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September 25, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Office of the Secretary
1919 M. Street, NW Room 200
Washington, DC 20554

Re: Ex parte - CC Docket No. 96-98, CCBPol 97-4
Petition of MCI for Declaratory Ruling That New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Network Elements

Dear Ms. Salas:

On September 24, 1998, Roy Hoffinger, of AT&T, Peter Keisler, of Sidley & Austin, and I met with Carol Mattey, Michael Pryor, Jake Jennings, David Kirschner, and Tonya Rutherford of the Common Carrier Bureau. AT&T reviewed its position of record in this proceeding with an emphasis on the current impacts on AT&T's business plans of the lack of certainty regarding the issues raised in MCI's petition, including a discussion of the number of potential vendors and intellectual property agreements affected by the issue raised in this proceeding. AT&T reviewed the law and prior Commission decisions that support AT&T's position and explained why questions that have been raised in opposition to AT&T's position are meritless. The enclosed provides a summary of the issues discussed by AT&T.

Also enclosed are copies of two recent decisions by the Montana Public Service Commission on this issue. Significantly, the Montana Commission, relying on the Commission's Infrastructure Sharing Order, concluded that "[i]t is the responsibility" of the ILEC to "obtain[] any necessary licenses in relation to intellectual property of third parties ... that may be required to enable the [new entrants] to receive any facilities or equipment" pursuant to their

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arbitrated agreement. Likewise, the Department of Justice, in its evaluation of the SBC 271 Application for Oklahoma (copy of the relevant pages enclosed), noted that "the Commission has already articulated procedures by which an ILEC, CLEC, and a third party vendor could work together ... to assure that the vendor's rights are protected and that the CLEC gets the nondiscriminatory access required under the Act."

Two copies of this Notice are being submitted to the Secretary of the Commission in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Very truly yours,

Albert M. Lewis

Enclosures
cc: Ms. C. Mattey
Mr. M. Pryor
Mr. J. Jennings
Mr. D. Kirschner
Ms. T. Rutherford

CC Docket No. 96-98, CCBPol 97-4
CC Docket No. 96-237

Intellectual Property Claims, Unbundled Network Elements, and Infrastructure Sharing

The central question in these proceedings is whether an ILEC may evade its statutory obligations by procuring or accepting contract language with third parties that it claims permits or requires it to engage in conduct that the Act forbids.

I. INTELLECTUAL PROPERTY LICENSES OBTAINED BY ILECS CANNOT DISCRIMINATE AGAINST CLECS PURCHASING ACCESS TO UNBUNDLED NETWORK ELEMENTS.

- Under § 251, the ILECs have the explicit obligation to provide nondiscriminatory access to the elements of their network. As the Commission concluded in the Local Competition Order, nondiscriminatory access to those elements is necessary for meaningful local competition to develop,[1] and the prospect of vigorous UNE-based competition is the linchpin of the Commission's access charge reform order.[2]

- It would be the very essence of discrimination for an ILEC to procure or accept contract language in its licensing agreements that permits it to use its network elements in certain ways while denying to CLECs access to those same functionalities.

- As noted by the Department of Justice, "the Commission has already articulated procedures by which an ILEC, CLEC, and third party vendor could work together . . . to assure that the vendor's rights are protected and that the CLEC gets the nondiscriminatory access required under the Act." Evaluation of US Department

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[1] See Local Competition Order, ¶ 388 (loop); id., ¶ 393 (network interface device); id., ¶ 419 (switch); id., ¶ 425 (tandem switch); id., ¶ 446 (interoffice facilities); id., ¶ 481 (signaling links and STPs); id., ¶ 490 (call-related databases); id., ¶¶ 493, 497, 499 (service management system for AIN); id., ¶ 521 (operations support systems); id., ¶ 538 (operator call completion services and directory assistance). Nothing in the decision of the Court of Appeals in Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir., filed July 18, 1997), provides any basis to preclude the Commission from deciding the intellectual property issues under Sections 259 and 251(c) of the Act. Section 259 expressly requires the Commission to establish rules under that section. As the Court of Appeals held with respect to section 251(c), moreover, the Act authorizes Commission rules regarding the definition of unbundled network elements, and the Commission therefore has ample authority to clarify that network elements include the embedded intellectual property that provides their functionality.

[2] First Report and Order, Access Charge Reform, CC Docket No. 96-262 et al. (released May 16, 1997).

of Justice, SBC 271 Application for Oklahoma, pp. 65-66 (May 16, 1997) (citing Infrastructure Sharing Order).

- In light of the clearly discriminatory effect that the ILECs' proposal would have, it is no surprise that their comments on MCI's Petition for Declaratory Ruling in CCBPol. 97-4 make virtually no attempt to reconcile their position with their nondiscrimination obligations.

  * The exception is SBC, but its attempt is frivolous. SBC argues that there is nothing discriminatory about requiring CLECs to secure their own licenses because ILECs had to do so as well.

    o Foremost, SBC's argument refuses to confront what it means to provide "nondiscriminatory" access. As the Commission held in its Local Competition Order, the Act's requirement that an ILEC provide "nondiscriminatory" access to the elements of its network means that the ILEC must provide access to the CLEC that is at least equal in quality to that which the ILEC provides to itself -- and that thus enables the CLEC to use the ILEC's network in the same ways that the ILEC can -- so as to ensure that the CLEC obtains full benefit of the ILEC's economies of scale. See Local Competition Order, ¶¶ 11, 312. This requirement obviously is not satisfied if the ILEC negotiates contractual arrangements that purport to permit it to utilize capabilities in its network to which CLECs are denied access.

    o Moreover, the suggestion that ILECs and CLECs are somehow equally positioned in this matter is refuted by the obvious facts. CLECs would be forced to seek these licenses in a substantially disadvantaged position.

      ♦ Whereas the ILECs had a choice among numerous vendors at the time they purchased their network hardware and software, and therefore paid a presumptively competitive price, CLECs will have no choice but to deal with the vendor whom the ILEC had previously selected, and will thus almost certainly be required to pay more for the same rights than the ILEC.

        This point is effectively conceded by BellSouth's claim in its reconsideration petition in the Infrastructure Sharing docket

that vendors would take advantage of any obligation on BellSouth's part to negotiate amendments by charging exorbitant rates. What BellSouth ignores is that if those vendors would extort high fees from BellSouth (their existing and often longstanding customer) they will have even more of an incentive to do so when negotiating with CLECs. Further, BellSouth is able to spread those higher costs through the UNE prices, while CLECs would have to bear those added costs alone if they were required to negotiate the license agreements themselves. This would create an additional element of discrimination, and would fail any test of competitive neutrality.

- As a party to the license agreement, the ILEC is in a considerably better position than the CLEC in assessing whether in fact any amendments are necessary. That is not only because the ILEC already has ready access to each agreement, but also because a license, like any other contract, is generally construed in accordance with the intent of the parties.[3] See p. 6, infra. At a minimum, it would take much longer for a CLEC to negotiate amendments than an ILEC, and impose far greater costs on the CLEC.

o SBC also claims that CLECs can avoid the necessity of negotiating deals as captive customers of the ILECs' vendors by choosing instead to build their own facilities. But the whole point of Section 251(c)(3) is that building redundant networks will often be completely uneconomical, and that is why Congress gave CLECs the right to obtain network elements from the ILECs on a nondiscriminatory basis.

The only resolution of this issue that creates the proper incentives to ensure the rapid and efficient development of local competition is the rule that the Commission adopted in the Infrastructure

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[3] See Affidavit of Richard L. Bernacchi, ¶ 12, Appended to Reply Comments of AT&T Corp., Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

Sharing Order: i.e., in those cases in which a license must actually be amended in order to enable an ILEC to provide nondiscriminatory access, it is the duty of the ILEC to "seek" and "obtain" such license amendment in order to comply with its statutory obligations. Report and Order, ¶ 69, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237 (released February 7, 1997). Indeed, it would be arbitrary and capricious for the Commission to adopt two conflicting rules, one under section 251 and the other under section 259, when there is no material difference in the two situations that would justify such a distinction. FERC v. Triton Oil and Gas Corp., 750 F.2d 113, 116 (D.C. Cir. 1984).

II. ILEC CLAIMS THAT APPLICATION OF THESE NONDISCRIMINATION REQUIREMENTS IS "UNWORKABLE" ARE MERITLESS.

- Some of the ILECs, particularly SBC, claim that this resolution is unworkable because it would require an ILEC "to purchase all potential rights for all potential users with respect to all network elements,"[4] and would require CLECs to disclose to ILECs their business plans.[5] That claim is baseless.

  * For the most part, CLECs are seeking access to features and functionalities of the ILECs' networks that the ILECs themselves are permitted to access today under their licenses. In such cases, if an ILEC believes that its licenses prohibit it to comply with its access obligations, the ILEC would need do no more than seek a modification that would extend whatever rights the ILEC currently enjoys to CLECs. Thus, ILECs will need know nothing about a CLEC's business plans in order to satisfy this obligation, and there should be little difficulty in negotiating an amendment which does no more in effect than add the CLEC as a beneficiary to the license.

  * In the event that a CLEC wishes to use an element in an innovative manner not covered by an existing license, the CLEC would have the option of seeking to have the ILEC negotiate on its behalf and sharing any necessary information with the ILEC, or approaching the vendors directly.[6]

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[4] See SBC Reply Comments, p. 14, Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

[5] Id., p. 13.

[6] Should a dispute arise between an ILEC and a CLEC as to whether an existing license would cover a CLEC's innovative use of an element, or should it be necessary in order for a CLEC to negotiate its own license for such an innovative use, the Commission should make clear that the ILEC must share the contract with the CLEC, subject to an appropriate non-disclosure

(continued...)

- The ILECs' claim that the principles adopted in the Section 259 proceeding would, if reaffirmed under Section 251, amount to an "expropriation" of vendors' rights, is likewise baseless. Vendors would receive fair compensation that would be determined in negotiations between them and their existing customers, and the only licenses and license amendments adopted would be those to which the vendors agree.

- Nor is it the case that applying the nondiscrimination requirement to network elements that include intellectual property would create incentives on the ILECs' part to negotiate disadvantageous terms and prices for the modified licenses. Intellectual property licenses are not materially different from the many other ILEC assets (e.g., land, equipment) that are inputs to its network and that must be shared with CLECs. To satisfy the Act's requirement that "rates" for UNEs be "just, reasonable and nondiscriminatory," those costs must be shared by all carriers who obtain access to the element, including the incumbent. See generally Local Competition Order, para. 743 (noting that objective of Act is to ensure that costs incurred by CLECs using ILEC facilities should be "similar to those incurred by incumbents"); id., para. 755 (costs for shared facilities "should be recovered in a manner that efficiently apportions costs among users"). This means that any licensing fees that the ILEC would negotiate would be imposed on the ILEC as well, thus giving it every incentive to negotiate reasonable terms.

  * ILECs may have incentives to delay necessary negotiations, but that is no different in kind from the many other respects in which ILECs can slow-roll the process of providing UNEs to competitors. These are risks CLECs face in many contexts, and enforcement measures and the incentives created by Section 271 will be no less (or more) effective in this instance than in any other. ILECs would, of course, be subject to both state and federal regulatory complaint proceedings for damages for failure expeditiously to comply with their legal obligations.

III. THE ALTERNATIVE APPROACHES PROPOSED BY THE ILECS WOULD NEITHER COMPLY WITH THE ACT NOR PROMOTE LOCAL COMPETITION.

- Requiring CLECs to negotiate necessary amendments, subject to some "strict burden of proof" by the ILEC that an amendment is necessary, would not be a workable alternative. To begin with, this rule would condemn each CLEC to

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[6] (...continued)
agreement. Lucent Technologies, for one, has stated it would not oppose such disclosures. See Reply Comments of Lucent Technologies, pp. 12-13, Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

endless litigation with the ILEC over the scope of each of the numerous licenses claimed to be necessary (77 separate licenses from 36 vendors in Texas alone, according to SWBT). Such delay would itself constitute the impediment to competitive entry that the Commission's policies must avoid, and would encourage the ILECs to make numerous such claims. More fundamentally, an interpretation of these licenses by the Commission would not necessarily bind the vendors and would thus do nothing to address the ILECs' purported concerns, or the legitimate needs of CLECs to obtain access to network elements free of the prospect of future liability.

- The proposal advocated by the ILECs, which would require each CLEC to separately negotiate its own licensing agreement with each of the ILECs' numerous vendors as a precondition to obtaining access to any of the ILECs' network elements, would create two sets of perverse incentives, each of which would harm and delay competitive entry:

  * The ILECs' proposal would create the incentive for the ILEC to construe its existing licensing agreements as narrowly as possible, thereby relegating competitors to the process of negotiating amendments with the vendors before obtaining desired and necessary network elements. See p. 3, supra. That incentive was vividly illustrated in the comments filed on MCI's Petition for Declaratory Ruling, where both Lucent and Nortel confirmed that in the ordinary course no license amendments would be necessary to enable an ILEC to provide access to network elements while SBC claimed that the restrictions under which it operated were far greater. It is unusual, to say the least, for licensees to construe their licensors' rights more broadly than the licensors themselves. Equally problematically, ILECs would then have the incentive to amend their existing licenses, and to negotiate future licenses, in ways that make it explicit and unambiguous that access to competitors is forbidden.

  * For the reasons discussed above, the ILECs' proposal would also give vendors the incentive -- and ability -- to drastically raise the prices they otherwise would charge customers in a competitive market for their licensing fees. The result of this incentive would be to dramatically increase the cost of UNE-based entry, thus thwarting Congress' intent with regard to local competition while at the same time fatally undermining the Commission's approach to access charge reform -- an approach which is critically dependent on meaningful UNE-based competition.

- The ILECs' insistence that each CLEC negotiate its own separate license would not only impede entry into the market for basic services, but would create an insurmountable obstacle to entry in the advanced services market as well. If the

Commission's ongoing effort in CC docket 98-147, et al., to ensure the availability of UNEs for the provision of advanced services is to produce any beneficial consequences, a correct resolution of the ILECs' obligations to secure any necessary license modifications is vital.

* Relatedly, unless the Commission correctly resolves this issue it will be impossible to ensure that any LEC advanced services affiliate that the Commission might approve will be similarly situated to CLECs in terms of access to UNEs. That is because the ILECs would undoubtedly claim in that eventuality that their existing licenses already covered uses by the ILECs' affiliates, whereas CLECs would need to incur the additional expense of securing their own licenses.

IV. CONTRARY TO THE CLAIMS MADE BY SOME ILECS, THE COMMISSION'S INFRASTRUCTURE SHARING ORDER IS NOT DISTINGUISHABLE.

- Although "qualifying carriers" under section 259 are those that lack economies of scale, no CLEC enjoys such economies when it comes to the provision of local exchange services. Indeed, the Commission's local competition order makes clear that the primary purpose of section 251(d)(3) was precisely to ensure that CLECs would obtain access to the ILECs' economies of scale and scope. Local Competition Order, ¶ 11. Furthermore, any decision the Commission makes under Section 251 will apply to small CLECs as well as large ones.

  * If anything, the ILECs' obligations under section 251 are greater than those under section 259. That is because section 251, unlike section 259, includes the additional statutory requirement that access be "nondiscriminatory." Moreover, because ILECs will have incentives to thwart competition, the Commission's approach under section 259 is all the more necessary and appropriate under section 251, for otherwise ILECs will be rewarded for structuring their licenses in ways that exclude access to competitors.[7]

    o Although section 251(d) requires the Commission to "consider" whether access to any "proprietary" network element is "necessary," the Commission has already affirmatively found that access to all of the UNEs that it specified in the Local Competition

[7] In this regard, the Commission's Infrastructure Sharing Order makes clear that "qualifying carriers" as defined in section 259 may choose to proceed either by negotiation under section 259 or arbitrations under section 251 and 252. It is thus not the case that the duties imposed under section 251 apply only to carriers seeking to compete with the ILEC.

Order are in fact necessary for competition to be possible. See supra p. 1 n.1.

* It is thus no surprise that the Montana PSC recently relied on the Infrastructure Sharing Order in concluding that "[i]t is the responsibility" of the ILEC to "obtain[] any necessary licenses in relation to intellectual property of third parties . . . that may be required to enable the [new entrants] to receive any facilities or equipment" pursuant to their arbitrated agreement.[8]

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[8] Order on Supplemental Disputed Issues, p. 20, Petition of AT&T Communications of the Mountain States, Inc., Utility Division, Docket No. D96.11.200, Order No. 5961d (Montana PSC, released April 30, 1998).

would be affected by the sale of an unbundled network element functionality.[83] But whether there are such rights or not, SBC's use of the claim of such rights to place burdens on parties seeking access to unbundled elements has unreasonable consequences, potentially delaying and increasing the expense of entry. The Commission has already articulated procedures, in its Order implementing the infrastructure sharing obligations imposed by Section 259 of the Act,[84] by which an ILEC, CLEC, and third party vendor could work together, in the case of legitimate third-party claims of intellectual property rights, to assure that the vendor's rights are protected and that the CLEC gets the non-discriminatory access required under the Act. The Commission has stated, "[i]n the ordinary course . . . . we fully anticipate that such licensing will not be necessary," Infrastructure Sharing Order ¶69, but that in any event, the providing incumbent LEC

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[83]Pelto Aff. ¶¶ 30-34. AT&T presents arguments which support the view that, because most intellectual property rights are extinguished with the first sale of the product containing the intellectual property, and given that, in providing the unbundled elements the ILEC never relinquishes control of the element, it is unlikely that any real violations of a third party's intellectual property rights are at issue. AT&T and MCI have both challenged the legality of SBC's position requiring interconnectors to secure intellectual property licences from third party vendors under the Act. AT&T has challenged this requirement in federal district court in Texas. AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Co. and the Commissioners of the Public Utility Commission of Texas, Civ. Action No. A 97CA 029 (W.D. Tex. filed Jan. 10, 1997). MCI has filed a Petition for a Declaratory Ruling at the Commission. In the Matter of Petition of MCI for Declaratory Ruling, CCBPol 97-4, (filed Mar. 11, 1997). Various vendors have raised doubts about the applicability of third-party licensing rights to unbundled elements in most situations where the CLEC is not using the unbundled elements in a different manner than the ILEC . See, e.g., Comments of Northern Telecom Inc., In the Matter of Petition of MCI for Declaratory Ruling, CC Docket No. 96-98, CCBPol 97-4, at 5-6 (filed Apr. 15, 1997); Comments of Lucent Technologies Inc., CCB Pol 97-4, at 2 (Apr. 15, 1997).

[84] Report and Order, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, ("Infrastructure Sharing Order"), CC Docket 96-237 (rel. Feb. 7, 1997).

must not impose "inappropriate burdens on qualifying carriers," and if a license is required, "the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." Id. ¶ 70. SBC's handling of this issue, in contrast, puts the burdens and the risk on the CLEC seeking to use its unbundled elements. Pelto Aff., ¶¶ 8-12.

At this time, given the lack of competition in Oklahoma and the various obstacles SBC has placed in the path of competitive entry, SBC's in-region interLATA entry in Oklahoma would not be consistent with the public interest.

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

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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-