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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 28, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

RE: CC Docket 96-98
CCB/CPD File No. 97-24
Metrocall, Inc. v. Bell South Telecommunications Inc., et al.,
File Nos. E-98-14-E-98-18
TSR Wireless LLC v. U S West Communications, Inc.,
File No. E-98-13

Dear Ms. Salas:

On Monday, September 27 1999, Jeff Brueggeman, Sheryl Fraser and the undersigned representing US WEST, met with Sarah Whitesell, Rebecca Beynon and Adam Krinsky. The purpose of the meeting was to discuss paging interconnection issues and the FCC's role and rules concerning this process. US WEST is submitting its presentation, and a "white paper" entitled Paging/LEC Interconnections: The FCC's Role and Rules, which supports the presentation with additional information and supporting citations.

Upon further review of the Federal Communications Commission 's February 11, 1999, Public Notice, which set forth limited "permit-but-disclose" procedures for certain formal paging complaints, including the complaints referenced in the captioned proceedings noted above, we believe that Public Notice could be read to require disclosures of this presentation in those proceedings. Public Notice, 13 FCC Rcd. 2866 (1998). Therefore, we are filing the notification of this presentation in those proceedings as well. We note, however, that this presentation to the staff of the Common Carrier Bureau did not in any way address these specific complaint proceedings.

In accordance with Section 1.1206(b)(1) of the Commission's Rules and Regulations, the original and three copies of this letter, US WEST's presentation, and the "white paper", are being filed with your office for inclusion in the public record for the above-captioned proceedings.

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Acknowledgment of the date of receipt of this transmittal is requested. A duplicate of this letter is provided for this purpose.

Please contact me if you have any questions.

Sincerely,

Melissa Newman /EB

Melissa Newman

cc: Sarah Whitesell
Rebecca Beynon
Adam Krinsky

LEC/PAGING INTERCONNECTION: THE FCC'S ROLE AND RULES

U. S. WEST, Inc.
Ex Parte
September 27, 1999

Melissa Newman
Jeffry Brueggeman
Sheryl Fraser

**LEC/PAGING INTERCONNECTION:
THE FCC'S ROLE AND RULES**

Introduction

- The FCC has the opportunity and the obligation to revisit and finally resolve LEC/paging interconnection issues.

  This opportunity is presented by the AT&T Corp. v. Iowa Utilities Board decision, which clarified the Commission's jurisdiction and role in the interconnection process.

  This obligation is a consequence of the long-standing LEC/paging industry impasse -- evidenced by comparatively few agreements, widely varying arbitration decisions, and the lengthening period of time since the filing of the challenges to the Local Competition Order and the Metzger letter.

- Substantive and procedural issues are of nearly co-equal importance in resolving this paging interconnection impasse.

  The FCC should affirm that the 252 negotiation/arbitration process must be used to reach interconnection agreements, not the section 208 complaint process.

  Allowing paging providers to obtain "free facilities" interconnection in the absence of a negotiated or arbitrated agreement would discourage private settlements and undermine the Act.

- It is fundamentally unfair to require that LECs shoulder the entire cost of LEC/paging interconnection (i.e., free facilities and terminating compensation).

  The FCC's current rules create an unauthorized and economically inefficient subsidy flowing from LECs and local ratepayers to paging providers.

  The FCC should adopt rules that are economically reasonable, and which allow mutually beneficial interconnection agreements.

U S WEST Has A Strong Desire To Reach Agreements, But The Current Framework Acts As A Disincentive For Paging Providers To Negotiate

- U S WEST has entered into interconnection agreements with almost every two-way CMRS carrier, but with fewer than 20 paging providers.

  Many paging providers simply have demanded free dedicated facilities and withheld payment for dedicated facilities ordered pursuant to state tariffs. They have refused to negotiate interconnection agreements that will define scope of the "free facilities" obligation.

  U S WEST's interconnection negotiations with large paging providers have proceeded slowly, and U S WEST recently has been compelled to file arbitration petitions.

- U S WEST has attempted to be flexible in its negotiations with paging providers.

  U S WEST's standard LEC/paging interconnection settlement offer provides for free interconnection facilities <u>and</u> terminating compensation.

  U S WEST does not raise the basic "entitlement" issue in settlement negotiations with paging providers, but it reserves the right to raise any legal argument in arbitration

- The three-year deadlock is the result of strong disagreement over the process for reaching LEC/paging interconnection agreements and the carrier-specific elements of these agreements (e.g., transit factor and points of interconnection).

The FCC Should Affirm That The Specific Elements Of LEC/Paging Interconnection Arrangements Must Be Established Through The Section 252 Negotiation/Arbitration Process

- The Commission should not mandate "free facilities" for paging providers in the absence of an interconnection agreement. "Free facilities" is an undefineable concept in the absence of an individual interconnection agreement.

    Allowing paging providers to end-run the section 252 process by demanding section 251 relief directly from the Commission would undermine the negotiation/arbitration process established by Congress.

    The provisioning of free facilities is inextricably linked to key interconnection issues such as ordering and provisioning procedures, the appropriate points of interconnection, and the amount of transit and enhanced services traffic carried over the facilities.

- The Commission should not attempt to establish LEC/paging interconnection policies piecemeal through the section 208 complaint process.

    Relying on the section 252 negotiation/arbitration process will promote private negotiations and settlement, as Congress intended.

    Attempting to establish interconnection policies through the section 208 decision would leave many complex, fact-specific interconnection issues still unresolved, and it would burden the Commission with future interconnection complaints.

The FCC Should Not Require Reciprocal Compensation For One-Way Paging Traffic

- The Commission's current rules create a one-way stream of payments that is entirely at odds with the economics of paging.

  Traditional two-way interconnection assumptions about the "originating carrier as cost-causer" do not apply here. As the Colorado PUC stated, "a paging service exists for one reason only, namely, to enable paging customers to be contacted by specific individuals to whom the number has been given. It is the provider of paging service, therefore, who is the cost-causer."

  One-way paging traffic tends to increase, not decrease, LECs' transport and termination costs. Because almost all local service is flat-rated, LECs cannot recover these additional costs.

- A significant problem for U S WEST, given its largely rural territory, are the demands of paging companies for free foreign exchange or ("FX") facilities.

  FX facilities enhance the marketing ability of paging providers by giving them a local presence in distant areas so that a person calling their paging customer does not pay toll charges.

  In U S WEST's territory, FX facilities may extend for hundreds of miles. Some statistics. Out of 5.966 Type 1 trunks provided by U S WEST, 3.148 {or 53%) are FX trunks. (Note that many paging companies order multiple trunks covering the same route). Of the 3,148 FX trunks:

  -57 trunks are over 200 miles longs, with the longest being 268 miles;
  -180 trunks (or 6%) are over 100 miles long;
  -660 trunks (or 21%) are over 50 miles long;
  -1436 trunks (or 46%) are over 25 miles long; and
  -1997 trunks (or 63%) are over 10 miles long.

The FCC's Current Rules Force LECs And Their Customers To Subsidize Paging Providers And Effect An Unconstitutional Taking

- Requiring LECs to pay the entire cost of one-way paging interconnection arrangements creates a new subsidy flowing from LECs and local ratepayers to paging providers.

- As the Colorado PUC noted, paying terminating compensation to paging providers causes a number of economic inefficiencies, such as overinvestment in paging-related facilities, prices possibly set below incremental cost, and cross-subsidization of customers who call pagers by those who do not.

- The legislative history of section 251(b)(5) demonstrates that Congress did not intend to require LECs to pay reciprocal compensation to one-way paging providers at all. As the Conference Report makes clear, section 251(b)(3) was seen as being "integral to a competing provider seeking to offer <u>local exchange service</u> over its own facilities," not as necessary to foster competition for paging services.

- Requiring LECs to construct and provide extensive dedicated facilities for paging providers at no cost and with no opportunity to recover costs (other than for carrying transit traffic) effects a taking of LEC property without just compensation in violation of the Fifth Amendment.

What The Commission Should And Should Not Do To Resolve The LEC/Paging Interconnection Impasse

- In order to resolve the longstanding LEC/paging interconnection impasse, the Commission should:

  Address the pending challenges to the Local Competition Order and the Metzger letter;

  Declare that the terms of LEC/paging interconnection – including the scope of the "free facilities" obligation – must be established through the section 252 negotiation/arbitration process;

  Reverse its decision to extend reciprocal compensation provisions intended for two-way traffic to one-way paging traffic; and

  Allow LECs and paging providers to develop economically rational interconnection agreements that fairly divide the costs and benefits of interconnection.

- The Commission should not attempt to establish LEC/paging interconnection policies piecemeal through the section 208 complaint process. To do so would:

  Undercut the Act's negotiation/arbitration process;

  Conflict with existing state commission decisions;

  Leave many complex, fact-specific interconnections issues still unresolved; and

  Burden the Commission with future interconnection complaints.

LEC/PAGING INTERCONNECTION: THE FCC's ROLE AND RULES

U S WEST, INC.

July 8, 1999

Kenneth T. Cartmell
Jeff Brueggeman

PAGING/LEC INTERCONNECTION:
THE FCC'S ROLE AND RULES

The *AT&T Corp. v. Iowa Utilities Board*[1] decision provides the Commission with an important opportunity to revisit and finally resolve the myriad complex paging interconnection issues that have been the subject of controversy for several years. In light of that decision, the Commission must clarify several questions with respect to the reach of its jurisdiction on paging/LEC interconnection disputes. Furthermore, to the extent the Commission proceeds to issue rules to guide state commissions regarding such interconnection, the Commission's rules should recognize the fundamental economic differences between one-way paging service (which is a *complement to* local exchange service) and two-way CMRS and wireline services (which can be *substitutes for* local exchange service). The Commission should clarify the distinct obligations and policies that apply to the former. In sum, the Commission should begin to cut through the murky disputes that have clouded this issue in the past and adopt a simple, common sense regulatory approach that (1) embraces the plain language of the 1996 Act, (2) maintains the primacy of the section 252 negotiation process established by Congress, and (3) permits LECs and paging providers to negotiate interconnection arrangements that are economically reasonable and mutually beneficial.

THE FCC'S ROLE

The Commission should affirmatively declare that the terms of LEC/paging interconnection arrangements must be established through the Act's section 252 state-based negotiation/arbitration process, just as they are for two-way interconnection.

In *AT&T v. Iowa Utilities Board*, the Supreme Court held that section 201(b) gives the Commission general authority to issue regulations to implement all sections of the Communications Act, including section 251.[2] Nothing in that decision, however, suggests that the Commission also has authority to adjudicate disputes under section 251 or that the obligations of section 251 are enforceable outside the context of the section 252 negotiation process. Indeed, as discussed below, allowing parties to end-run the section 252 process by demanding section 251 relief directly from the Commission would undermine the state negotiation and arbitration process established by Congress. Thus, as the Commission considers its proper role regarding LEC/paging interconnection, it should state affirmatively that LECs and paging providers must reach their terms for interconnection pursuant to the section 252 state-based process, just as LECs and CLECs do.

As noted, the Supreme Court's recent decision makes clear that the Commission has *rulemaking* authority to implement section 251.[3] The Commission, however, does not have adjudicatory or enforcement authority with respect to that section: Congress vested *that* authority entirely with the states. Although section 208 grants the Commission general authority to investigate and adjudicate alleged violations of the Act, other provisions of the Act can override such authority in particular contexts. In *Iowa Utilities*, for example, the Supreme Court recognized that, although the Commission has general authority under section 201(b) to promulgate regulations to implement the Act, other provisions of the 1996 Act could "negate particular aspects of the Commission's implementing authority."[4]

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[1] 119 S. Ct. 721 (1999).

[2] *Id.* at 729-32.

[3] *Id.* at 730 ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252 . . . .").

[4] *Id.* at 732.

Section 252 does precisely that with respect to the Commission's authority under section 208 to resolve disputes concerning the terms of interconnection agreements: It establishes a comprehensive state-based adjudicatory procedure that displaces equivalent Commission authority over section 251 interconnection disputes and agreements. The intricate section 252 process assigns to the states the task of adjudicating disputes about the appropriate terms of interconnection agreements. As the Supreme Court stated, "The 1996 Act entrusts *state commissions* with the job of approving interconnection agreements."[5] The states, of course, are legally bound to follow the Act and the Commission's regulations,[6] and the states' decisions are subject to review in the federal courts.[7] Section 252, however, mentions no role for the Commission with respect to individual interconnection agreements, save for the rare case where a state commission has refused to act.[8]

The Commission itself has acknowledged the appropriate division of labor between it and the states. In its brief to the Supreme Court, the Commission noted that Congress, "in assigning authority to implement the terms of Sections 251 and 252, . . . divided responsibility between the FCC and the state commissions along the lines of *legislative* and *adjudicatory* function."[9] Now that the Supreme Court has affirmed the Commission's authority to *legislate* interconnection regulations, the Commission should assume that role and, in so doing, should affirm the states' corresponding authority to *adjudicate* interconnection disputes. In part, this obliges the Commission to state plainly and clearly that it will not establish the terms of interconnection agreements through the section 208 complaint process.

That Congress would leave the Commission out of the adjudicatory process should not be surprising, considering that such dual state/Commission authority would create inevitable jurisdictional conflicts. If, for example, the Commission had authority to review and modify the specific terms of state-approved individual interconnection agreements, it would be unclear whether an appeal would go to the federal district courts or to the courts of appeal. It also is unclear how Commission involvement in specific interconnection disputes in place of, or prior to, the section 252 process would affect parties' statutory rights to state arbitration: For example, it would be unclear whether, on petition for subsequent arbitration by one of the parties, a state agency could revisit specific individual interconnection terms dictated by the Commission.

Moreover, the decision to leave adjudication to the states makes sense because the Commission, though well-suited to determine industry-wide guidelines, should not be expending scarce resources to determine the practical details of any number of individual interconnection agreements. That is precisely where local authority is more informed and most essential. As two recent paging interconnection decisions demonstrate, interconnection between a LEC and a paging provider is inherently a fact-intensive and case-specific matter.[10] In those decisions, the state regulators concluded that the

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[5]*Id.* at 733 (emphasis added); *see also* 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation . . . to cooperate with the *State commission* in carrying out its function as an arbitrator shall be considered a failure to negotiate in good faith.") (emphasis added); *id.* § 252(e) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the *State commission*.") (emphasis added); *id.* § 252(f)(1) ("A Bell Operating Company may prepare and file with a *State commission* a statement of the terms and conditions that such company generally offers within that state.").

[6]*See id.* § 252(c)(1).

[7]*See id.* § 252(e)(6).

[8]*See id.* § 252(e)(5).

[9]Opening Brief for the Federal Petitioners at 37, *FCC v. Iowa Utilities Bd.*, No. 97-831 (U.S. Apr. 1998) (emphasis added) (original emphasis omitted).

[10]*See Petition of AirTouch Paging, Inc., for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc. Pursuant to 47 U.S.C. § 252*, Docket No. 99A-001T, Decision Regarding Petition for

Commission's precedent as currently developed requires LECs to pay compensation and provide free facilities to paging providers. The state authorities nonetheless had to wrestle with difficult and complicated practical matters to determine the appropriate terms of the specific agreements before them, such as the cost-based rates for terminating compensation, the proportion of the paging provider's incoming traffic that is compensable (*i.e.*, the proportion that is local and non-transit), and the appropriate points of interconnection between the LEC and the paging provider.[11] Thus, even if the Commission were to determine conclusively that LECs were prohibited from charging for facilities, the implementation of that seemingly simple rule would require detailed factual determinations about what portion of the specific facilities at issue were used for delivering traffic originated by third-party carriers (*i.e.*, transit traffic). The Commission is ill-prepared to resolve such questions through section 208 complaints, and any effort to do so would conflict with the efforts of state authorities to resolve similar questions through the section 252 process.

Furthermore, if paging providers could obtain the benefits of section 251 through the Commission's complaint process, they likely would abandon section 252's individualized, state-by-state process altogether, and Congress' negotiation/arbitration framework would be undermined. Indeed, experience has already shown that the mere prospect that the Commission would allow an "end run" around section 252 has been enough to cause paging providers to spurn state-by-state negotiations and to file complaints at the federal level instead. This practice of turning to federal, rather than state, authorities not only is contrary to the Act but also has delayed the implementation of the widespread local interconnection envisioned by section 251: Instead of actually reaching interconnection arrangements based on section 251, LECs and paging providers have simply been pointing fingers at each other before the Commission in proceedings that, whatever their resolution, likely will still require the parties to return to state negotiation or arbitration to reach the specific terms of the agreement for their ongoing or future interconnection.

The Commission accordingly should clarify, as well, that any rules it does promulgate under section 251 apply "only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition."[12] As the Commission itself already has stated, "Section 252 sets forth the procedures that incumbent LECs and new entrants must follow to transform the requirements of section 251 into binding contractual obligations."[13] And as the Supreme Court noted in *Iowa Utilities*, the Act gives state commissions the power to arbitrate open issues, and it is *that arbitration* that "will be subject to § 251 and the FCC regulations promulgated thereunder."[14] Moreover, allowing the obligations of section 251 to be imposed unilaterally on LECs outside of the section 252 process would deny LECs a right specifically provided to them by Congress. The plain language of section 252 states that "[u]pon receiving a *request for interconnection . . . pursuant to section 251*, an incumbent local exchange carrier may negotiate and enter into a binding agreement . . . without regard to the standards set forth" in sections 251(b) and (c).[15] The section 252 negotiation process, in other words, is the starting point for providing *all* interconnection terms that are based on section 251, and the right to negotiate ultimately

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Arbitration, Decision No. C99-419 (Col. Pub. Util. Comm'n April 28, 1999) ("*Colorado AirTouch Decision*"); *Petition for Arbitration of an Interconnection Agreement Between AirTouch Paging and U S WEST Communications, Inc.*, Docket No. UT-990300, Arbitrator's Report and Decision, (Wash. Utils. and Transp. Comm'n April 28, 1999) ("*Washington AirTouch Decision*").

[11] *Colorado AirTouch Decision* at 16-18, 20-22; *Washington AirTouch Decision* at 9-13, 25-32.

[12] *Goldwasser v. Ameritech Corp.*, No. 97C6788, 1998 WL 60878, at *11 (N.D. Ill. Feb. 4, 1998).

[13] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14179 ¶ 18 (1996).

[14] 119 S. Ct. at 727.

[15] 47 U.S.C. § 251(a)(1) (emphasis added).

trumps the specific terms of section 252 because parties may reach agreements through the negotiation process that depart from the strict terms of section 251.[16]

A federal district court recently upheld this basic understanding of the relationship of sections 251 and 252 in a post-*Iowa Utilities* decision.[17] According to the court, steps taken by a state (and, *a fortiori*, steps taken by the Commission) to "expedite the interconnection process" must be taken "within the overall framework established by the Act."[18] Thus, the court ruled that imposing blanket interconnection obligations on LECs outside the negotiations process is unlawful: "Before purchasing finished services or unbundled elements from an ILEC, each CLEC must enter into an interconnection agreement," and the ILEC must have the right to seek "additional or different terms in a particular agreement."[19] This holding accords with Congress' rule that even where a BOC has proposed and a state has approved generally-available interconnection terms, the BOC and the interconnecting carrier nonetheless must "negotiate the terms and conditions of" their particular agreements, which might appropriately involve different terms depending on the specific circumstances.[20] The court accordingly held that the Act prevents any regulation that requires an ILEC to provide specific interconnection terms to "a CLEC that has not first entered into an interconnection agreement . . . pursuant to the Act."[21]

THE COMMISSION'S PAGING/LEC INTERCONNECTION RULES

In determining how to exercise its rulemaking authority under section 251, the Commission should be careful to respect the fact that interconnection between a LEC and a one-way paging provider presents issues and concerns quite distinct from those raised by two-way interconnection arrangements. The Commission must adopt rules that reflect these distinctions and that provide carriers with flexibility to develop arrangements that account for the economic realities of one-way paging interconnection and its impact on LEC networks. Not to do so would create an unnecessary and unauthorized subsidy to paging providers and would violate both the Act and the Constitution.

A. Interconnection between a LEC and a One-way Paging Provider Is Fundamentally Different From Other LEC-CMRS Interconnection.

The Commission's interconnection rules should distinguish between one-way and two-way interconnection.

When adopting rules for paging interconnection, the Commission should recognize that one-way paging is fundamentally different from two-way CMRS and wireline technologies and that it therefore is not appropriate to blindly require LECs to pay paging providers for traffic delivered to paging providers' networks. As explained below, basic economic principles show that paging services are not substitutes for local exchange service, as two-way services provided by CLECs and many CMRS carriers are. Rather, paging service is a complementary service that, like alarm monitoring and audio-text services, is used in conjunction with — but performs a different function than — local exchange service. The

[16] *See Iowa Utilities*, 119 S. Ct. at 726-27 ("When an entrant seeks access [to an incumbent's network] through *any* of the[] routes [established in section 251], the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c).") (footnote omitted) (emphasis added).

[17] *See MCI Telecommunications Corp. v. GTE Northwest, Inc.*, No. 97-1687-JE, 1999 WL 151039 (D. Or. Mar. 17, 1999).

[18] *Id.* at *19.

[19] *Id.*

[20] 47 U.S.C. § 252(f)(5).

[21] *MCI Telecommunications*, 1999 WL 151039, at *20.

Commission's rules should not ignore this important distinction between paging and true two-way services. Instead, as it has done in exempting paging from the CMRS spectrum cap and number portability requirements, the Commission should recognize that distinctions between paging and two-way communications services should, in some instances, lead to a different regulatory framework for each.[22]

In any interconnection arrangement between two carriers, it is reasonable to assume that both carriers will gain some benefit: Interconnection allows communications to be transmitted between the carriers' customers and hence makes both carriers' networks more valuable. Two-way interconnection arrangements reflect this economic reality by establishing a mutual compensation scheme in which each carrier pays for the traffic it hands off to the other. With one-way paging interconnection, however, such a compensation scheme (especially when combined with a policy requiring LECs to provide free facilities) creates a one-way stream of payments that is entirely at odds with the principal economics of paging.[23]

Fundamental logic requires that the Commission analyze paging/LEC interconnection with a fresh perspective and not automatically cleave to the traditional originating-carrier-as-cost-causer assumption. Paging is a service that is designed to allow subscribers to *receive* messages: The *sine qua non* of paging service is the incoming phone call. As the Colorado PUC concluded:

> A paging service exists for one reason only, namely, to enable paging customers to be contacted by specific individuals to whom the number has been given. It is, therefore, the provider of paging services . . . who is the cost-causer. As such, compensation should be due [the LEC], not the other way around.[24]

Without the calls sent to the paging network by LEC customers, paging service simply could not function. Thus, it would be ironic, to say the least, to point to a paging provider's receipt of incoming calls and suggest that LECs are imposing a "cost" on the paging network by allowing their customers to send pages. The analysis is vastly different with respect to traditional, two-way CMRS providers. Like wireline LECs, two-way CMRS providers serve customers who are *callers,* and they earn revenues (at least in part) from their subscribers for these calls. It therefore strains credulity to argue that paging providers incur an unanticipated or additional cost each time a call is delivered by a LEC, and that they accordingly must be compensated by the LEC for such calls. Inflexibly imposing the traditional "reciprocal" compensation scheme on the LEC/paging relationship, however, means that paging providers would receive the benefits of interconnection (*i.e.*, the ability to receive LEC-originated calls and thereby serve paging subscribers) for free and, indeed, would gain additional benefits in the form of compensation from LECs.

By contrast, LECs will always bear significant costs from interconnecting with paging providers. Indeed, it is a fallacy to assert that LECs, by transmitting calls to paging providers, avoid any meaningful costs. In both Type 1 and Type 2A interconnection with paging providers, LECs must perform a two-switch operation that is virtually identical to the two-switch operation necessary to terminate calls on their own networks. No costs are avoided: The costs a LEC incurs for routing traffic to a paging provider

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[22]*See* 47 C.F.R. § 20.6 (imposing spectrum cap only on broadband PCS, cellular, and SMR licensees); *id.* §§ 52.21(c), 52.31(a) (imposing number portability requirements only on those CMRS providers that "offer real-time, two-way switched voice service").

[23]Although two-way paging is now possible, the vast majority of paging traffic today is still one-way. Furthermore, it remains to be seen whether two-way paging service in fact will terminate traffic on the LEC's network. For example, the ability of a paging subscriber to send messages to the paging terminal for delivery to another paging subscriber would not terminate any traffic on a LEC network and therefore would not be considered "two-way" for purposes of section 251(b)(5). Furthermore, until there is a significant degree of real mutual traffic exchange between LECs and paging providers, requiring LECs to pay compensation for traffic originating on their networks will continue to produce an extremely lopsided, uneconomic result.

[24]*Colorado AirTouch Decision* at 9-10 n.7.

are identical to the costs the LEC would have incurred if the paging provider did not exist and all of the paging provider's customers were on the LEC's network. This situation is entirely different from the situation with CLECs and two-way CMRS providers, which do terminate traffic and thereby allow LECs to avoid costs.

Indeed, LEC costs are actually increased by paging interconnection because paging service is a complement to, not a substitute for, local exchange service. A LEC's primary function is to perform real-time, two-way communications, and both competitive LECs and two-way CMRS providers perform substitutes for that function. By contrast, paging service simply offers a complement to this function: It offers callers an additional option of sending narrowband messages to paging subscribers. Paging service generally does not replace traffic that a LEC otherwise would carry as part of its local exchange service, but simply increases the number of calls on the LEC's network (with short-duration paging calls). Thus, paging traffic will tend to increase, not decrease, a LEC's transport and termination costs, and because local service often is flat-rated, LECs cannot recover these additional costs. Return traffic from the individual who has been paged likewise may be over a flat-rated service. Indeed, 94 percent of U S WEST's business lines and 96 percent of its residence lines are flat rated. And although LECs do benefit from the general ability to offer customers yet another complementary service over their networks, they should not be required to bear the cost of connecting with paging services any more than they do with other complementary services.[25]

B. Requiring LECs To Shoulder The Entire Cost of Paging Interconnection Would Create An Unauthorized And Economically Inefficient Subsidy For Paging Providers.

The Commission should not require LECs and their subscribers to subsidize paging providers through the payment of terminating compensation and the provision of free facilities.

One of the most perverse results of requiring LECs to pay the entire cost of one-way paging interconnection arrangements would be the creation of a new subsidy from telephone carriers and their local exchange ratepayers. As noted above, both paging providers and LECs benefit from the ability to have their subscribers communicate in some manner. But under the rules advocated by the paging industry, the entire *cost* of interconnection would be borne by LECs and their customers. This mismatch of costs and benefits would create a significant subsidy for paging providers, allowing them to expand their networks, serve more customers, and reap more profits — all at the expense of local exchange service.[26]

Such a subsidy clearly cannot be justified on economic grounds. As the Colorado PUC recently noted, paying termination compensation to paging providers will cause "a number of economic inefficiencies."[27] For example, a subsidy would cause the market price for paging service not to reflect its true costs and therefore would encourage excessive use of paging service by consumers. At least some of this excess use would come at the expense of other mobile wireless services that offer an alternative to paging — such as digital cellular and PCS — because these services would become relatively more expensive for consumers. Unlike paging, such services share the costs of LEC/CMRS interconnection and therefore do not receive any implicit subsidy. Thus, consumers' choices would be artificially distorted in favor of paging service and away from mobile alternatives. Furthermore, if paging providers' costs for

[25]*See Colorado AirTouch Decision* at 8 n.5 (stating that PUC's independent conclusion would be that paging providers perform "essentially an enhanced service, rather than the termination of telecommunications traffic").

[26]*See* Elizabeth V. Mooney, *Wireless Carriers Continue Interconnection Fight*, RCR Radio Communications Report, Dec. 21, 1998, at 3 (quoting paging industry representative as saying that pagers stand to gain "hundreds of millions of dollars" if LECs must provide terminating compensation and free facilities).

[27]*Colorado AirTouch Decision* at 9-10 n.7.

facilities were to drop to zero, nothing would prevent them from making extravagant demands about the quality of interconnection service they expect LECs to provide to them. Paging providers not only would be able to obtain any quantity of interconnection facilities they wanted at LEC expense, they also would want to dictate the level or features of service without regard to cost.

Additionally, subsidization is not necessary to ensure low-cost, competitive paging service because the Commission itself has recognized that the paging industry has been competitive for years.[28] Indeed, prices for paging service have fallen consistently and dramatically in recent years *without* any subsidy for paging providers.[29]

Finally, a subsidy from LECs to paging providers would be entirely at odds with the letter and spirit of the 1996 Act. Congress provided in the 1996 Act that universal service support subsidies should be equitable, nondiscriminatory, and express.[30] Moreover, it required *all* telecommunication carriers — including paging providers — to contribute on an equitable and nondiscriminatory basis to universal service support.[31] It thus would come as a surprise to Congress, to say the least, for section 251 to be used to create a new, implicit subsidy for paging service at the expense of local exchange service. This is especially troubling given the absence of any finding by the Commission that any paging provider — much less all such providers — are eligible to receive universal service support of any kind. Indeed, while Congress left open the possibility that services other than basic telecommunications might be included in the definition of "universal service" that should be available at reasonable rates,[32] it strains credulity that, at this point in time, all Americans have a need for low-cost paging service that should be subsidized through local exchange service — which clearly *is* a basic, universal service.[33] Thus, it is both nonsensical and contrary to the Act to have local exchange customers shoulder the cost of paging/LEC interconnection and thus subsidize paging providers' costs.

C. Requiring LECs To Pay Terminating Compensation To One-Way Carriers Rather Than Permitting A Flexible, More "Reciprocal" Division Of Costs And Benefits Would Be Inconsistent With Congress' Intent And The Purpose Of The 1996 Act.

The Commission should recognize that section 251(b)(5) requires a fair and equitable compensation scheme in which costs and benefits are shared rather than borne by one party alone.

Even if some type of "reciprocal" compensation obligation under 251 is to apply to one-way paging interconnection, it must allow for compensation that is indeed mutual, rather than obligate LECs to shoulder the entire cost of interconnection that benefits both the LEC and the paging provider. Any other approach would be inconsistent with Congress' intent and the specific purposes of section 251. As many LECs (including U S WEST) have explained at length elsewhere, section 251(b)(5) is directed at

[28]*See Implementation of Sections 3(n) and 322 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1468 ¶ 140 (1994) ("*Mobile Services Second Report and Order*") (finding that "the paging industry is highly competitive").

[29]*See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Third Report, 13 FCC Rcd 19746, 19751-53 (1998).

[30]*See* 47 U.S.C. § 254(b).

[31]*See id.* § 254(d); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9175 ¶ 780 (1997) ("*Universal Service Order*").

[32]*See* 47 U.S.C. § 254(c).

[33]*See Universal Service Order*, 12 FCC Rcd at 8810-11 ¶¶ 62-63.

situations involving a two-way relationship. The statute obligates a LEC to establish "*reciprocal* compensation arrangements for the transport and termination of telecommunications."[34] As the Commission has explained, "We use the term 'reciprocal compensation' and 'mutual compensation' synonymously to mean that compensation *flows in both directions* between interconnecting networks."[35] Of course, one-way paging providers and LECs are not engaged in a reciprocal exchange of traffic, and paging providers do not actually transport or terminate LEC traffic; their interconnection arrangements therefore fall outside the scope of section 251(b)(5).[36] But to the extent the Commission seeks to apply the reciprocal compensation rules at all, it would simply strain the intent of the Act beyond reason to reach a result that put *all* the costs of LEC/paging interconnection on the LEC alone.

Indeed, the legislative history of section 251(b)(5) demonstrates that Congress did not intend to require LECs to compensate one-way paging providers at all. The Senate Report indicates that the reciprocal compensation provision would apply to interconnection arrangements involving an "in-kind exchange of traffic," and the reciprocal compensation model relied on by the Senate was a Rochester Telephone interconnection agreement that specifically *excluded* reciprocal compensation for paging providers because their traffic was one-way.[37] This is consistent with Congress' view that reciprocal compensation was intended to facilitate nascent competition among providers of *local exchange service*, not among paging providers. As the Conference Report makes clear, section 251(b)(5) was seen as being "integral to a competing provider seeking to offer *local telephone services* over its own facilities."[38] By contrast, there was no need to facilitate competition among paging providers because that market was competitive long before passage of the 1996 Act.[39] And, as noted above, paging providers do not perform a service that relieves the LEC from its function as the provider of local exchange service, as CLECs do.

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[34]47 U.S.C. § 251(b)(5) (emphasis added). Section 252(d) confirms that section 251(b)(5) obligation is premised on reciprocity of traffic delivery, stating that "[f]or the purposes of compliance by an incumbent [LEC] with section 251(b)(5)," the terms of any agreement must provide for "the *mutual and reciprocal* recovery by *each* carrier of costs associated with the transport and termination on *each* carrier's network facilities of calls that originate on the network facilities of the other carrier." *Id.* § 252(d)(2)(A)(i) (emphases added).

[35]*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16045 n.2634 (1996) (emphasis added) ("*Local Competition Order*").

[36]*See Colorado AirTouch Decision* at 8 n.5 (stating that PUC's independent conclusion would be that reciprocal compensation should not apply because paging providers do "not terminat[e] 'telecommunications' . . . for purposes of section 251(b)(5)").

[37]*See* S. Rep. No. 104-23, at 20 (1995); *see also Rochester Tel. Corp.*, Cases 93-CO-103 & 93-C-0033, Op. No. 94-25, N.Y. Public Serv. Comm'n, 160 P.U.R.4th 554, 587 (1994).

[38]H.R. Conf. Rep. No. 104-458, at 120 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 131-32 (emphasis added); *see also* H.R. Rep. No. 104-204, at 72-73 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 38; *cf. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19538 n.700 (1996) (stating that paging service is neither telephone exchange service nor comparable to such service).

[39]*Mobile Services Second Report and Order*, 9 FCC Rcd at 1468 ¶ 140 (finding that "the paging industry is highly competitive").

Nonetheless, the Commission determined in the *First Report and Order* that section 251(b)(5) would apply to paging providers.[40] This conclusion is entirely sensible to the extent a paging provider provides two-way service that terminates on the LEC's network like a classic, two-way CMRS provider: At that point, the paging provider should have the related rights and obligations. In such situations, paging providers will provide a service that begins to approximate the type of communications service Congress seemed to have in mind. In the meantime, however, paging providers do not appear to be exchanging any traffic with LECs. Indeed, the supposed "two-way services" that paging carriers currently provide do not in any way resemble local exchange service and do not terminate any traffic on LEC networks. Rather, they simply allow paging devices to acknowledge receipt of the paging message to the paging terminal so that the pager's system will quit trying to deliver the paging message, and may enable the paging device to send short messages over the Internet.

Thus, if the Commission's holding is to apply to one-way paging interconnection, any attendant rules must mirror Congress' concern that the costs of interconnection be shared. The problem that concerned both Congress and the Commission was the situation in which, despite mutual exchange of traffic, all costs were imposed on the CMRS provider.[41] To remedy this, Congress made clear that costs should be shared by both parties. It would be perverse to implement the resulting legislation in such a way as to simply impose all costs on the LEC despite shared benefits. In no way could such an arrangement be described as "mutual" or "reciprocal" compensation. The Commission, in addressing the equities and economic realities here, should be guided by Congress' intent as clearly indicated by the language of the Act: No party should enjoy the benefits of interconnection without sharing its costs.

D. Requiring LECs To Provide Free Facilities Would Effect An Unconstitutional Taking Requiring The Federal Government To Pay Compensation In The Tens Of Millions Of Dollars Annually.

The Commission should construe section 251 in to avoid subjecting the federal government to liability under the Takings Clause of the Fifth Amendment.

As it considers its paging interconnection rules, the Commission should bear in mind that requiring LECs to provide free facilities to paging providers would effect a taking of the LECs' property without just compensation, in violation of the Takings Clause of the Fifth Amendment.[42] Indeed, such a Commission decision could have a substantial economic impact because the government would be constitutionally required to compensate LECs for the revenues lost for their facilities. These constitutional and economic considerations are quite serious and must be addressed by the Commission as it revisits and resolves the pending paging interconnection issues.[43]

The Common Carrier Bureau's letter dated December 30, 1997 (the so-called "Metzger Letter") regarding paging interconnection seems to suggest that, at least in context of a section 252 agreement, the Commission would require LECs to construct and provide extensive facilities for paging

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[40] *Local Competition Order*, 11 FCC at 15997 ¶ 1008 (1996) ("LECs are obligated, pursuant to section 251(b)(5) . . ., to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks . . . .").

[41] *See, e.g., Local Competition Order*, 11 FCC Rcd at 16044 n.2633 (noting that some LECs had refused to compensate, or had even charged, cellular providers that terminated traffic originating on the LECs' networks).

[42] *See* U.S. Const. amend. V.

[43] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (requiring statutes to be construed to avoid constitutional questions).

providers at no cost and with no opportunity to recover their costs (other than for transit traffic).[44] Such a requirement, however, would violate "the guiding principle . . . that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[45]

Indeed, the Supreme Court has found that compensable takings have occurred in cases that were, if anything, less confiscatory than the situation here. For example, in *Northern Pacific Railway v. North Dakota*,[46] the Court struck down a compensation scheme as a taking because a "carrier [was] compelled to transport [a] commodity for less than cost, or without substantial compensation in addition to cost."[47] The Court held that, under the Fifth Amendment, a carrier "cannot be required to carry persons or goods gratuitously."[48] The Court also has ruled specifically that compelled construction of new facilities constitutes a taking if there is not a reasonable opportunity to recoup the costs of constructing and operating those particular facilities, plus a reasonable return on investment.[49]

Furthermore, in an era of local competition and price cap regulation, the Commission cannot simply assume that LECs will make up their losses on paging facilities through profits from other services. If a LEC tries to raise its retail prices for other telephone services, competitors will underprice the LEC. Regulators, in other words, no longer can set prices below cost "in hopes that revenue from other customers or products will make up for the shortfall."[50] A LEC's losses on paging facilities therefore are real losses that the Commission and the courts cannot ignore.[51]

Substantial sums would be at stake if LECs were unconstitutionally required to provide free facilities to paging providers. For example, paging providers incur approximately $5 million in charges annually for interconnection facilities provided by U S WEST. It is impossible for U S WEST to know how much in facilities charges paging providers incur with other LECs. If, however, one extrapolates based on U S WEST's nine-percent share of the nation's total telephone lines, any action prohibiting LECs from collecting facilities charges could require the federal government to pay LECs

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[44]*But see Colorado AirTouch Decision* at 15 n.12 (stating that the Metzger Letter misinterprets the Commission's policy in Rule 51.703(b) and paragraph 1042 of the *Local Competition Order*).

[45]*Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (citation omitted).

[46]236 U.S. 585 (1915).

[47]*Id.* at 596.

[48]*Id.* at 595; *see also United Rys. & Elec. Co. v. West*, 280 U.S. 234, 249 (1930); *Bluefield Co. Water Works & Improvement v. Public Serv. Comm'n*, 262 U.S. 679, 692-93 (1923); *Norfolk & Western Ry. v. Conley*, 236 U.S. 605, 609 (1915).

[49]*See Great Northern Ry. v. Minnesota*, 238 U.S. 340, 345-46 (1915) (holding that requiring railroad to erect scales without compensation constituted a taking); *Washington ex rel. Oregon R.R.. & Nav. Co. v. Fairchild*, 224 U.S. 510, 533 (1912) (holding that requiring railroad to construct new tracks without compensation constituted a taking); *see also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) ("[A] requirement that facilities be built and dedicated without compensation to the federal government (for public use) would be a deprivation forbidden by the Fifth Amendment."), *aff'd*, 440 U.S. 689 (1979); *Pacific Tel. & Tel. Co. v. Eshleman*, 137 P. 1119, 1135-37 (Cal. 1913) (holding that compelling telephone company to construct interconnection facilities without compensation constituted a taking).

[50]*MCI Telecommunications*, 1999 WL 151039, at *11.

[51]*See also Colorado AirTouch Decision* at 15 n.11 (stating that the federal government — not the states — would be responsible for avoiding an unconstitutional taking because the Metzger Letter free facilities requirement is a federal requirement).

approximately $50 million in compensation for each year they are required to provide free facilities to paging providers.

E. LECs And Paging Providers Need Flexibility To Negotiate Interconnection Agreements That Reflect The Basic Economic Differences Between One-Way And Two-Way Interconnection.

The Commission's rules should allow LECs and paging providers to reach a broad range of economically-rational interconnection agreements.

If the section 252 negotiation process is to play the meaningful role that Congress intended, the Commission's rules for LEC/paging interconnection must leave ample room for the parties to negotiate a variety of interconnection terms that are economically rational and mutually beneficial. The rules should not attempt to predetermine precise outcomes, which are better left to the parties and the supervision of state commissions. And even if the Commission finds that section 251(b)(5) should apply in some manner to one-way paging/LEC interconnection, its rules should recognize the basic difference between one-way and two-way interconnection and should allow carriers to develop interconnection arrangements that reflect this difference.

Negotiations inherently involve give-and-take, and the Commission's regulations under section 251 should leave room for states and negotiating carriers to develop a broad variety of interconnection arrangements. The whole concept behind a negotiation process such as that specified in section 252 is that, when the parties first come to the table, the specific contours of their future agreement are not predetermined. Any other conclusion would turn Congress' carefully-crafted scheme into a rather absurd formalistic dance in which the parties go through the motions for no particular reason. Indeed, many potential interconnection proposals have not even been advanced because of the apparent lack of flexibility in the Commission's rules and because of the threat — raised in several pending 208 complaints brought by paging providers — that anything short of what the paging providers unilaterally demand will be portrayed as bad faith on the part of the LEC. By contrast, giving carriers negotiating flexibility allows them to develop interconnection arrangements that are tailored to their specific circumstances and mutually beneficial.

Furthermore, even if the Commission determines that the reciprocal compensation obligations of section 251(b)(5) are generally applicable in some manner to LEC/paging interconnection, the Commission's rules for such interconnection should not simply mirror the rules for very different two-way interconnection based on a knee-jerk "cost causation" rationale. As discussed above, one-way and two-way interconnection are fundamentally different, and the Act does not require the Commission to treat them identically. To avoid creating the economic inefficiencies and implicit subsidies set forth above, the Commission's rules for LEC/paging interconnection should permit LECs and paging providers to develop economically-rational interconnection agreements that fairly divide the costs and benefits of paging interconnection. And the Commission certainly should avoid any interconnection policy like the Metzger Letter, which appears to permit only one possible outcome for LEC/paging interconnection.

The Commission could, for example, permit agreements that provide paging providers with interconnection facilities at cost. Or, if the Commission determines that facilities must be provided for free as part of a LEC's interconnection obligation (a conclusion that has significant constitutional and statutory infirmities, as discussed above), LECs should be permitted, at a minimum, to have control over the facilities and to require paging companies to pay for "gold plated" or value-added facilities, such as FX arrangements. Indeed, any other rule requiring free facilities would be incredibly inefficient because it would give paging companies the incentive to request excessive facilities while imposing unnecessary and excessive costs on LEC customers.[52] And to the extent that LECs are required to shoulder the costs of paging interconnection, they should be permitted to insist on Type 2 interconnection when it would be more efficient and less costly than Type 1 interconnection and to require concessions from paging providers who refuse to accept that level of service. In addition, LECs and paging providers should be

[52] *See Colorado AirTouch Decision* at 14.

permitted to develop other fair divisions of interconnection costs that reflect the shared benefits. A sharing of facility costs, for example, would reduce a paging provider's incentive to order excessive facilities.

CONCLUSION

As the Commission revisits paging interconnection issues in the wake of *Iowa Utilities*, the Commission should take this opportunity to adopt a clear, common sense regulatory approach that respects the section 252 negotiation process established by Congress and that allows paging providers and LECs to reach interconnection agreements based on the economic realities of one-way paging interconnection. Such an approach would both preserve the Commission's resources for the resolution of broader industry-wide issues and promote the negotiation of mutually-beneficial interconnection agreements for one-way paging providers.