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Patrick H. Merrick, Esq.
Director - Regulatory Affairs
AT&T Federal Government Affairs

Suite 1000
1120 20th St. NW
Washington, DC 20036
202 457-3815
FAX 202 457-3110

September 24, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation: Local Competition Provisions of the
Telecommunications Act of 1996, CC Docket No. 96-98.

Dear Ms. Salas;

Per the request made by Jonathan Reel, please include the attached materials in the record of the above mentioned proceeding.

I have submitted an original and two copies of this Notice in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Attachment

CC: Cathy Carpino
Jonathan Reel

No. of Copies rec'd at 2
List ABOVE

Decision No. R00-128

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 99F-404T

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,
COMPLAINANT,

RECEIVED
AT&T Corp. Legal - Denver

v.

FEB 9 2000

U S WEST COMMUNICATIONS, INC.,
RESPONDENT.

COMM. _____
MISC. _____
INTERNAL _____
OTHER _____ INITIALS *CR*

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
KEN F. KIRKPATRICK
DISMISSING COMPLAINT**

Mailed Date: February 7, 2000

Appearances:

Letty Friesen, Esq., Denver, Colorado, for
the Complainant; and

Timothy M. Timkovich, Esq., Richard A.
Westfall, Esq., and Thomas Dethlefs, Esq.
for the Respondent.

I. STATEMENT

A. AT&T Communications of the Mountain States, Inc. ("AT&T"), filed this complaint against U S WEST Communications, Inc. ("U S WEST"), on August 18, 1999. The complaint was originally filed as an expedited complaint under Rule 61(j) of the Commission's Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1. However, U S WEST opted out of the

expedited procedure, as it is entitled to do.¹ Staff of the Commission filed its petition to intervene on September 15, 1999, which was granted by Decision No. R99-1079-I. On September 20, 1999, Sprint Communications Company, L.P. ("Sprint") filed its Petition to Intervene, which petition was denied by Decision No. R99-1077.

B. A prehearing conference was held on September 10, 1999. A procedural schedule was established which called for the matter to be heard on November 16, 17, and 18, 1999. The hearing was rescheduled at the request of U S WEST due to a family health emergency. The hearing was scheduled for December 20, 21, and 22, 1999 at 9:00 a.m. in a Commission hearing room in Denver, Colorado.

C. At the assigned place and time the undersigned Administrative Law Judge ("ALJ") called the matter for hearing. Several preliminary matters were dealt with. First, Staff's intervention was dismissed at its request. Second, a motion of U S WEST filed December 9, 1999 for leave to file its second amended answer was granted. Next, administrative notice was taken of U S WEST's Colorado access tariff and U S WEST's federal access tariff. Finally, testimony of U S WEST witness Phyllis Sunins was admitted by stipulation in the form of an affidavit and attachments, with AT&T waiving its right to cross-

¹ See 4 Code of Colorado Regulations 723-1-61(j)(5).

examine Sunins. All these preliminary rulings are memorialized in this decision.

D. The matter then proceeded to hearing. During the course of the hearing Exhibits 1 through 5, 7 through 18, 20, 23 through 42, 44 through 51, 54 through 58, 60 through 62, and Exhibits A, E, F, G, K, L, and Q were identified, offered, and admitted into evidence.² At the conclusion of the hearing the parties were authorized to file posthearing statements of position no later than January 24, 2000. Timely closing statements were filed by both AT&T and U S WEST.

E. In accordance with § 40-6-109, C.R.S., the undersigned ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

A. AT&T is a telecommunications provider operating in Colorado. As pertinent to this proceeding it provides telecommunications services between local exchange areas. AT&T maintains an extensive facilities-based network, but it also purchases access from U S WEST. Access is of two types, special and switched. Special access is a point-to-point or point-to-multipoint service provided by U S WEST, dedicated to the

² Exhibit A is the Sunins affidavit and attachments which was admitted as a preliminary matter by stipulation.

exclusive use of AT&T for the transmission of telecommunications services. Switched access is the services or facilities furnished by U S WEST to AT&T that allows AT&T to use U S WEST's local network for origination or termination of interexchange telecommunications services. See §§ 40-15-102(25) and (28), C.R.S. AT&T purchases access to connect to its end-user customers. While AT&T could build its own access, either by itself or through an affiliated entity, it is cheaper for it to purchase access from U S WEST.

B. The Federal Communications Commission ("FCC") extensively regulates interstate telecommunications services. By rule, the FCC has determined that any access line which carries 10 percent or more interstate services must be purchased through a federal tariff. Thus U S WEST has a tariff, FCC No. 5, which includes extensive conditions and terms governing the provision of access services. Because of this 10 percent rule, AT&T purchases the vast majority of its access through the federal tariff. In this proceeding AT&T has complained specifically concerning approximately 100 orders for access, with 3 of these orders purchased out of the Colorado catalog. The Colorado catalog of U S WEST lists the terms and conditions for the provision of services for so-called Part 4 services, services exempt from regulation under § 40-15-401, C.R.S. Special access is a Part 4 service. Switched access is

a Part 3 service, regulated by this Commission as an emerging competitive telecommunications service. U S WEST maintains a tariff with this Commission governing the sale and purchase of intrastate switched access.

C. The federal tariff under which access is purchased sets forth numerous conditions of the offering, beyond price. For example, the tariff covers ordering conditions, firm order confirmation, and service date intervals.¹ The tariff also contains a provision concerning waiver of certain charges should the intervals not be met, and a provision limiting liability under the tariff. The intrastate tariff governing switched access is almost identical to the federal tariff. The U S WEST catalog is similar, but does not contain all of the provisions. The catalog does not contain a section concerning specific service intervals.

D. AT&T has experienced regular, frequent, widespread, and ongoing delays in obtaining access purchased out of the federal tariff. AT&T has experienced delays in three instances with orders for access under the State catalog. Sometimes U S WEST will provide a date upon which service is to be provided, but extend that date once or repeatedly with little or

¹ Service date intervals contain milestones for the steps U S WEST takes in provisioning access, and thus indicate as well how long it should take for an order to be fully provisioned.

no warning to AT&T. Or, U S WEST may establish a date on which service is to be provided but later simply cancel that date and not provide a new date. While there is an expedited process available through the tariff, for an increased charge, AT&T has little control over the date that access ordered in the normal course of events will be provided.

E. Orders are deemed to be held orders when facilities are not in place to provide the service. U S WEST has put held status on many orders submitted by AT&T within the recent past. Many other orders have simply not been filled on the date originally promised.

F. When U S WEST does not meet its dates for the provision of service, it works a hardship on AT&T as well as AT&T's customers. AT&T is held responsible by the ultimate end user which puts AT&T in a poor business light. Also, the end user does not obtain the service when requested or needed. In an attempt to reduce the frequency with which this occurs, AT&T has requested information from U S WEST concerning "hotspots" or areas in the network which are nearing capacity. AT&T has sought this information generally, and also for areas where it has forecasted a demand, in order to be able to better coordinate its business with the ability of U S WEST to provision services. However, U S WEST refuses to provide information of this type.

G. On a region-wide, multi-state basis, U S WEST has provisioned DS1s and DS0s to AT&T on a wholesale basis after a longer interval than it provided those same services to other wholesale customers. In addition, the provision of these circuits to AT&T takes longer than it does to provision these circuits to U S WEST retail sales on a region-wide, multi-state basis.

III. DISCUSSION

A. U S WEST at the outset asserts two arguments made previously in its Motion for Summary Judgment. First, it suggests the Commission does not have jurisdiction over access services purchased out of FCC No. 5, U S WEST's federal tariff. And second, it suggests that the filed rate doctrine, as interpreted by the Supreme Court in *American Telephone and Telegraph Company v. Central Office Telephone Company*, 118 Supreme Court 1956 (1998) preempts all of AT&T's claims. AT&T believes that this Commission has jurisdiction to adjudicate all of its claims.

B. The *Central Office* case involved provisioning of a service by AT&T⁴ that was federally tariffed at the FCC. The complainant in that proceeding had brought a State law claim for

⁴ The petitioner in the *Central Office* case and the complainant in this case are distinct but related entities. For ease of identification, both are referred to as AT&T in this decision.

damages against AT&T. The complainant alleged that certain promises made by AT&T which related to subjects covered by the tariff were not kept. The terms of the promises were different from the tariff terms. The Supreme Court initially noted that 47 U.S.C. § 203(c) makes it unlawful to "extend to any person privileges or facilities in such communications, or employ or enforce any classification, regulations, or practices affecting such charges" except those set forth in the tariff. Noting that the provision of services in a manner better than set forth in the tariff could constitute a preference, the court concluded that the filed rate doctrine and the statutory prohibition against discrimination effectively precluded all of the complainant's State law claims for damages.

C. U S WEST also asserts as a defense the doctrine of primary jurisdiction, which suggest that even if this Commission had authority or jurisdiction to determine whether U S WEST was providing just and reasonable service for services provided out of its FCC tariff, it should defer to the FCC.

D. This Commission has determined that it has authority to interpret federal certificates issued by the Interstate Commerce Commission and the Federal Highway Administration in determining whether or not a motor carrier was conducting lawful operations. See Decision No. C98-1024. See also *Arapahoe County Airport Authority v. Centennial Express Airlines*, 956

P.2d 587 (Colo. 1998). These decisions convince the ALJ that in appropriate circumstances the Commission can evaluate service nominally provided under a federal tariff to determine whether the provisions of those services violates any state law requirements. This would include the requirement that all services provided by a utility be adequate, efficient, just, and reasonable. See § 40-3-101(2), C.R.S. The question is whether this is an appropriate circumstance.

E. The Commission noted that the factors to be applied in determining whether to invoke the doctrine of primary jurisdiction are as follows:

- a. Whether the question at issue involves technical or policy issues within the [FCC's] particular field of expertise beyond the understanding of [the PUC];
- b. Whether the federal agency determination would materially aid the adjudicator to whom the question has been presented and avoid the danger of inconsistent rulings; and
- c. Whether the benefits of applying the doctrine outweigh the costs resulting from delay attributable to the referral of the matter to the federal administrative agency.

F. The provisioning of access does not involve technical or policy issues beyond this agency's expertise or understanding. The portions of U S WEST's federal tariff concerning access are almost identical to the provisions governing access in the State tariff and the State catalog.

G. However, the danger of inconsistent rulings looms large in this proceeding. AT&T has filed similar complaints to this one in numerous other states seeking particular relief. A review of the relief sought by AT&T is illustrative. AT&T seeks a Commission order that U S WEST immediately fill all of AT&T's held orders, and an order that U S WEST immediately develop and implement a plan to construct or deploy facilities where it has held AT&T's orders for lack of facilities. AT&T seeks to have construction completed and facilities deployed within 30 days of the Commission's order. Obviously, were the Commission to issue such an order and U S WEST to comply with it, resources would have to be taken from other areas, with a likely degradation of service in those other areas. For example, the provisioning process is generally done on a regional basis. Such an order from this Commission would affect the provisioning process region wide. Thus that portion of the complaint which deals with provisioning of circuits out of the Federal tariff should be deferred to the FCC.

H. There are other portions of the complaint which arguably do not arise out of the FCC tariff. One of AT&T's other claims is that U S WEST is not maintaining an adequate network to provide access services. However, the proof at hearing did not distinguish specifically which parts of the network are inadequate. Rather, there was general information

about a number of held orders from which AT&T concludes that the network is being maintained in an unreasonable and inadequate fashion. Two specific areas discussed were Northglenn and Durango. However the service to Northglenn was provided fairly quickly after an initially pessimistic response from U S WEST. Concerning Durango, U S WEST appears near to completing a \$15,000,000 fiber connection to Grand Junction that has involved unusual circumstances. Even if this claim is severable from the claims relating to service ordered out of the federal tariff, the proof was insufficient to warrant an order from this Commission to make network improvements.

I. Concerning AT&T's discrimination claim, the evidence is similarly insufficient. AT&T's sole evidence consisted of regional data indicating a slightly longer time to provide circuits to AT&T than to other wholesale customers. However, the lack of Colorado specific data precludes any finding of discrimination in the rendition of the intrastate access.

J. AT&T claimed that U S WEST does not keep it apprised of hotspots in the network for areas where AT&T has forecast a demand for services. AT&T suggests that this constitutes inadequate service. U S WEST concedes that it does not provide information until services are ordered. This is not a claim based on the FCC tariff. It appears that such an action could be maintained but was not proven in this case. While there were

many instances of orders not being timely filled, there was no evidence linking them to the lack of information provided to AT&T by U S WEST. There was no evidence put in the record that these orders were for areas where AT&T had forecast a need for facilities. There was no evidence of AT&T's forecasts at all. There was no nexus between established between untimely provisioning and the forecasts of AT&T.

K. There were three specific instances of orders purchased out of the U S WEST catalog. One resulted in service being provided approximately 60 days after the customer's desired due date. See Exhibit 47A, line 1, page 1. One resulted in completion approximately 15 days after the customer desired due date. See Exhibit 46A, page 5, line 4. And the third resulted in completion approximately 30 days beyond the customer desired due date. See Exhibit 46A, page 10, line 10. These delays appear to be attributable to lack of equipment. Unlike the tariff, the catalog does not contain timelines for completion of orders. Nonetheless, the tariff serves as a guideline for these services.

L. U S WEST suggests that this Commission has no authority to evaluate the provision of deregulated services. Alternatively, it suggests that limitations of liability contained in the tariff and catalog preclude this Commission from entering remedial orders. Both propositions are false.

This Commission has the authority to resolve complaints concerning the quality of access between providers, see § 40-15-404, C.R.S. This includes the timeliness of the provisioning process. Concerning liability limitation provisions, these provisions do not apply to regulatory agency remedial orders. Were that the case, a utility could simply file such a provision and exempt itself from any regulatory oversight. Rather, such provisions speak to damages limitations in the event of a civil action for damages. This Commission has no jurisdiction over damages at all. But the Commission's regulatory oversight authority, including its authority to hear and decide complaints, is unaffected by such provisions.

M. AT&T has thus established that in three instances U S WEST provided services under its catalog after a period of time that was longer than the standard interval contained in U S WEST tariffs. The frequency with which this occurs was not established. Given the relatively short time after the standard intervals when the service was provided, and given that facilities had to be constructed to meet the orders, the undersigned ALJ does not find that this forms a sufficient basis to warrant any relief.

IV. CONCLUSIONS

A. AT&T's claims for relief for access services provisioned out of the federal tariff should be deferred to the FCC for adjudication.

B. AT&T's claims of discriminatory treatment in the provision of access services were not proven.

C. AT&T's claim that U S WEST is providing unreasonable service by failing to inform AT&T of hotspots throughout U S WEST's network was not proven.

D. AT&T's claim that U S WEST is providing inadequate service by failing to maintain its network was not proven.

E. AT&T established three instances of poor service for access ordered out of the U S WEST catalog. However, given the circumstances of those orders, no remedial order is warranted.

F. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

V. ORDER

A. The Commission Orders That:

1. Docket No. 99F-404T, being a complaint of AT&T Communications of the Mountain States, Inc., against U S WEST Communications, Inc., is dismissed.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

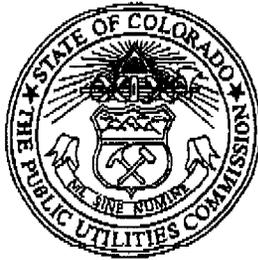
a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



KEN F. KIRKPATRICK

Administrative Law Judge

ATTEST: A TRUE COPY

Bruce N. Smith
Director

Decision No. C00-631

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 99F-404T

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,
COMPLAINANT,

V.
U S WEST COMMUNICATIONS, INC.,
RESPONDENT.

RECEIVED
AT&T Corp. Legal - Denver

JUN 12 2000

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DECISION ON EXCEPTIONS

Mailed Date: June 9, 2000
Adopted Date: June 7, 2000

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Decision No. R00-128 ("Recommended Decision") filed by Complainant AT&T Communications of the Mountain States, Inc. ("AT&T"), and Respondent U S WEST Communications, Inc. ("USWC"). In Decision No. R00-128, the Administrative Law Judge ("ALJ") recommended that AT&T's complaint against USWC be dismissed. The parties, pursuant to the provisions of § 40-6-109(2), C.R.S., have filed exceptions to the Recommended Decision. AT&T objects to the ALJ's

recommendation that the complaint be dismissed.¹ USWC, although agreeing with the recommendation for dismissal, objects to various factual findings by the ALJ. Now being duly advised in the premises, we deny the exceptions and affirm the Recommended Decision in its entirety.

B. AT&T Exceptions

1. This proceeding concerns AT&T's complaint against USWC. In its complaint, AT&T claims that USWC has failed to provide adequate and timely switched² and special³ access services to AT&T, and that USWC has discriminated against AT&T in the provision of such services (as compared to USWC's provision of these services to other wholesale customers and itself). After hearing, the ALJ concluded that AT&T had failed to meet its burden of showing that the Commission should grant any relief in this case. In large measure, the ALJ's conclusion was based upon his finding that AT&T's complaint mainly relied upon switched and special access services ordered out of the Federal Communications Commission's ("FCC") tariff. That is, the ALJ found that the evidence here primarily related to USWC's provision of interstate

¹ AT&T, as part of its exceptions, also requests that we reopen the record to allow for the introduction of new evidence.

² "Switched access" is defined as the services or facilities furnished by a local exchange company to interexchange providers that allow such providers to originate or terminate interexchange telecommunications services. Section 40-15-102(28), C.R.S.

³ "Special access" is defined as any point-to-point or point-to-multipoint service provided by a local exchange provider dedicated to the exclusive use of any interexchange provider for the transmission of any telecommunications services.

access. The ALJ then concluded that the Commission should defer to the FCC on the issues presented by the complaint pursuant to the doctrine of primary jurisdiction. In particular, the ALJ noted that AT&T had filed complaints similar to this one in several states. As such, the ALJ determined, consideration of AT&T's claims here would result in a risk of inconsistent rulings on those complaints in the various states. AT&T now excepts to these conclusions.

2. The exceptions first assert that the Commission and the FCC have concurrent jurisdiction over the claims relating to the adequacy of access services provided by USWC. AT&T contends that it is seeking relief here based, in part, on state law.¹ In particular, AT&T asserts that the Commission has jurisdiction over the adequacy of USWC's access services under § 40-15-404, C.R.S. (Commission has complaint authority over interconnection and access disputes), and § 40-6-108, C.R.S. (Commission has complaint authority over violations of the public utilities laws). The exceptions then assert that the doctrine of primary jurisdiction is inapplicable here because the doctrine calls for *judicial deference to an administrative agency* in cases involving questions within that agency's particular expertise. In this case, AT&T suggests, the doctrine of primary jurisdiction is inapplicable because two administrative agencies, the

¹ We note, however, that both AT&T in its exceptions and USWC in its response rely extensively on provisions in the FCC tariff.

Commission and the FCC, have concurrent jurisdiction over the subject matter of the complaint. Finally, AT&T contends that there is no threat of inconsistent rulings (if we ruled on the merits of its complaint) between the Commission and the FCC. The claims regarding the adequacy of USWC's access services are based on state law. Federal law (*i.e.*, 47 U.S.C. §§ 261(b-c)) specifically preserves state authority over access services provided by local exchange carriers such as USWC. Therefore, AT&T submits, the Commission is not preempted by federal law from addressing the merits of the complaint.

3. We affirm the ALJ's recommendation that the claims raised in this case regarding USWC's access services should be deferred to the FCC. Although AT&T argues that its claims are based on state law, the evidence of inadequate service presented here relates almost entirely to access services provided by USWC out of its federal tariff. Virtually all of AT&T's proof in support of its complaint relates to interstate, not intrastate, services.⁵ The record also indicates that AT&T purchases the vast majority of access services from USWC out of the federal tariff. Therefore, AT&T is incorrect in suggesting that its complaint here is based on state law.

⁵ FCC rules require carriers such as AT&T to purchase access out of the federal tariff if more than 10 percent of traffic on a specific circuit is interstate traffic. As USWC points out, this 10 percent rule indicates that the FCC intends to regulate access provided over a circuit when even a slight amount of traffic on that circuit is interstate.

4. As for AT&T's argument that federal law preserves state authority over exchange access, we agree with USWC that §§ 261(b-c) preserve such authority with respect to intrastate services. These provisions do not suggest that a state commission is the appropriate forum to resolve a complaint concerning the adequacy of interstate services.

5. The complaint here, for the most part, does not raise issues regarding the adequacy of access services subject to the Commission's authority under state law (i.e., intrastate access services). Because AT&T's claims relate to interstate services, we agree with the ALJ that these claims are more appropriately resolved by the FCC.

6. In its second argument (exceptions, page 10), AT&T argues that USWC's access services in general are inadequate and unreliable in violation of specific provisions of Colorado law. AT&T asserts that it is challenging USWC's general practices in providing access services (e.g., USWC's alleged inability to provide service within the intervals specified in its tariff, USWC's alleged refusal to inform AT&T of areas where it has a shortage of facilities necessary to provide access services, USWC's alleged failure to manage its network to timely provide service to AT&T, etc.). The complaint does not challenge USWC's actions with respect to individual access orders. The Commission, AT&T argues, has authority under §§ 40-4-101(1) and 40-4-102(1), C.R.S., to resolve these issues.

7. The evidence upon which AT&T relies to support its challenges to USWC's general access provision practices still relates to interstate services. This record contains little evidence about USWC's practices with respect to the provision of intrastate access, and, therefore, little evidence regarding USWC's compliance with the provisions of state law cited by AT&T. As such, we conclude that these challenges to USWC's services are more appropriately considered by the FCC.

8. As part of its exceptions, AT&T requests that we reopen the record and accept into evidence certain information appended to the exceptions.⁶ We will deny the motion to reopen for failure to state good cause. There is no reason to believe that the new information would affect our decision that the complaint should be dismissed for the reasons stated in the Recommended Decision and discussed above.

C. USWC Exceptions

1. USWC, while it agrees with the ALJ's ultimate recommendation in this matter, objects to a number of findings made in the Recommended Decision. Specifically, USWC excepts to the findings that: (1) AT&T has experienced regular, frequent, widespread, and ongoing delays in obtaining access services out of the federal tariff (finding D, pages 5-6); (2) USWC's failure to timely provide service and its failure to provide certain

⁶ AT&T's Motion for Leave to Reply to U S WEST's Response to AT&T's Exceptions and Request to Reopen the Record will be granted.

information to AT&T harms AT&T and its customers (finding F, page 6); and (3) On a region-wide basis, USWC has provided services to AT&T after a longer interval than it provided those services to other wholesale customers or to itself for its retail services (finding G, page 7). Generally, USWC argues that the record fails to support these findings.

2. We reject these arguments. Our review of the record indicates that the evidence supports the ALJ's findings in all respects. For example, witness Field (for AT&T) testified that on "numerous" occasions USWC had cancelled firm order confirmations given to AT&T (December 20, 1999 transcript, page 58); that USWC's held orders for AT&T continually "hovered around" 80-90 orders in Colorado (December 20, 1999 transcript, pages 62-63); and that USWC's performance had harmed AT&T's reputation because of its inability to meet its end-users' due dates for service (December 20, 1999 transcript, page 177-178). Witness MacCorquodale (for AT&T) testified that there was a "large number" of USWC held orders for AT&T (December 20, 1999 transcript, page 300). Similarly, witness Blaszczyk (for AT&T) submitted testimony that USWC's untimely provisioning of access was harming AT&T's ability to provide service to end-users (December 21, 1999 transcript, page 8); that he deals with complaints almost on a "daily" basis because USWC informed AT&T, just before the due date for service, that it could not provide service (December 21, 1999 transcript, page 10-11). Mr. Blaszczyk

also sponsored those exhibits (57 and 58) which indicate USWC provided service to AT&T on a less timely basis than to other customers (December 21, 1999 transcript, pages 75-78). In rebuttal, witness Field testified that USWC does not provide "hot spot"⁷ information to AT&T (December 21, 1999 transcript, page 263-64), and that many times USWC misses firm order confirmation dates without giving AT&T prompt notice that orders would not be completed on time, and without giving prompt notice that facilities are not in place to provide service (December 21, 1999 transcript, pages 265-70). Based upon evidence such as this, we reject USWC's arguments.

3. USWC's exceptions also object to the ALJ's observation that there are portions of the complaint "which arguably do not arise out of the FCC tariff" (Recommended Decision, paragraph H, page 10). The ALJ's observation that "arguably" some portions of the complaint do not relate to the FCC tariff is supportable (although those portions are minor). Moreover, we find it unnecessary to modify the Recommended Decision as requested by USWC. As discussed above, we agree with USWC that the vast majority of evidence presented in this case relates to services purchased out of the federal tariff, and that the Commission should defer to the FCC on these matters. No need exists to modify the Recommended Decision as suggested by USWC.

⁷ "Hot spots" are areas in the network that are near capacity and in which USWC may have difficulty providing service.

4. Finally, USWC excepts to the ALJ's observation (paragraph L, page 13) concerning limitation of liability provisions in a tariff as not applying to remedial orders issued by a regulatory agency such as the Commission. The ALJ stated that such provisions, in general, purport to limit damages in civil actions, but that such provisions do not affect the Commission's authority to hear and decide complaints. These general observations are correct. As such, we reject USWC's request to limit or otherwise modify these statements.

II. ORDER

A. The Commission Orders That:

1. The Motion for Leave to Reply to U S WEST's Response to AT&T's Exceptions and Request to Reopen the Record filed by AT&T Communications of the Mountain States, Inc., is granted.

2. The exceptions to Decision No. R00-128 and the Motion to Reopen the Record filed by AT&T Communications of the Mountain States, Inc., are denied.

3. The exceptions to Decision No. R00-128 filed by U S WEST Communications, Inc., are denied.

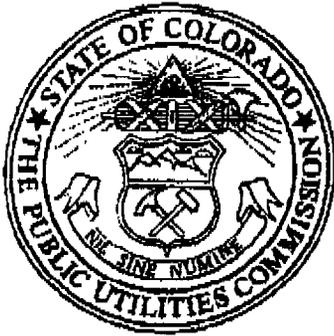
4. The 20-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

5. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING June 7, 2000.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



RAYMOND L. GIFFORD

ROBERT J. HIX

ATTEST: A TRUE COPY

Bruce N. Smith
Director

POLLY PAGE

Commissioners