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April 20, 2000

Federal Communications Commission  
Secretary of the FCC  
TW-A325  
445 12th Street, S.W.  
Washington, D.C. 20554

**RECEIVED** Via Federal Express  
**APR 21 2000**  
**FCC MAIL ROOM**

Re: In the Matter of Petition of US WEST for Declaratory Ruling Preempting State Commission Proceedings to Regulate US WEST's Provision of Federally Tariffed Interstate Service  
FCC Docket No. CC 00-51

Dear Secretary of the FCC:

Enclosed for filing in the above-captioned matter, please find Comments of the Minnesota Department of Commerce. An original and seven copies are enclosed along with an affidavit of service. Copies are also being forwarded to the Common Carrier Bureau and International Transcription Services, Inc.

Yours truly,

GINNY ZELLER  
Assistant Attorney General

(651) 296-3701

Enclosures

cc: All Parties of Record (w/enc.)  
Janice M. Myles (w/enc.)  
International Transcription Services, Inc. (w/enc.)

AG: 373465, v. 01

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Before the

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FCC Docket File No. CC00-51

In the Matter of

Petition of U S WEST, Inc. for  
Declaratory Ruling Preempting State  
Commission Proceedings to Regulate  
U S WEST's Provision of Federally  
Tariffed Interstate Service

## COMMENTS OF THE MINNESOTA DEPARTMENT OF COMMERCE

### INTRODUCTION AND SUMMARY OF ARGUMENT

On August 18, 1999, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint with the Minnesota Public Utilities Commission (MPUC), charging that U S WEST Communications, Inc. (U S WEST) provisioned access services in an untimely, inadequate, and discriminatory fashion.<sup>1</sup> On or about the same date, AT&T filed similar complaints with four other state public utilities commissions.<sup>2</sup>

In the Minnesota complaint proceeding (as in all the proceedings), U S WEST submitted a motion for summary judgment, urging the state commission to find that it lacks jurisdiction over the complaint because most of the access facilities were ordered out of the federal, rather than intrastate, access service tariff. AT&T does not dispute the fact that most of the subject

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<sup>1</sup> *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service*, Minnesota Public Utilities Commission Docket No. P-421/C-99-1183.

<sup>2</sup> The other complaints were filed in the states of Washington, New Mexico, Arizona, and Colorado.

facilities were ordered out of the federal tariff, but does dispute the contention that the MPUC lacks jurisdiction over the issues raised in the complaint.

On February 16 and 17, 2000, the MPUC heard evidence on AT&T's complaint. The MPUC did not address U S WEST's motion for summary judgment on jurisdiction at the hearing, but instead instructed parties to address the jurisdictional issues in post-hearing briefs. Parties have now submitted initial and reply briefs to the MPUC; that body will address the merits of the complaint and U S WEST's jurisdictional arguments in a yet-to-be-scheduled hearing.

The Minnesota Department of Commerce (the Department) is a state agency with regulatory and enforcement responsibilities regarding telecommunications, gas, and electric services.<sup>3</sup> Pursuant to its statutory authority, the Department intervened in the AT&T/U S WEST complaint proceeding. In post-hearing briefs, the Department recommended that the MPUC require U S WEST to adhere to certain quality standards to bring its provision of access service to an adequate and reasonable level. The Department also recommended that the MPUC deny U S WEST's motion for summary judgment and find that the MPUC has the authority to monitor the quality of intrastate service provided over the federally tariffed mixed use facilities that are the subject of the complaint.

The Department here files comments in response to U S WEST's December 15, 1999 request for a Federal Communications Commission (FCC) declaratory judgment that would preempt the MPUC's consideration of the issues raised in the Minnesota complaint proceeding. For a number of reasons, the FCC should deny U S WEST's request for a finding of exclusive

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<sup>3</sup> See, e.g., Minn. Stat. § 216A.07.

FCC jurisdiction over the complaint issues. First, the Communications Act establishes a system of dual jurisdiction in which a state commission can appropriately monitor the provisioning of federally tariffed mixed use facilities affecting state customers sharing the facilities. Second, contrary to U S WEST's assertion, the filed rate doctrine does not prohibit a state commission from exercising its regulatory authority to ensure that federally tariffed mixed use facilities are provisioned in an adequate and reasonable manner. Third, the MPUC's consideration of AT&T's requested relief should not be preempted because the state commission's actions would support, rather than block, the FCC's interests in the federally tariffed mixed use facilities.

## **ARGUMENT**

### **I. TITLE II OF THE ACT ESTABLISHES A SYSTEM OF DUAL JURISDICTION IN WHICH STATE COMMISSIONS CAN APPROPRIATELY MONITOR THE PROVISIONING OF FEDERALLY TARIFFED MIXED USE FACILITIES AFFECTING STATE CUSTOMERS SHARING THE FACILITIES.**

#### **A. Introduction.**

In its Petition for Declaratory Ruling, U S WEST argues that Title II of the Communications Act places the regulation of all federally tariffed services exclusively within the federal jurisdiction and leaves no room for any state regulatory interest. According to U S WEST, the fact that an access facility is mixed use--that is, it carries intrastate as well as interstate traffic--does not affect the FCC's exclusive jurisdiction if the facility is ordered out of the federal tariff under current jurisdictional separations principles. For these reasons, U S WEST argues, the MPUC cannot examine the intrastate quality of service issues arising from the provision of federally tariffed mixed use access facilities.

The Department disagrees with U S WEST's argument. The Communications Act and a consistent body of case law clearly establish a system of dual state/federal jurisdiction over telecommunications services. The Act creates a system of concurrent jurisdiction in which state

and federal interests are coordinated and sometimes overlap. Oversight of mixed use access facilities, which carry both state and interstate traffic and are tariffed by both state and federal regulatory entities, is a good example of the dual jurisdictional system. The ten percent separations principle, by which mixed use access facilities are jurisdictionally separated and ordered, is consistent with the overall system of dual jurisdiction over telecommunications. Viewed as a whole, these principles provide room for state commission oversight of state quality of service issues arising from the provision of federally tariffed mixed use access facilities.

**B. Title II of the Communications Act Creates a System of Dual Federal and State Jurisdiction over Telecommunications Services.**

The Communications Act of 1934 established a “system of state and federal regulation over telephone services.” *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986). While the Act gave jurisdiction over interstate communications to the FCC, savings clauses were inserted into the Act to ensure the continuation of state authority over telecommunications services within states:

47 U.S.C. § 152 (b) . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service...

47 U.S.C. § 261 (b) Existing State regulations. Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to February 8, 1996, in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provision of this part.

47 U.S.C. § 261 (c) Additional State requirements. Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.

The Communications Act therefore created a system of dual, concurrent jurisdiction, in which state commissions retain their regulatory authority over intrastate services necessary for

the provision of local service or exchange access, “as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.” The Communications Act demonstrated a congressional intent that the FCC will *not* occupy the field of telecommunications regulation, to the exclusion of state regulatory interests.

**C. The Ordering of a Mixed Use Access Service Out of a Federal Tariff Does Not Prevent the FCC’s Exercise of Shared Jurisdiction.**

U S WEST argues that “once AT&T opted for U S WEST’s federal tariff, however, it subjected itself to the federal scheme and the Commission’s rules. As soon as a service is deemed to be governed by federal law, that is the end of the matter: the Act divests the states of any authority to regulate it.” *U S WEST Petition for Declaratory Ruling* at p. 11. The Department disagrees.

First, as noted previously, the Communications Act itself allows latitude for state actions necessary for local competition or exchange access. Furthermore, since the passage of the Communications Act of 1934, Courts have acknowledged that the boundaries of the dual jurisdiction established will not be neatly defined, that “most aspects of the communications field have overlapping interstate and intrastate components,” and that the sections of the Act granting state and federal authority “do not create a simple division; rather, they create a persistent jurisdictional tension.” *Public Utilities Commission of Texas v. Federal Communications Commission*, 886 F.2d 1325, 1329 (D.C. Cir. 1989).

The FCC has also recently demonstrated concurrent jurisdiction with state commissions over inter-carrier compensation for traffic bound to an Internet Service Provider (ISP), although the FCC found that such traffic was jurisdictionally mixed and largely interstate. *Declaratory Ruling, CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound*

*Traffic (February 26, 1999).*<sup>4</sup> While holding that it has jurisdiction over calls to ISPs as interstate calls, the FCC recognized the authority of state commissions, in the absence of federal rules, to determine the appropriate compensation for the termination of a call to an ISP within its state. The FCC reasoned that the state exercise of jurisdiction was appropriate because it did not obstruct the concurrent federal interests:

[N]either the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.

*Id.* at ¶ 26.

The Communications Act, case law, and the FCC's own pattern of practice show that state commissions have latitude to pursue necessary state regulatory interests even if those interests arise in the context of a shared use facility that is ordered out of a federal tariff.

**D. The Ten Per Cent Separations Principle for Mixed Use Access Facilities is Consistent with the Overall Dual System of Jurisdiction Over Telecommunications.**

The principle by which mixed use access services are jurisdictionally separated and ordered out of state and federal tariffs is consistent with the overall system of dual federal and state jurisdiction over telecommunications and with past FCC practice of shared jurisdiction. The separations principle neither expressly nor impliedly shifts the regulation of access facilities out of the concurrent jurisdictional mode into exclusive oversight by the FCC.

The "ten percent" separations principle for mixed use special access lines was established in 1989, in the FCC's *MTS and WATS Market Structure, Amendment of Part 36 of the*

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<sup>4</sup> The reasoning by which the FCC determined ISP-bound traffic to be interstate was recently criticized, and the decision vacated and remanded to the FCC. *Bell Atlantic Telephone Companies v. FCC*, D.C. Circuit No. 99-1094 (March 24, 2000). The Court of Appeals did not, however, object to the concept of concurrent jurisdiction between the FCC and state commissions in the area of reciprocal compensation.

*Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660 (the MTS/WATS Order). In that Order, the FCC found that "mixed use" special access lines will be federally tariffed when the lines carry more than de minimis amounts of interstate traffic. De minimis was determined to be ten percent or less of total traffic on the special access line.

The ten percent separations principle was codified in the federal rules, 47 C.F.R. § 36.154. Part 36 is entitled "Jurisdictional Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Expenses, Taxes and Reserves for Telecommunications Companies." Section 36.154, entitled "Exchange Line Cable and Wire Facilities (C&WF)--Category 1--apportionment procedures," consists of the methodology for "apportioning the cost of exchange line cable and wire facilities among the operations." The ten percent separations principle is therefore codified as a cost apportionment methodology, which allows customers to buy from one tariff, either federal or state, through a predictable formula.

The jurisdictional separations principle, and its codification into regulation, are consistent with the state/federal jurisdictional concept. The ten percent separations principle is an acknowledgement that both state and federal regulatory bodies will have appropriate interests in the provision of the mixed use facilities, which will carry intrastate and interstate traffic, and that these concurrent interests must be accommodated in the setting of cost allocation and ordering principles. Neither the order establishing the principle, nor its codification as a cost allocation principle, express a Congressional intent to create exclusive federal jurisdiction over this area of telecommunications service. As long as a state commission does not act in a manner inconsistent with federal interests, it may appropriately monitor necessary state interests arising from intrastate use of the federally tariffed mixed use facility. As discussed below, the MPUC's oversight of state service quality issues arising from the use of the federally tariffed access

facilities, and affecting intrastate shared users, does not conflict with federal interests and should not be preempted.

**II. THE FILED RATE DOCTRINE DOES NOT PROHIBIT A STATE COMMISSION FROM EXERCISING ITS REGULATORY AUTHORITY TO ENSURE THAT FEDERALLY TARIFFED MIXED USE FACILITIES ARE PROVISIONED IN AN ADEQUATE AND REASONABLE MANNER.**

**A. Introduction.**

U S WEST claims that 47 U.S.C. § 203(c) and the filed rate doctrine are an “absolute bar to AT&T’s claims for relief.” *U S WEST Petition for Declaratory Ruling* at p. 12. U S WEST argues that its federally ordered access tariffs cover all terms and conditions necessary for the provision of service. AT&T could have chosen to bring its complaint, based upon the terms and conditions of those tariffs, to the FCC, but chose not to. Therefore, U S WEST argues, “by bringing its service-related claims before various state commissions, AT&T seeks nothing more than an enlargement of the rights conferred by the tariff, which would not be available to other customers.” *U S WEST Petition for Declaratory Ruling* at p. 14. U S WEST cites to the most recent U.S. Supreme Court case on the filed rate doctrine, *American Telephone and Telegraph Co. v. Central Office Telephone*, 118 S. Ct. 1956 (1998), as its primary authority for this argument.

The Minnesota Department of Commerce disagrees with U S WEST’s argument that the filed rate doctrine divests state regulatory commissions of their normal regulatory authority over these access service provisioning issues. The *Central Office* case, and the filed rate doctrine to which it refers, do not preclude a state commission from considering AT&T’s charges regarding the quality of U S WEST’s provision of service within the state. The facts of the *Central Office* case differ significantly from the access service state complaint proceedings; the purpose of the filed rate doctrine is at odds with the argument raised by U S WEST; and *Central Office*’s

holding, which is much more narrow than U S WEST depicts it, does not apply to the state complaint proceedings.

**B. The Facts of *Central Office* Differ from the Facts of AT&T's Complaint Proceedings.**

The *Central Office* case concerns a telephone company pursuing extra-tariff state law contract and tort claims. In contrast, AT&T's complaint seeks an MPUC determination that the provision of certain telecommunications services is contrary to the provider's state tariff and state quality of service standards. The MPUC is not being asked to settle an extra-tariff contract or tort claim; it is being asked to exercise its normal, ongoing regulatory oversight of the quality of the provision of services affecting Minnesota customers.

One of the Department's recommendations in the ongoing Minnesota complaint proceeding will illustrate the difference between the requests for relief in the AT&T complaint proceeding and the cause of action in the *Central Office* case. The Department has recommended that the MPUC require U S WEST to provision access services, when facilities are in place, within the timeline established by the state and federal access tariffs--that is, by the Standard Interval Guide (SIG) standard intervals, or by the customer desired due date, whichever is later--85% of the time. This standard is based on the tariff requirement and does not represent an enhanced, discriminatory requirement. Unlike the *Central Office* case, in which the plaintiffs sought enforcement of state contract and tort claims based on their own extra-tariff inter-company agreement, the Department's recommended 85% timely provisioning standard is based on the tariff requirement. It is a recommended measuring stick upon which the MPUC can judge U S WEST's performance under the tariff, not an extra-tariff claim.

AT&T's requests for relief in the complaint proceeding, and the Department's recommendations in the case, rest on tariff terms or on state quality of service statutes and rules.

Unlike the *Central Office* case, in which the claims were based on rights which arose from an extra-tariff contract, the complaint claims are based on state regulatory standards. The filed rate doctrine, which is a regulatory concept itself, should not be invoked to block proper state regulatory action.

**C. The Purpose of the Filed Rate Doctrine is at Odds with the Argument Raised by U S WEST.**

U S WEST's invocation of the filed rate doctrine to preclude state commission consideration of AT&T's claims is inconsistent with the purpose of the doctrine. The Supreme Court in *Central Office* explained that the filed rate doctrine is meant to prevent a telecommunications carrier's discriminatory provision of service:

Section 203(a) of the Communications Act requires every common carrier to file with the FCC 'schedules,' i.e., tariffs, 'showing all charges' and 'showing the classifications, practices, and regulations affecting such charges.' 47 U.S.C. § 203(a). Section 203(c) makes it unlawful for a carrier to 'extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.' Section 203(c). These provisions are modeled after similar provisions of the Interstate Commerce Act (ICA) and share its goal of preventing unreasonable and discriminatory charges. Accordingly, the century-old 'filed-rate doctrine' associated with the ICA tariff provisions applies to the Communications Act as well. . . . (Citations omitted.)

*Central Office* at 1962.

The *Central Office* Court further explained the purpose of the filed-rate doctrine:

While the filed-rate doctrine may seem harsh in some circumstances, its strict application is necessary to 'prevent carriers from intentionally *misquoting* rates to shippers as a means of offering them rebates or discounts, the very evil the filing requirement seeks to prevent.' Regardless of the carrier's motive--whether it seeks to benefit or harm a particular customer--the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that anti-discriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.' (Citations omitted.)

*Central Office* at 1963.

The MPUC has the statutory duty to oversee the provision of telecommunications service within the state of Minnesota. This includes the authority to prohibit the discriminatory provision of service. The invocation of the filed rate doctrine to prevent the state commission from exercising its regulatory authority would be absolutely inconsistent with the antidiscriminatory purpose of the doctrine.

**D. The Holding of the *Central Office* Case Does Not Apply to These Proceedings.**

U S WEST cites to the *Central Office* case for the proposition that a state regulatory agency may not address issues associated with a federally tariffed service or apply state law to ensure that the provision of the federally tariffed service is reasonable or adequate. *Central Office* did not address this issue. Quoting from the petition for certiorari, Justice Stevens noted in his dissenting opinion (which would have narrowed the application of the filed rate doctrine to allow possible recovery on the state law tort claim) that the only question the Supreme Court agreed to decide was “whether the filed rate doctrine pre-empts ‘state-law contract and tort claims based on a common carrier’s failure to honor an alleged side agreement to give its customer better service than called for by the carrier’s tariff.’” *Central Office* at 1968. This is the question the Supreme Court addressed in *Central Office*. In citing to *Central Office* for the proposition that a state regulatory agency may not use its state authority to ensure adequate provision of a federally tariffed mixed use service, U S WEST stretches the holding of the *Central Office* case beyond its scope.

**E. Conclusion.**

In its complaint, AT&T asks the MPUC to remedy a pattern of treatment AT&T alleges violates the state quality of service standard. Neither the filed rate doctrine, nor the *Central Office* case cited by U S WEST, precludes the Minnesota Public Utilities Commission from

fulfilling its regulatory duty to ensure the adequate provision of access service in Minnesota by addressing the merits of the AT&T complaint.

**III. GRANTING AT&T'S REQUESTED RELIEF WOULD NOT INTERFERE WITH THE FCC'S INTERESTS IN THE FEDERALLY TARIFFED MIXED USE SERVICES.**

Since the same access circuits carry both interstate and intrastate traffic, U S WEST argues that it is "neither technically nor practically feasible to sever the provisioning of a circuit into federal and state components." *U S WEST Petition for Declaratory Ruling* at p. 17. U S WEST asserts that the FCC should therefore preempt all state commission action on the complaint proceedings because their subject matter cannot be separated from matters under FCC jurisdiction.

The Department agrees that the use of the access services at issue is thoroughly mixed between interstate and intrastate traffic, so much so that a codified process is necessary to establish cost allocating and ordering out of the tariff. 47 C.F.R. § 36.154. The process, by which costs are allocated according to formulas or estimates, is a recognition of two facts regarding mixed use facilities: the facilities *will* be shared by intrastate and interstate callers; and traffic is shared so freely through these dedicated pipes that it cannot be accurately measured as to volume or jurisdiction. These facts in turn underscore a significant fact regarding jurisdiction over the mixed use facilities: the intertwining of the interstate and intrastate use means that intrastate service will not escape the effects of any delay or blockage of federally tariffed elements, or of any discriminatory provision of the service. Intrastate callers will be affected by the same service quality issues that affect interstate callers. These facts, rather than justifying federal preemption, highlight the need for a state commission to pursue its regulatory duty to oversee quality of service issues for its state citizens.

This application of dual jurisdiction is possible so long as the state regulation will not “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Louisiana* at p. 374. In this instance, U S WEST’s Minnesota and interstate access service tariffs are nearly mirror images of each other. The MPUC’s application of the tariffs in its oversight of quality of service issues affecting Minnesota intrastate callers will therefore not hinder the FCC’s interest in service quality issues. The MPUC’s application of its expertise in service quality issues will bolster, rather than obstruct, the FCC’s regulatory interests.

### CONCLUSION

The Minnesota Department of Commerce respectfully requests that the Federal Communications Commission deny U S WEST’s request for a declaratory ruling. The Department requests that the FCC find that the Minnesota Public Utilities Commission may appropriately address state quality of service standards and remedies in connection with the intrastate use of federally tariffed access services that are the subject of the AT&T complaint, and that these MPUC actions are not preempted by federal law.

Dated: April 21, 2000

Respectfully submitted,

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Re: In the Matter of Petition of U S WEST for Declaratory Ruling Preempting State Commission Proceedings to Regulate U S WEST's Provision of Federally Tariffed Interstate Service  
FCC Docket No. CC 00-51

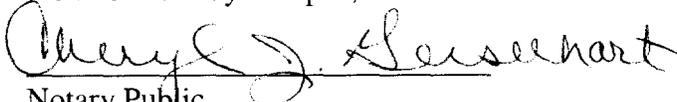
STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF RAMSEY    )

Kristine L. Danielson, being first duly sworn, deposes and states at the City of St. Paul, county and state aforesaid, on the 20th day of April, 2000, she served copies of the attached **COMMENTS OF THE MINNESOTA DEPARTMENT OF COMMERCE** by depositing the same in the United States Mail at said City of St. Paul, true and correct copies thereof, properly enveloped, with postage prepaid, and addressed to:

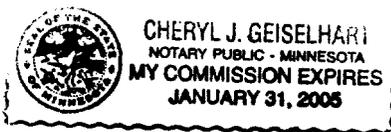
See attached service list

  
\_\_\_\_\_  
Kristine L. Danielson

Subscribed and sworn to before  
me this 20th day of April, 2000.

  
\_\_\_\_\_  
Notary Public

AG: 376252, v. 01



Service List, April 21, 2000  
In the Matter of Petition of U S WEST, Inc. for Declaratory  
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AT&T Complaint Against US WEST, Inc.  
PUC Docket No. P421/C-99-1183  
April 21, 2000  
AG:365952.v1

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