July 18, 1997 opinion states that a CLEC who orders UNEs "is entitled to gain access to all unbundled elements that are sufficient, when combined by the requesting carrier, to enable the requesting carrier to provide telecommunications service." Iowa Utils. Bd., 120 F.3d at 815. The Court further stated that, "The fact that the ILECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them. Id., at 813. The materials before this Commission do not support the Court's conclusion.

15. The arguments that have been made in this proceeding do not demonstrate that U S WEST is willing to permit this access. U S WEST's advocacy is that CLECs can only obtain access to UNEs by collocating equipment in each central office that a CLEC wants to provide service from. Collocating a "cage" and the accompanying cost of connecting with U S WEST's network in every central office and by every CLEC is likely to be quite costly to new

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[4]Briefing by both parties in December 1997 to address the effect of the Eighth Circuit's October 14, 1997 ruling discusses alternatives to the dilemma created in this proceeding. AT&T suggests several alternatives to physical collocation and virtual collocation; U S WEST attached recent correspondence between the parties which refers to a Single Point of Termination (SPOT) method. However, the substance of the parties' arguments for alternatives is not part of the record and cannot be considered by the Commission at this time.

entrants and perhaps to U S WEST as well. Every CLEC wishing to use UNEs will have to collocate its own equipment in each U S WEST central office serving area the CLEC wishes to serve. This will drive up the cost for CLECs to provide service in competition with the ILEC and may constitute a barrier to CLEC entry, which this Commission cannot support.

16. Not only will CLECs incur additional costs which could be avoided, U S WEST will incur costs to unbundle combinations so that the CLEC can make its own combinations. It will incur further costs to recombine elements if the CLEC's customer returns to U S WEST, as will the CLEC to unbundle the elements from its connections. It makes little economic sense to require the CLEC to invest this heavily to enter the market. The use of UNEs to gain market entry should fulfill the goals of federal and state law to encourage competition; it should not have the effect of establishing a barrier to entry for the CLECs.

17. The Commission must ensure that its decision is consistent with the goals and policies of the federal Act and Montana law. We conclude preliminarily that the agreement should set forth detailed procedures for AT&T to obtain access to unbundled elements--procedures that do not conflict with the stated purposes in the Montana Telecommunications Act (MTA) to maintain universal service availability at affordable rates and to encourage competition in all telecommunications markets. Section 69-3-802, MCA. Absent such procedures, it is reasonable to restrict U S WEST from disassembling existing UNE combinations.

18. The Eighth Circuit orders preclude a CLEC's acquisition of already combined elements at cost-based rates. The Court stated that such would "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunica-

tions retail services for resale on the other." Iowa Utils. Bd., Order on Petitions for Rehearing, 135 F.3d 535, 1997 U.S. App. LEXIS 28652, at **3-4, *amending initial decision reported at* 120 F.3d at 813 (Oct. 14, 1997). U S WEST argues this holding also confirms that forcing it to combine UNEs for AT&T at cost-based rates undermines the distinction between resale and UNE pricing created by the Act and bars the Commission from imposing a state law requirement that U S WEST combine UNEs for AT&T. U S WEST further argues that any rule that prohibits an ILEC from separating network elements that it may currently combine is contrary to § 251(c)(3) and cannot stand. Therefore, according to U S WEST, the Commission cannot invoke state law authority to take action inconsistent with § 251 because any Commission decision imposing the vacated combination requirement would conflict with the 1996 Act and is preempted by the Act.

19. We disagree. U S WEST's argument is contrary to the Eighth Circuit's holding that CLECs can provide services entirely through the ILEC's unbundled elements without owning or controlling any of their own facilities. Although the FCC's rule prohibiting the disassembling of currently combined elements has been vacated, U S WEST must provide access to its network to enable AT&T to recombine elements, and it may not do so in such a way as to discriminate against other competing providers or to create anticompetitive barriers to entry.

20. U S WEST's position is also inconsistent with its prior argument in this Docket that the Commission should permit it to charge a "rebundling charge." The Commission accepted U S WEST's argument that the price for unbundled elements should include a rebundling charge--at least until permanent prices are developed. The Eighth Circuit precludes CLECs from acquiring UNEs at cost-based rates. The rebundling charge, advocated by

U S WEST and adopted by the Commission in the Arbitration Order, ensures that AT&T will not acquire UNEs at cost-based rates. Requiring U S WEST to provide UNE combinations only if paid a rebundling charge by the CLEC is not inconsistent with the Eighth Circuit's opinion.

21. Therefore, based on the parties' representations, the applicable state and federal law as discussed above, and the Commission's analysis of the issue presented, the following adjustments to the parties' agreement should be made:

a. Definition of Combinations (Part A, p. 6, Definitions Section): The definition is not consistent with the Eighth Circuit's October 14, 1997 decision on rehearing. It should either be deleted or clarified to state that U S WEST has no obligation to combine UNEs unless it refuses to allow AT&T sufficient access to its network--consistent with this Order--to make the combinations of elements necessary to provide the service to its customers.

b. Virtual Collocation (Part A, p. 36, Section 40.2.1): U S WEST's position on combining UNEs is inconsistent with the definition of "virtual collocation," with which AT&T would have no access to the facilities to physically combine UNEs. U S WEST's proposed language denying its obligation to combine UNEs should be revised to clarify that if AT&T does not have sufficient access to virtually collocated equipment used to combine UNEs, U S WEST shall perform the combination.

c. Recitals section, fourth *Whereas* (Part A, p. 87[5]): AT&T's proposed phrase should be deleted to conform to the Eighth Circuit's decision on rehearing. For further clarity the entire phrase "separately or in any combination" should be deleted.

d. Attachment 3 (p. 1, Section 1.2.2): U S WEST's proposed language is adopted; AT&T's proposed provision is inconsistent with the Eighth Circuit's decision on rehearing. The provision should include a statement reflecting the Commission's decision that existing combinations will not be unbundled unless the parties negotiate an amendment that provides for AT&T to gain access to U S WEST's network for purposes of combining elements.

e. Attachment 3 (p. 2, Section 2.5): AT&T's proposed term relating to the demarcation point is rejected as inconsistent with the Eighth Circuit's decision on rehearing.

f. Attachment 3 (p. 4, Section 3.3): AT&T's proposed language on combinations and the reference to provision of better service than U S WEST provides itself should be deleted. U S WEST must only provide services at parity to that which it provides itself, its affiliates, or any other third party.

g. Attachment 5 (p. 17, Section 3.2.15.1): The Commission is unclear what the intent is for this provision. The "combination" language is inconsistent with the Eighth Circuits decision on rehearing and should, therefore, be deleted. The provision should include a statement reflecting the Commission's decision relating to existing combinations, which will not

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[5]This page is numbered as "87" in the second draft provided to the Commission. In the first draft, numerous references were to "Utah" instead of Montana, and the page was numbered as "2" (there were two pages numbered as "2" in the first draft).

be unbundled unless the parties negotiate an amendment that provides for AT&T to gain access to U S WEST's network for purposes of combining elements.

2. Issue No. A-2: Intellectual Property - Part A, Section 5

22. As stated by U S WEST, the dispute over intellectual property provisions involves two distinct issues related to requests made by AT&T for a service that involves the intellectual property of a third party. The two issues are: (1) which party must obtain the third party's permission for the use of that intellectual property, and (2) who should bear the responsibility if that third party refuses to grant permission to sell or sublicense its intellectual property to AT&T?

23. U S WEST's position is that AT&T should bear the burden of obtaining the permission and paying any required fees to the third party. U S WEST further contends that it should not be held responsible for damages caused by a breach of the license agreements U S WEST holds with the third party owners. U S WEST states that its proposed contract language recognizes that it is not in a position to mandate that an independent, third party owner sell its property to anyone. U S WEST further states that it has offered to facilitate any negotiations between AT&T and the third party in an effort to facilitate AT&T's use of such third party property. If the third party owner refuses to grant AT&T permission, then U S WEST believes AT&T should be responsible for any damages caused by unlawful use of the third party intellectual property. U S WEST argues it is unreasonable and unfair if AT&T insists that U S WEST provide a service even if it means violating a license agreement, and that U S WEST must then bear responsibility for all damages resulting from such violation.

24. AT&T argues that U S WEST's contract term would prohibit CLEC access to some of the most vital network elements unless and until a new entrant negotiates a separate agreement with literally dozens of third parties whose intellectual property rights could be infringed by such access. AT&T asserts that the Act's requirement in § 251(c)(3) which permits new entrants' access to ILECs' network elements, is critical to effectively opening the local exchange market to competition. AT&T alleges that U S WEST's position is an attempt to impose a potentially fatal barrier to entry by CLECs in the local exchange market.

25. AT&T also makes the following assertions, which are undisputed by U S WEST:

(a) U S WEST has not established that the mere sale of UNEs to AT&T or any other CLEC would necessarily require an amendment to U S WEST's existing licenses. The provisioning of access to UNEs, according to AT&T, likely constitutes U S WEST's own use or an internal business purpose that would not require an additional license or any additional license fee.

(b) If it is necessary to amend existing licenses, the 1996 Act obligates U S WEST to obtain amendments instead of using its existing licenses as a shield to prevent competitive entry to local markets. The requirement in § 251(c) that U S WEST provide nondiscriminatory access to network elements means that the access received by CLECs and the element itself must be at least equal in quality to that which the ILEC provides to itself. This prevents the ILEC from prospectively entering into agreements with its vendors that would preclude it from providing nondiscriminatory access to its facilities to new entrants. AT&T asserts that U S WEST has an affirmative duty to negotiate future agreements to include any provisions that might be necessary to facilitate its obligations under the Act for services. It

further argues that U S WEST's existing licenses should be treated no differently because ¶ 202 of the FCC's Interconnection Order[6] requires U S WEST to make feasible modifications to its existing facilities in order to provide nondiscriminatory access to new entrants. Therefore, the Commission should conclude that the Act imposes on U S WEST an obligation to renegotiate its license agreements to ensure that CLECs are provided with access to its network that is at least equal in quality to that which U S WEST enjoys.

(c) U S WEST's obligation to negotiate license amendments is a part of the general policy requirement that ILECs' unique economies be shared with new entrants. Interconnection Order, at ¶ 11. U S WEST by virtue of its size and large capital investment, has leverage with existing vendors so that it can reopen licenses in the ordinary course of business and achieve cost economies and efficiencies otherwise unavailable to new entrants. On the other hand, AT&T and other CLECs would be forced to negotiate for the sole purpose of securing permission to use the vendors' intellectual property, and the likely result would be fees in excess of those paid by U S WEST as part of the purchase of the equipment.

(d) The FCC's Infrastructure Sharing Order[7] is analogous to this situation. The FCC rejected a similar argument by an ILEC that sharing intellectual property must be condi-

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[6]In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, FCC 96-325, 11 F.C.C.R. 15499 (1996) (Interconnection Order), Order on Reconsideration, 11 F.C.C.R. 13042 (1996), Second Order on Reconsideration, 11 F.C.C.R. 19738 (1996), Third Order on Reconsideration, 12 F.C.C.R. 12460 (1997).

[7]In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, Report and Order, 12 F.C.C.R. 5470 (Suppl.), CC Docket No. 96-237, FCC 97-36 (Feb. 7, 1997) (Infrastructure Sharing Order).

tioned on the qualifying carrier's obtaining a license from persons having a protected interest in the property, stating that § 259(a) of the Act requires ILECs to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by the qualifying carrier for the purpose of enabling the carrier to provide telecommunications services. AT&T asserts that this order stands for the following: If the only way a CLEC such as AT&T can obtain access to U S WEST's network is to first modify the private contracts that U S WEST has with vendors, then U S WEST has the affirmative duty to seek and obtain those licenses from third parties and it is not enough for U S WEST to offer to "use reasonable efforts to facilitate" AT&T's negotiations with the vendors. AT&T argues that this Infrastructure Sharing Order is persuasive authority for requiring U S WEST to take steps, if necessary, to modify existing agreements and licenses as part of its broader duty to comply with the nondiscrimination obligations in the Act. U S WEST has every incentive to construe its existing contractual arrangements to preclude it from satisfying its obligation to provide nondiscriminatory access to UNEs.

26. AT&T's language requires each party to obtain consent of third parties if such consent is required to allow the other to use the party's respective network; this duty is appropriately the responsibility of the party who owns and operates the network. AT&T asserts that U S WEST should be ordered to obtain all necessary licenses from third parties, both prospectively and for existing agreements, so that AT&T can use U S WEST's facilities.

27. This issue is particularly difficult to resolve because the Commission has no information about the contents of U S WEST's existing intellectual property agreements. The record is devoid of information to shed light on what may actually be involved in obtaining

modifications or sublicenses to U S WEST's existing agreements, whether any such modifications or sublicenses are in fact necessary, and what obstacles may be present that prevent either U S WEST or AT&T from negotiating required changes. Further, there is no evidence that quantifies the number of sublicenses required or separate agreements that may have to be modified.

28. The issue is further complicated by U S WEST's refusal to grant AT&T any access to its network. See Issue No. A-1 above which discusses combination of elements. Added to that is the lack of legal precedent to guide our decision. The Commission's resolution of this issue must consider not only AT&T, but also other CLECs who may adopt AT&T's interconnection agreement as their own. Further, the Commission's decision may affect other CLECs who negotiate their own agreements with U S WEST. Finally, we have no record evidence or other source from which to conclude that access to unbundled elements as contemplated by the 1996 Act can be classed as anything other than U S WEST's own use of third party intellectual property.

29. Given this lack of evidentiary and noticeable material, the Commission concludes that its decision should be based on the pro-competitive policies set forth in Montana and federal law. The Commission concludes that U S WEST has not made a persuasive argument to support its position. U S WEST's proposed contract language states that U S WEST will "use reasonable efforts to provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party, and, to the extent necessary, use reasonable efforts to facilitate the negotiation of any necessary licenses." The record is bare as to whether U S WEST has taken any steps to facilitate negotiations for AT&T or any other CLEC.

30. The Commission has approved nearly thirty interconnection agreements to date. Rarely a week goes by without at least one filing for approval of an agreement between U S WEST and another party--for resale, for unbundled elements, for facilities interconnection, or a combination of the three. There is no indication that this will slow down; rather, although anecdotal, Commission staff has had indications that there are a number of new entrants who are either in the process of negotiating agreements with U S WEST, or are waiting for this AT&T contract to become effective so they can adopt it as their own.

31. For Montana agreements alone, third party vendors could be inundated with requests for licenses. These licenses would likely be different than the licenses U S WEST obtains for itself as the owner of the network facilities. The CLECs may need to be privy to U S WEST's agreements so they can understand what it is they need to have a license to use. It would seem much simpler and more efficient for U S WEST to negotiate these sublicenses so that all CLECs are covered by them. Therefore, the Commission rejects U S WEST's proposed Section 5.3.

32. From that conclusion, it seems the logical next step is to require U S WEST to bear the cost of obtaining these sublicenses for CLECs because to require payment of AT&T and/or other CLECs who have already executed agreements with U S WEST for interconnection would place an unproportionate share of costs on these CLECs. The Commission rejects U S WEST's contract Section 5.2, which would have required CLECs to obtain a license or permission for access or use of intellectual property, to make all payment to obtain the license, and to provide evidence of the license.

33. The Commission accepts AT&T's proposed language in the last sentence of its proposed Section 5.1 as a preferable alternative to U S WEST's Sections 5.2 and 5.3. The Commission also accepts other language in AT&T's proposed Section 5.1, which is similar to that of U S WEST's Section 5.4. The deleted language in AT&T's 5.1 appears to allow a party to unilaterally determine when the other party can grant non-exclusive languages; U S WEST's correlative language would permit a party to treat the intellectual property as if it were not joint property. The Commission has received no evidence or briefing on either party's position relating to use of jointly-owned intellectual property.

34. Not all language in these proposed clauses is accepted, however, and corrections should be made as shown below. The Commission has rejected and accepted certain parts of the parties' several sections on intellectual property. Because of the way they are drafted, it is not possible to accept either party's sections in full. The first two sentences and the last sentence in AT&T's Section 5.1, accepted by the Commission, should read as follows:

> 5.1 Any intellectual property jointly developed in the course of performing this Agreement shall belong to both Parties ~~who shall have the right to grant non-exclusive licenses to third parties except as otherwise designated in writing by one Party to another.~~ Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. ~~Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property presently or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.~~ It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third parties used in its network that may be required to enable the other party to use