NOTE! An important notice to parties about administrative review appears at the end of this order.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,	)	
	)	DOCKET NO. UT-971063
Complainant,	)	
v.	)	NINTH SUPPLEMENTAL ORDER
	)	INITIAL ORDER
U S WEST COMMUNICATIONS, INC.,	)	
Respondent.	)	
. . . . .	)	

SUMMARY

PROCEEDINGS: On June 26, 1997, MCImetro Access Transmission Services, Inc. (MCImetro) filed a formal complaint against U S WEST Communications, Inc. (U S WEST), alleging breaches of contract and violations of law resulting from U S WEST's failure to adequately forecast network growth and timely provision interconnection facilities. On July 16, 1997, U S WEST filed its answer to the complaint.

On July 30, 1997, a prehearing conference was conducted and Commission Staff entered its appearance. On August 15, 1997, U S WEST filed its Motion to Dismiss; on August 22, 1997, MCImetro and Commission Staff filed oppositions to the Motion to Dismiss; on August 27, 1997, the Commission heard oral arguments, and the Commission's October 2, 1997 Order denied the motion.[1]

On October 20, 1997, the Commission reconvened the prehearing conference, and a petition to intervene by TRACER was granted.

On February 13, 1998, MCImetro and Commission Staff filed opening testimony. On March 27, 1998, U S WEST filed reply testimony. On April 24, 1998, MCImetro and Commission Staff filed rebuttal testimony.

[1] Order Denying U S WEST Communications, Inc.'s Motion to Dismiss, Docket No. UT-971063 (October 2, 1998).

On June 2-5, 1998, an evidentiary hearing was conducted before Administrative Law Judge Lawrence J. Berg.

On July 16, 1998, the parties filed opening briefs. On July 31, 1998, MCImetro, Commission Staff, and U S WEST filed reply briefs.

PARTIES: Complainant, MCImetro is represented by Clyde MacIver, attorney, Seattle, WA, William Hunt, Denver, CO, and Deborah Ching, San Francisco, CA; respondent, U S WEST, by Lisa Anderl and Peter Butler, attorneys, Seattle, WA; Commission Staff by Shannon Smith, Assistant Attorney General, Olympia, WA; and TRACER by Arthur Butler and Joel Paisner, attorneys, Seattle, WA.

SUMMARY OF DECISION: This Order determines that U S WEST must provide MCImetro with the same information that it makes available to itself regarding the availability of facilities. This Order also directs U S WEST to employ its access tandem to relieve call blockage and to provide interconnection when capacity is exhausted at its local tandem. Reporting requirements are imposed upon U S WEST. This Order determines that U S WEST has not engaged in willful or intentional misconduct, and no monetary penalties are imposed.

MEMORANDUM

I. BACKGROUND

In this Order, the Commission addresses MCImetro's charges against U S WEST contained in a complaint filed June 26, 1997. The parties have interconnected for the ordering and provisioning of local exchange services pursuant to three successive agreements since September 1995. MCImetro alleged violations in four main areas: 1) network capacity and provisioning of facilities; 2) production of quarterly forecasts and notices of facilities exhaust; 3) interconnection at U S WEST's access tandem; and 4) call blockage.

This Order discusses the complexities of forecasting and provisioning capacity, and the developing process of interconnection. The initial interconnection agreement between the parties predates the Federal Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act), and the Federal Communications Commission's First Report and Order (FCC Order).[2] The Telecom Act and the FCC Order established additional obligations between the parties. However, this Commission best summarized the essential obligation between MCImetro and U S WEST in its Ninth Supplemental Order Rejecting Tariff Filings, Washington Utilities and Transportation Commission v. U S West Communications, Inc., (Interconnection Case), Consolidated Docket Nos. UT-941464, 941465, 950146, and 950265, at 21 (March 13, 1996):

> Our order requires that USWC and competing carriers treat each other as co-carriers.

[2] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B- Final Rules.

MCImetro is dependent upon U S WEST for interconnection services in order to provide local service to its own customers. The Commission does not underestimate the challenge of competing and cooperating at the same time. With that understanding, the Commission gives U S WEST the benefit of the doubt in this proceeding and does not view its actions as intentional and discriminatory. This Order seeks to minimize MCImetro's dependence on U S WEST, enabling MCImetro to assume greater control of its operations and sharing the responsibility for making those decisions that impact both companies.

Arguments by Commission Staff and TRACER coincide with arguments by MCImetro and do not require restatement, but their contribution to the legal and factual analysis in this initial Order deserves recognition.

II. STATEMENT OF JURISDICTION AND AUTHORITY

The Commission has jurisdiction over this complaint and U S WEST pursuant to RCW 80.01.040 (general powers of the Commission) and 80.04.110 which provides that when two or more public service corporations are engaged in competition in any locality in the state, either may make complaint against the other that its practices are unreasonable, unremunerative, discriminatory, illegal, unfair, or intending or tending to oppress the complainant. The Commission also has jurisdiction pursuant to RCW 80.36.186, .300, and WAC 480-120-515.

III. SUMMARY OF STATE LAW AND POLICY

The Washington Legislature has made competition in telecommunications markets a matter of state policy. RCW 80.36.300. The Washington Supreme Court reiterated this policy in Electric Lightwave, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 530, 869 P.2d 1045 (1994), where the court rejected the argument that exclusive franchise service areas in the telecommunications industry were the law in Washington. Thus, it is state policy to promote competition in the local exchange.

The Commission regulates, in the public interest, the rates, services, facilities, and practices of public utility companies, including telecommunications companies. RCW 80.01.040. In so regulating, the Commission must implement the state policy favoring competition in the telecommunications markets.

In keeping with its mandate to promote competition in the local exchange, the Commission entered into a proceeding to decide the "terms and conditions under which competitors for local exchange service will interconnect their networks in order to exchange traffic between their customers." Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, In Part, Interconnection Case, at 6 (Oct. 31, 1995). In that Order, the Commission explained how interconnection is necessary to ensure competition in the local exchange:

> Technically and economically efficient interconnection of the incumbent LEC and new entrant [alternative local exchange company] ALEC networks is essential to the emergence of a competitive local exchange market. Denial of technically and economically efficient interconnection arrangements creates a barrier to entry. The Commission is persuaded that ALECs should have considerable flexibility to configure their networks in a manner they deem suitable.

Id. at 45. In the Fourth Supplemental Order, the Commission directed U S WEST to file interconnection tariffs. Id. at 97-99. In addition, the Commission expressly rejected the contention that a company's obligation to interconnect is limited to the availability of facilities:

> The Commission will not allow any carrier, regardless of the terms offered to its own customers, to condition its obligation to interconnect at meet points and to complete local calls delivered by originating carriers on the availability of facilities.

Ninth Supplemental Order Rejecting Tariff Filings, Interconnection Case, at 19 (March 13, 1996). This complaint involves the Commission's orders in the Interconnection Case as well as the statutes and rules governing telecommunications companies in the State of Washington.

IV. SUMMARY OF FEDERAL LAW

In addition to the laws and policies of the State of Washington requiring competition in the local exchange, Congress also has mandated local competition on a national level. On February 8, 1996, the Telecom Act became law. The purpose of the Act is to:

> [P]rovide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996). As an incumbent local exchange carrier (ILEC), U S WEST is obligated by the Act to *inter alia* interconnect with competitive providers, such as MCImetro. 47 U.S.C. § 251(c)(2). U S WEST must interconnect its network with MCImetro "at any technically feasible point" and the interconnection provided by U S WEST must be "at least equal in quality" to the interconnection it provides to itself. Id.

The Telecom Act provides that telecommunications companies will provide interconnection pursuant to agreements that are negotiated by the parties, arbitrated by state commissions, or both. 47 U.S.C. § 252(a) and (b). The

agreements must be consistent with the Act and state law and policy. 47 U.S.C. § 252(e).

V. INTERCONNECTION AGREEMENTS BETWEEN U S WEST AND MCIMETRO

1. The September 1, 1995, Interconnection Agreement (Initial Agreement).

The Initial Agreement was executed between MCImetro and U S WEST pending the outcome of the Interconnection Case. Exh. 10. Under this agreement, U S WEST was to provide one T-1 trunk for termination of local traffic from U S WEST's local tandem switch to MCImetro's Class 5 switch. This agreement also provided that MCImetro may order additional tandem trunks as growth may require.

Section 1.5 of the Initial Agreement states:

> The parties will use their best efforts to cooperate and install, test and make available for use on a mutually agreeable schedule the services ordered from each other.

Section 11 of the Initial Agreement states that the parties agree to follow each other's ordering process for all services.

2. The August 26, 1996, Interconnection Agreement (Interim Agreement).

MCImetro and U S WEST entered into the Interim Agreement pending execution of an arbitrated agreement pursuant to the Telecom Act. Exh. 11. The Interim Agreement superseded the Initial Agreement. The parties renewed their pledge to use their best efforts to cooperate and install services ordered. U S WEST agreed to provide facilities within the standard time interval for private line transport service. The interval for high density facilities in place was five business days, and where facilities were not in place the committed due date was determined on an individual case basis (ICB).

Among other things, this agreement provided that both parties would work toward the development of joint forecasting for traffic utilization over trunk groups. The quarterly forecasts required the parties to describe major network projects anticipated for the following six months. If one party's requirements exceed forecasted quantities for forecasted locations, the facilities would be provisioned as available, with the further agreement that the parties would use their best efforts to meet the requirements as quickly as possible. If MCImetro and U S WEST were unable to reconcile their forecasts, the trunk groups would be provisioned at the higher number and a reimbursement would occur if the forecast turned out to be excessive.

This agreement also provided that U S WEST would "to the greatest commercially reasonably extent possible" make available additional trunking facilities at the Seattle and Tacoma tandems. In situations where capacity is exhausted at the

tandems, the agreement proposed a direct end-office trunking (DEOT) plan to ensure call completion.

3. The August 20, 1997, Interconnection Agreement (Definitive Agreement).

MCImetro and U S WEST entered into an interconnection agreement as the result of negotiation and arbitration pursuant to the Telecom Act. The Definitive Agreement superseded the Interim Agreement and also provided for forecasting and provisioning of trunk groups. Exh. 12, Attachment 4. The interval used for the provisioning of local interconnection trunk groups was restated to be no longer than the standard interval for the provisioning for switched access service. The applicable interval varies from 27 to 49 days for facilities in place (depending on the volume of trunks requested and the need for NXX[3] activation), and ICB applies where facilities are not in place or the service order constitutes a special project.

Attachment 4, Section 10.2.2 states that quarterly forecasts are required to include a description of major network projects anticipated in the succeeding six months that could affect the other party. Major network projects expressly include trunking or network rearrangements, shifts in anticipated traffic patterns, or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecasting period. This planning also includes issues of network capacity and forecasting.

The Definitive Agreement is on appeal to the United States District Court, Western District of Washington. It has not been stayed pending appeal.

VI. MCIMETRO'S COMPLAINT

MCImetro's complaint alleges *inter alia* that U S WEST failed to provide adequate interconnection facilities to interconnect its telecommunications network with MCImetro's network. MCImetro asks the Commission 1) to order U S WEST to immediately devote the resources and personnel necessary to insure that sufficient local interconnection facilities are in place and that orders are processed in a timely manner, 2) to order U S WEST to comply with its contractual obligations and provide forecasts and notices of major network projects, 3) to order U S WEST to provide sufficient capacity within its own network to eliminate call blockage, 4) to order U S WEST to provide a monthly review of traffic data, 5) to enter an order finding that U S WEST has violated the public service laws, regulations, and orders of the Commission, 6) to find that U S WEST has subjected MCImetro to undue or unreasonable prejudice or disadvantage and failed to provide nondiscriminatory access to its network, and 7) to order U S WEST to provide monthly reports to the Commission showing how U S WEST is meeting its obligations to timely provide local interconnection services.

[3] "NXX" refers to the first three digits in a seven-digit telephone number that routes messages to the proper exchange.

Finally, MCImetro asks the Commission to impose damages and penalties against U S WEST for its violations of its agreements and state laws.

VII. RESTRICTED ACCESS TO HIGHLY CONFIDENTIAL (HC) DOCUMENTS

Several documents produced by U S WEST and admitted into evidence were designated HIGHLY CONFIDENTIAL. Limited copies were made, access was restricted to specific individuals, and copies were returned to U S WEST at the close of the proceeding.

One copy of Exhibits HC-123, HC-124, HC-140, and HC-141 will be retained by the Commission in a separate, sealed, and clearly marked file. Any person seeking access to these HIGHLY CONFIDENTIAL documents for any purpose, other than parties presiding over administrative or judicial reviews, must submit a written request, provide notice to U S WEST, and obtain approval from the Commission.

VIII. MCIMETRO'S CHALLENGE TO CONFIDENTIAL DOCUMENTS

On May 12, 1998, the Fourth Supplemental Order in this proceeding denied MCImetro's challenge to the confidential designation of U S WEST's Common Funding Document - Project ID 62WD631 (later admitted as Exhibit C-94). The Commission subsequently denied interlocutory review of that decision, but provided for its review along with the initial Order.[4] The Commission also ruled that all challenges to confidential designations in this case are governed by procedures established in the Commission's Third Supplemental Order entered on October 28, 1997 (Protective Order).

On August 27, 1998, MCImetro applied for a determination challenging the confidential designation of excerpts in two other documents, 1) Common Funding Document - Project ID 62WD634 (Exh. C-116) and 2) Common Funding Document - Project ID 62WD817 (Exh. C-117). MCImetro filed additional arguments supporting its application on September 2, 1998. U S WEST and Commission Staff answered on September 8, 1998.

MCImetro argues that excerpts regarding U S WEST's corporate policies are a matter of public record and cannot be considered confidential. MCImetro also points to U S WEST's disavowal of those policy statements and argues that those statements do not contain planning details or result in personal loss; thus, they are not entitled to protection. MCImetro alternatively argues that it is in the public interest to disclose those statements. Commission Staff supports MCImetro's application and

[4] *Eighth Supplemental Order Granting, In Part, and Denying, In Part, Review of Fourth Supplemental Order*, Docket No. UT-971063 (July 23, 1998).

relies on earlier arguments based upon the similarity between Exhibits C-116, C-117, and C-94.

U S WEST also relies on its earlier arguments and states that the documents are called Common Planning Documents or Common Funding Documents because they contain network planning details. U S WEST argues that the documents should be considered proprietary in their entirety. U S WEST includes details in planning documents with the expectation that the information will be confidential.

The excerpt in Exh. C-116 is substantially similar to the previously challenged excerpt in Exh. C-94. The excerpt in Exh. C-117 is relatively terse, but relates to the same underlying issue. The additional arguments by MCImetro are not convincing that Exhibits C-116 and C-117 should be treated any differently than Exh. C-94.

As discussed in this initial Order, the policy statements contained in Exh. C-94 are credible. Exhibits C-94, C-116, and C-117 were created for network planning purposes. Excerpts referring to corporate policy have not been made part of the public record in this case. Those excerpts potentially may be of public interest; however, U S WEST has a legitimate expectation that all planning details will be protected as confidential information. The challenged excerpts are relevant to planning decisions based upon consideration of the documents in their entirety. The characterization of these policy statements as planning details is not clear-cut; however, this initial Order resolves all doubts in favor of preserving confidentiality.

ISSUES PRESENTED

A. Did U S WEST Engage In Willful or Intentional Misconduct?

B. Did U S WEST Reasonably Forecast Demand for Interconnection Facilities?

1. Did U S WEST reasonably believe that it could satisfy MCImetro's requirements from existing capacity?

2. Were network capacity demands caused by the Internet, CLEC interconnection, and number portability unforeseeable?

C. Did U S WEST's Failure to Reasonably Forecast and Provision Facilities Constitute a Breach of the Initial Agreement?

D. Did U S WEST's Failure to Reasonably Forecast and Provision Facilities Constitute a Breach of the Interim and Definitive Agreements?

E. Does U S WEST Have a Contractual Duty to Provide Notices of Facilities Exhaust?

1. Did U S WEST's failure to provide notices of facilities exhaust breach the Interim Agreement?

2. Does U S WEST's failure to provide notices of facilities exhaust breach the Definitive Agreement?

F. Does U S WEST's Failure to Provide Notices of Facilities Exhaust Violate State Law?

G. Does U S WEST's Refusal to Exchange Traffic Through Its Access Tandem Violate State Law?

H. Did U S WEST Cause Call Blockage?

I. What Relief Should the Commission Order?

1. MCImetro's Request for Damages.

2. MCImetro's Request for Penalties.

3. MCImetro's Request for Other Relief.

COMMISSION DISCUSSION AND DECISION

A. Did U S WEST Engage In Willful or Intentional Misconduct?

U S WEST's Common Funding Document ID 62WD631, Exhibit C-94, has been the source of considerable controversy. Exh. C-94 is a network planning document to increase the trunk capacity at the Seattle East tandem switch. MCImetro argues that two policy statements in Exh. C-94 reveal willful and intentional misconduct. U S WEST states that Exh. C-94 was prepared in late 1996 and is consistent with its good faith effort to satisfy its obligations. The approximate date of Exh. C-94 is consistent with testimony by U S WEST witness Wiseman, and factual allegations in the MCImetro Complaint. TR 776-777, Complaint, ¶ 25.

Mr. Wiseman credibly testified that official statements of U S WEST corporate policy are not issued in common funding documents. TR 810-811. However, this does not resolve the controversy over Exh. C-94. Mr. Wiseman did not participate in the preparation of Exh. C-94 and he does not review common funding documents in the normal course of his business duties. TR 759. Therefore, Mr. Wiseman does not appear qualified to testify on the inherent reliability of references to

corporate policy in this kind of document. Mr. Wiseman's opinion of whether Exh. C-94 reliably states corporate policy is given no greater weight than the document itself. Statements of corporate policy in
Exhibit C-94 (and Exh. C-117) are credible and reliable.

Mr. Wiseman testified that U S WEST believed it could satisfy competitive local exchange carrier (CLEC) requirements with existing trunk capacity in 1996. TR 756. Both MCImetro and U S WEST used similar approaches to estimate initial demand. MCImetro based its estimate on its own marketing sales projections due to the lack of historical data, and U S WEST based its estimate on loss of market share projections. However, U S WEST also required MCImetro to submit trunking forecasts as a prerequisite to placing orders in 1996. U S WEST's failure to disclose that it did not rely upon MCImetro's forecasts was unreasonable. MCImetro reasonably believed that U S WEST's network capacity would be based upon its forecasts and that facilities would be provisioned in a timely manner. This is especially true subsequent to the effective date of the Interim Agreement which provided that the higher number of facilities forecasted by the companies would be provisioned. In April 1997, U S WEST changed its approach to include a consolidated forecast based on CLEC demand. TR 780.

U S WEST argues that the policy statements in Exh. C-94 are consistent with its belief that existing capacity could satisfy demand. MCImetro's protest over those statements is understandable. Nevertheless, Exh. C-94 does not establish willful or intentional misconduct. The controversial networking policy statement is somewhat consistent with U S WEST's belief that existing capacity could satisfy demand (whether that belief was reasonable is a different issue). Furthermore, Exh. C-94 also refers to U S WEST's policy to comply with its legal obligation by honoring CLEC interconnection orders. The author of Exh. C-94 then concludes that these two policies will cause a shortage in capacity. The April 1997 change in U S WEST's forecasting practice appears to be a belated responsive to the conclusions in Exh. C-94 and Exhibit C-117. U S WEST's inability to provision MCImetro's orders from existing capacity should have called its practices into question much sooner.

The obligations established by the interconnection agreements require that U S WEST be held accountable for its provision of interconnection facilities; however, its failure in this regard is not an automatic indictment. At the same time that MCImetro claims that U S WEST has behaved more egregiously than other ILECs (forcing MCImetro to scale back its sales operation), MCImetro also reports that the Northwest Territory was its top performing sales and service organization in 1997. TR 523, 351, and 354. Thus, U S WEST may have unreasonably delayed MCImetro's implementation of local service in this region, but it has not denied MCImetro entry into the market in violation of the Telecom Act.

Decision. While this Order acknowledges certain of U S WEST's conduct as unreasonable under the circumstances, it does not find sufficient evidence

to conclude that U S WEST has committed willful or intentional misconduct. This Order focuses on measures that are intended to improve the process, as requested by MCImetro, but it does not impose penalties. If U S WEST does not comply with the Commission's final Order in this case, a different decision may be appropriate upon further review.

B. Did U S WEST Reasonably Forecast Demand for Interconnection Facilities?

As in any industry, forecasting demand is important in telecommunications. However, forecasts, by their nature, will rarely be exact:

> The art of forecasting has always required the inclusion of unknown factors, because forecasting is an attempt at predicting the future. Some factors are considered to be somewhat of an unknown quantity because they may not be fully quantifiable. However, these factors are relevant and are known to have an impact on the final results.

Commission Staff witness Griffith, Exh. T-108 at 8, ll. 7-13.

As discussed in this Order, U S WEST's obligation to interconnect is not limited to the availability of facilities:

> The Commission will not allow any carrier, regardless of the terms offered to its own customers, to condition its obligation to interconnect at meet points and to complete local calls delivered by originating carriers on the availability of facilities.[5]

At the same time, the interconnection agreements between the parties contemplate that exhaustion may occur and facilities will not be available (the standard interval for provisioning reverts to ICB in event of exhaust). MCImetro argues extensively that U S WEST did not reasonably forecast demand for interconnection facilities because it did not specifically consider MCImetro's 1996 forecasts. See Exh. C-73. U S WEST responds that MCImetro's forecasts were considered; however, U S WEST also states that it did not consolidate MCImetro's estimates into its forecasts prior to April 1997. TR 756. At the inception of MCImetro's local interconnection, a consolidated forecast should have been a simple matter of adding the projected requirements for capacity at the tandem. However, the need to establish new processes to accept and integrate MCImetro's forecasts becomes increasingly important as more interconnections points are established. The development of this process is apparent from the way that forecasts changed formats over time. Exh. C-46, C-48, C-53, C-55.

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[5] Ninth Supplemental Order Rejecting Tariff Filings, Interconnection Case, at 19 (March 13, 1996).

In this case, U S WEST's failure to communicate with MCImetro is as egregious as its actual practices. U S WEST failed to disclose that its system did not accept CLEC forecasts at the same time that it required MCImetro to submit forecasts as a precondition to provisioning facilities. Consequently, MCImetro had a reasonable expectation that its forecasts were being relied upon and that network capacity existed to meet its requirements.

U S WEST's argument that MCImetro's forecasting practices were responsible for the unavailability of facilities is without merit because U S WEST did not rely on those forecasts in any meaningful way prior to April 1997. Forecasts based upon historical data are preferable to those based upon sales projections, but there was no "history" at the inception of MCImetro's local service. Because U S WEST unilaterally substituted its loss of market projections for MCImetro's sales projections, it must bear full responsibility for the reasonableness of its decision.

1. Did U S WEST reasonably believe that it could satisfy MCImetro's requirements from existing capacity?

U S WEST historically augments its network capacity after facilities become 90 percent exhausted. This provides for 10 percent of capacity to meet interconnection needs during the seven-month process to engineer, furnish, and install new facilities to increase capacity. This existing capacity should have been sufficient to meet MCImetro's relatively small percentage of DS1s in both the Seattle and Tacoma areas. TR 830-836, Exh. HC-124, HC-141. U S WEST's projected loss of market share for 1996 and 1997 should have been sufficient to absorb MCImetro's forecasts as well as the total CLEC demand for DS1s at the end of 1997. Exh. HC-124, HC-140. Staff witness Griffith's review of highly confidential U S WEST internal documents highlighted this fact:

> The data revealed that during that time frame USWC added to its Tacoma tandem switch well over 1,000 new tandem trunks while MCI had only requested 120 tandem trunks. At the same time USWC had more than 5,000 trunks terminating on the tandem.

Exh. T-109 at 5.[6] U S WEST's belief that it could satisfy MCImetro's demand out of existing capacity would be reasonable if no other demands were made on its network capacity. However, there were other demands and the reasonableness of U S WEST's forecasts must take these other factors into account.

[6] By adding over 1,000 new tandems, U S WEST added 42 DS1s, while MCImetro had requested only 5 DS1s.

2. Were network capacity demands caused by the Internet, CLEC interconnection, and number portability unforeseeable?

U S WEST claims the convergence of the demands associated with number portability, CLEC interconnection, and Internet usage was unforeseeable. Wiseman, Exh. T-110 at 20. U S WEST emphasized that the volume and length of Internet calls was unpredictable and claims that it has taken steps to anticipate Internet traffic on the voice network. Id. at 4 and 7.

Commission Staff testified that the rapid growth of the Internet has been known for years. Griffith, Exh. T-108 at 8. Mr. Griffith stated that minimal research would have provided U S WEST with sufficient information to estimate Internet growth on the part of all providers and respond to that growth in its network planning. He also testified that U S WEST Advanced Technologies had referred to the growth of the Internet at rates of ten percent per month at least five years ago. Griffith, Exh. T-109 at 4. U S WEST's claim that it was caught off guard by the growth of the Internet is neither reasonable nor credible.

U S WEST testified that CLEC market entry was anticipated, but the details of when, where, and how they would interconnect could not be predicted with any certainty. Wiseman, Exh. T-110 at 7. U S WEST argues that CLEC interconnection has caused increased demands for network capacity (particularly for switch ports at the tandem), and that tandem interconnection is not efficient for the primary delivery of traffic. U S WEST considers tandem interconnection to be a low-volume, short-term solution. U S WEST's network is designed and constructed based on DEOT, and use of the local tandem as a routing and traffic termination point is not consistent with past operations.

MCImetro responds that U S WEST has known since September 1995 that MCImetro would initially interconnect at the Seattle tandem. Exh. 10. MCImetro's requirements for additional interconnection facilities in two subsequent interconnection agreements emphasized tandem interconnection. Exhs. 11 and 12. MCImetro argues that requests to interconnect at the tandem or other locations specified in the agreements should not have been a surprise to U S WEST, especially since MCImetro provided U S WEST with forecasts of its anticipated needs. U S WEST failed to take these factors into consideration when augmenting its facilities.

Commission Staff argues that U S WEST was aware of potential competition at least as early as 1994 when the state supreme court issued its decision in Electric Lightwave, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 530, 869 P.2d 1045 (1994). U S WEST was directed by the Commission's Fourth Supplemental Order in the Interconnection Case to interconnect with CLECs in October 1995.

Interconnection at the tandem is consistent with the Commission's decision in the Interconnection Case and the Telecom Act. This Commission has held that CLECs should be allowed flexibility in interconnecting with ILECs. In adopting rules under the Telecom Act, the FCC also determined that CLECs must be able to interconnect at points in the incumbent's network that are convenient and efficient for the CLEC. FCC Order, at ¶ 209.

Because interconnection at the tandem is contemplated by the Commission's prior Orders and the Telecom Act, U S WEST's suggestion that it should not have anticipated interconnection at the tandem is not credible and is rejected. Furthermore, there is no credible evidence that actual CLEC interconnection has placed a significant capacity strain on U S WEST's network. It is conceivable that the cumulative effect of errant forecasts could pose uncertainties and risks to U S WEST at some future point in time, but there is no evidence that this has occurred to date. The cumulative evidence in this case suggests that there is an increasing demand for excess capacity and that there is very little, if any, risk in optimistic forecasting.

U S WEST began planning for permanent number portability (PNP) in July 1996, increasing its signaling system 7 links for the PNP database later that year, and began deployment of its equipment in April 1997. TR 753-55. U S WEST claims that network requirements for this project were unforeseeable and contributed to the exhaust of network capacity.

The record establishes that network facility exhaust delayed provisioning of service orders in March and August 1996, prior to the demands caused by PNP. U S WEST has not presented any credible evidence that the requirements to deploy number portability were unforeseeable and impaired its ability to forecast capacity to meet MCImetro's service orders.

U S WEST argues that the cumulative impact of the Internet, CLEC interconnection, and number portability impaired its ability to provision MCImetro's service orders in accordance with standard intervals for existing facilities. Each of these factors increased demand and reduced the margin of error in accurately forecasting capacity at a time when U S WEST had an obligation to provide facilities to MCImetro. U S WEST forecasted its network requirements without sufficient regard for the extent to which MCImetro depended upon its process.

Decision. While the actual demand caused by the Internet, CLEC interconnection, and number portability may have been difficult to predict, they were foreseeable. There is no evidence explaining how U S WEST expected to provision facilities for these foreseeable factors in addition to meeting MCImetro's requirements with existing capacity. The record also is clear that U S WEST continued to increase capacity based upon its own needs. Exh. C-94, C-116, C-117. It was not reasonable for U S WEST to forecast that it could meet these other demands (including MCImetro)

through excess capacity based upon its historical practice of increasing capacity when facility usage exceeds 90%.

C. Did U S WEST's Failure to Reasonably Forecast and Provision Facilities Constitute a Breach of the Initial Agreement?

MCImetro alleges that U S WEST's failure to incorporate its forecasts into the network planning process constitutes a breach of Section 1.5 of the Initial Agreement. MCImetro also argues that U S WEST failed to use its best efforts to cooperate and make services available, effectively denying access to the Seattle/Tacoma markets.

U S WEST responds that the information contained in the Initial Agreement does not constitute a forecast. U S WEST also argues that there is no provisioning interval in that agreement. U S WEST claims that it made its best effort to provide facilities to MCImetro on an expedited basis. Osborne, T-29 at 5.

The Initial Agreement establishes interconnection at U S WEST's tandem switch. Section 2.1 states that deposits will be renegotiated if either party orders more than eight DS1 trunk groups from the other. While the agreement is explicit that MCImetro may order additional quantities of interconnection services as growth may require (Section 1.4), Section 2.1 does not constitute a forecast.

The nature of the forecast in Section 1.4 reflects the uncertainty of MCImetro's requirements upon beginning local service. U S WEST's obligation was to use its best efforts to meet MCI's service requests within standard intervals for existing facilities. There is no evidence that U S WEST refused to provide existing facilities to MCImetro pursuant to the March 5, 1996 service request. Likewise, MCImetro's April 17, 1996 order was submitted prior to the completion of the capacity upgrade in progress. The April order was subject to the individual case basis interval, and the record does not disclose whether U S WEST timely installed the requested facilities after they were in place.

In June 1996, U S WEST timely provisioned a MCImetro request for interconnection facilities within the standard interval from its existing capacity.

On April 15, 1996, MCImetro prepared and transmitted a trunk forecast for 1996 and 1997. Exh. C-46. On August 19, 1996, MCImetro informed U S WEST that it required facilities at the U S WEST tandem in mid-September. Iannotta, Exh. T-40 at 9.

U S WEST informed MCImetro that its capacity was exhausted and that it was unable to provide service until its facilities augmentation was completed.

Decision. U S WEST failed to reasonably forecast facilities which resulted in a lack of network capacity. Furthermore, U S WEST failed to communicate notices of tandem exhaust and failed to inform MCImetro that it did not rely on its forecasts. U S WEST's breached Section 1.5 of the Initial Agreement by failing to use its best efforts to cooperate and provide services.

D. Did U S WEST's Failure to Reasonably Forecast and Provision Demand for Facilities Constitute a Breach of the Interim and Definitive Agreements?

In April 1997, U S WEST began consolidating CLEC forecasts into its network planning process. U S WEST produced a list of all job orders to increase capacity that were impacted by MCImetro's forecast dated April 24, 1997. Exh. C-132, Attachment A. Even though U S WEST requires seven months to perform augments, the vast majority of engineering jobs were scheduled to be in service nine months or later from that date. Therefore, the augments were not timely initiated based upon the consolidated forecasting process. U S WEST failed to communicate the information contained in Exh. C-132 to MCImetro prior to this proceeding.

Exhibits C-103 and C-68 are tables which list critical dates for the provisioning of MCImetro service orders in 1997 and 1998. These tables include 19 direct end office trunking orders which were classified as a complex project and implemented in three phases on an individual case basis. However, numerous other projects reveal delays between requested due dates and dates completed. Of equal concern, there are numerous discrepancies between the due dates set by U S WEST and completion dates. MCImetro's 1998 service orders data indicates a marked improvement in U S WEST's provisioning process; however, many delays persist due to the unavailability of facilities.

Decision. U S WEST's cloistered approach to forecasting continued to cause unacceptable delays on MCImetro service orders subsequent to the effective dates of the Interim and Definitive Agreements. U S WEST's failure to reasonably forecast demand and to provide facilities in response to MCImetro's service requests breached Section 2.3 and 3.9(b) of the Interim Agreement, and Attachment 4, Section 8.4.2, and Part A, Section C, of the Definitive Agreement.

The local exchange market must be open in order to be competitive. In order to establish an open market, U S WEST must make full and complete disclosure of traffic data on its local network so that MCImetro can share the responsibility for ensuring the delivery of services to its customers. This will enable MCImetro to judge the impact of exceeding forecasted requirements for itself. U S WEST's 1998

performance demonstrates improved compliance with its standard provisioning intervals, but unless
U S WEST immediately increases network capacity to reasonably meet MCImetro's forecasted requirements these complaints are certain to continue.

E. Does U S WEST Have a Contractual Duty to Provide Notices of Facilities Exhaust?

MCImetro alleges that U S WEST's failure to provide notice of facilities exhaust breached the Interim and Definitive Agreements and violated state law.

U S WEST's argument that it is under no obligation to inform MCImetro of exhaust in its network epitomizes the narrow perspective that has guided U S WEST throughout the development of its wholesale market. This is the perspective of a reluctant seller, not a co-carrier using its best efforts to cooperate and install ordered services. U S WEST narrowly defines its legal and contractual obligations to exclude information regarding network capacity that seriously impacts MCImetro. It is readily apparent that U S WEST could not efficiently or effectively plan and manage its own network without foreknowledge of facilities exhaust, yet it expects MCImetro to do so. Exh. C-94 and C-116.

U S WEST argues that any obligation to report facilities exhaust does not begin until the effective date of the Definitive Agreement (August 20, 1997). U S WEST also argues that any requirement to report facilities exhaust only applies to information provided in quarterly forecasts. Exh. 12, Attachment 4, Section 10. U S WEST witness Osborne testified that U S WEST does not discuss capacity issues with MCImetro until an implementation planning meeting conducted prior to accepting a service order. Osborne, Exh. T-29 at 12. According to Ms. Osborne, U S WEST would not have kept MCImetro advised of capacity issues on an ongoing basis because switch capacity changes constantly. Osborne, Exh. T-29 at 12.

In fact, the only time MCImetro received notice of a lack of interconnection facilities was when it submitted service orders. Beach, Exh. T-1 at 8. MCImetro's sales practice was to take orders from its customers without committing to a specific delivery date. TR 339. When U S WEST is unable to provide interconnection facilities due to exhaust, it creates uncertainty and makes it difficult for MCImetro to meet its customers' expectations. Londgren, T-20 at 22. To the customer, MCImetro appears to be the party that cannot provide service. Id. MCImetro scaled back its sales effort in Washington in order to protect its reputation. Id at 22-23.

While switch capacity may be constantly changing, switch capacity augments are engineered to last 18 to 24 months. TR 781. When U S WEST inaccurately forecasts demand, capacity is constantly exhausted because the augment

process takes approximately seven months. Wiseman, Exh. T-110 at 12. U S WEST must keep MCImetro advised of capacity issues on an ongoing basis for this very reason.

If U S WEST had notified MCImetro of its tandem exhaust at the time it was forecasted, MCImetro could have revised its plans and deployed direct end office trunking sooner. If capacity issues then developed in the end offices, U S WEST and MCImetro would have more lead time to cooperatively resolve these issues. If it appeared that MCImetro would not be able to obtain network access to a specific end office for extended periods of time, it could then modify its sales or marketing plans. Instead, MCImetro went about planning its network based upon its interconnection agreements only to discover that U S WEST had no capacity when MCImetro needed it. Beach, Exh. T-1 at 15. Because the standard interval for provisioning service is suspended and facilities are made available on an individual case basis when exhaust occurs, interconnection has been an ongoing crisis. TR at 647; Beach, Exh. T-1 at 14-15.

The May 1, 1997, meeting to discuss MCImetro's April 24, 1997 MCImetro forecast illustrates MCImetro's problem. Iannotta, Exh. T-65 at 24-25, Exh. 132. MCImetro delivered its forecast to U S WEST prior to the meeting. MCImetro told U S WEST that its sales force was in place in Tacoma, customer orders were going to start, and U S WEST should expect orders for trunks to be placed in Tacoma. TR 558. Despite these statements and the disclosure of Tacoma DS1s requirements in MCImetro's April 24th forecast, U S WEST identified no information at that meeting (or at any time prior to the order for those DS1s) regarding capacity problems in Tacoma. Id. As a result, MCImetro continued its Tacoma marketing plans based upon the presumption that its forecasted needs would be timely provisioned. Londgren, T-20 at 4, Iannotta T-65 at 25, TR 521.

1. Did U S WEST's failure to provide notices of network capacity exhaust breach the Interim Agreement?

Section 3.4© of the 1996 Interim Agreement requires the parties to provide quarterly forecasts to each other, including descriptions of major network projects anticipated for the succeeding six months. MCImetro argues that major network projects includes facilities exhaust because it needs to make appropriate arrangements to minimize the impact on its business and its customers. U S WEST initiated several projects to expand capacity during this relevant time period for which MCImetro did not receive notice. Exh. C-94, C-116, C-117, C-118, and C-120.

MCImetro also alleges that U S WEST breached Appendix B - Section 3.3(a), of the Interim Agreement which states:

> USWC tandem exhaust - If a USWC tandem to which MCImetro is interconnected is unable to, or is forecasted to be unable to, support additional traffic loads for any period of time, the parties will mutually agree on an end office trunking plan that will alleviate the tandem capacity shortage and ensure completion of traffic between MCImetro and USWC subscribers.

MCImetro does not have access to U S WEST's network capacity monitoring systems, and is totally dependent upon U S WEST to provide notice when tandem exhaust is forecasted or occurs. U S WEST was obligated to notify MCImetro of known or forecasted tandem exhaust, but did not provide any notices. Beach, Exh. 1 at 2.

U S WEST claims that the agreement obligated MCImetro to provide notice and opportunity to cure contractual breaches before seeking relief from the Commission.
U S WEST fails to cite any specific provision in the Interim Agreement imposing an obligation on MCImetro to provide notice of a breach prior to bringing a claim for relief. See Exh. 11. Furthermore, Section 2.5 of the Interim Agreement states:

> The parties will use their best efforts to cooperate and install, test and make available for use on a mutually agreeable schedule the services ordered from each other.

U S WEST's argument that its obligation to cooperate by providing notices of exhaust only arises when MCImetro submits service orders is unreasonable. While U S WEST may have made its best efforts to provision MCImetro's service orders on an individual case basis, U S WEST needs to minimize the impact of exhaust on MCImetro sales and marketing. U S WEST's laissez-faire approach is inconsistent with its commitment to use its best efforts on MCImetro's behalf.

Decision. U S WEST was obligated to notify MCImetro of current or forecasted exhaust pursuant to Sections 2.5, 3.4© and Appendix B, Section 3.3(a) of the Interim Agreement.

2. Does U S WEST's failure to provide notices of facilities exhaust breach the Definitive Agreement?

The Definitive Agreement also requires the parties to provide each other with notice of major network projects.[7] MCImetro alleges that U S WEST withheld

[7] Exh. 12, Attachment A, Section 10.2.2: "A description of major network projects anticipated for the following six (6) months that could affect the other party. Major network projects include trunking or network rearrangements, shifts in anticipated traffic patterns or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecasting period. *This planning will*

notice of two types of major projects: (a) repeated exhausts at U S WEST's tandem and end office switches, and (b) the permanent number portability project. U S WEST engineers establish an estimated exhaust date for each new capacity job added to the network. For example, the Common Funding Document - Project Id No. 82WD652 predicts that the facilities put in place for CLECs will exhaust as early as February 1999. Exh. C-121. Another example is Common Funding Document - Project Id No. 62WD631, which predicted exhaust at the Seattle local tandem by the end of 1997. Exh. C-94.

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include the issues of network capacity, forecasting and compensation calculation where appropriate." (Emphasis added).

The second major network project was permanent number portability.[8] MCImetro argues that this project falls squarely within the contractual definition of a major network project. U S WEST admits that the planning process for this project began in 1996 prior to the release of the FCC's PNP Order that set the time schedule for implementation. TR 754. Seattle was designated for deployment of permanent number portability in the first quarter of 1998. TR at 753.

U S WEST argues that this project was a "mandate" and took precedence over other network growth jobs such as MCImetro's requested interconnection facilities. TR 752. According to U S WEST, MCImetro's request for facilities to the tandem or end office where this work was being performed was subject to delay until the PNP project was completed. U S WEST also argues that MCImetro was aware of U S WEST's obligations to implement number portability.

MCImetro argues that U S WEST remained silent in the face of a contractual duty to inform MCImetro of the constraints the project would place on capacity. That silence allowed U S WEST to provision limited network facilities to itself while causing delay to MCImetro and its customers. MCImetro concludes that U S WEST's failure to provide notices of major network projects or capacity exhaust constitutes a breach of Attachment 4, Sections 10.2, 10.2.2, 10.4.1, Part A, Section 29.1 and Part A, Section B[9] of the Definitive Agreement.

U S WEST restates its objection to the characterization of capacity exhaust as a major network project. U S WEST's argument that a dictionary definition of the word "projects" should control its obligation is rejected. Section 10.2.2 expressly includes the obligation to report issues of network capacity and forecasting where appropriate. Issues regarding current or forecasted tandem exhaust where MCImetro interconnects or forecasts requirements are irrefutably appropriate.

U S WEST also restates its right to cure contractual breaches. Exh. 12, Section 32.1.1. This argument is flawed because U S WEST is obligated to provide notice of current or forecasted exhaust in addition to its quarterly reporting obligations. MCImetro is incapable of providing U S WEST notice to cure a default pursuant to Section 10.4.1 when pertinent information is exclusively under the control of U S WEST.

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[8] See *re* Telephone Number Portability, First Report and Order, Federal Communications Commission, CC Docket No. 95-116, Adopted June 27, 1996 (PNP Order).

[9] "In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation, the obligation of the Parties to further negotiate the resolution of new open issues under this Agreement) such action shall not be unreasonably delayed, withheld or conditioned."

Decision. Network capacity exhaust constitutes a major network project. Even though U S WEST routinely evaluates and forecasts tandem and end office exhaust, U S WEST has repeatedly failed to comply with its duty to provide notices to MCImetro. Furthermore, MCImetro may have had foreknowledge of U S WEST's mandate to implement permanent number portability, but it had no way of knowing its impact on network capacity.

U S WEST's failure to provide notices of major network projects or capacity exhaust constitutes a breach of Sections 2.5, 3.4(c), and Appendix B - Section 3.3(a) of the Interim Agreement, and Attachment 4, Sections 10.2, 10.2.2, 10.4.1, Part A, Section 29.1 and Part A, Section B of the Definitive Agreement.

F. Does U S WEST's Failure to Provide Notices of Facilities Exhaust Violate State Law?

MCImetro argues that the failure to provide notice of current or forecasted exhaust is discriminatory because it allows U S WEST to make its network plans based on information that is withheld from new entrants. This enables U S WEST to develop its business plans and marketing strategy around capacity constraints. At the same time, MCImetro is required to adjust its business plans and marketing strategy in mid-stream. U S WEST argues that it treats MCImetro the same as it treats itself and other carriers, but this obviously is not the case.

RCW 80.36.170 expressly prohibits U S WEST from subjecting MCImetro "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Further, RCW 80.36.186 prohibits U S WEST from making or granting any undue or unreasonable preference or advantage to itself. U S WEST's practices subject MCImetro to undue disadvantage because it provides notice of the availability of facilities only after MCImetro submits a service order. U S WEST grants an undue advantage to itself by making strategic networking decisions based upon foreknowledge of the availability of facilities.

Decision. U S WEST's failure to provide MCImetro notices of current and forecasted facilities exhaust violates RCW 80.36.170 and RCW 80.36.186. U S WEST must provide to MCImetro the same information regarding the availability of facilities and exhaust that it relies upon to make strategic network planning decisions for tandems and end offices where MCImetro interconnects or forecasts requirements.

G. Does U S WEST's Refusal to Exchange Traffic Through Its Access Tandem Violate State Law?

U S WEST operates two separate networks. The first network is the access network from which U S WEST provides interconnection services to

interexchange carriers such as MCI Telecommunications (access network). The second network is its local network "local network). The local network is used to provide local calling services and is smaller than the access network. Exh. T-1 at 16. U S WEST's local network is engineered to exchange its traffic through direct end office trunking.

For a new entrant, interconnection at the local tandem provides greater access to U S WEST customers at the lowest cost because one DS1 will connect a CLEC switch to the tandem, which has connections to all end offices serving the local calling area. The tandem is not as important to U S WEST because it has DEOT between each of its end offices. U S WEST uses the tandem for overflow. TR 683-85. Thus, capacity problems at the local tandem have a minimal impact on U S WEST.

U S WEST interconnects other carriers such as wireless providers and Internet service providers to the local network in addition to CLECs. MCImetro argues that these U S WEST networking decisions are responsible for overloading the local tandem. MCImetro requested to terminate traffic through the access tandem on several occasions when the local tandem was exhausted and U S WEST refused. MCImetro argues that it is entitled to exchange traffic with U S WEST through the access tandem when U S WEST is unable to provide facilities at the local tandem, as a matter of law.

U S WEST argues that it does not discriminate against MCImetro because it provisions its own local service through the same network. U S WEST states that interconnection at the access tandem for the exchange of local traffic is not consistent with prudent network management and planning. Exh. C-9.

MCImetro points out that U S WEST routed calls from another CLEC through its access tandem when facilities were not available in the local tandem for several weeks in 1997. Exh. C-8. U S WEST also has transmitted local calls destined for MCImetro, originating from U S WEST central offices, through the access tandem to alleviate call blockage. Id.

U S WEST argues that it does not have a duty to provide for local interconnection through its access network. U S WEST admits that another CLEC is allowed to route calls through the access tandem when facilities are not available in the local tandem pursuant to an interconnection agreement. Exh. C-8. However, U S WEST argues that this is matter of a contract, not law; the Definitive Agreement does not include similar terms. Therefore, U S WEST argues that MCImetro is not entitled to the same treatment.

Under the Telecom Act, U S WEST has a legal obligation to interconnect with MCImetro "at any technically feasible point." 47 U.S.C. sec. 251 (c)(2); see FCC Order, para. 209. U S WEST is relieved of this duty only if it proves to the Commission that interconnection at that point is not technically feasible. 47 C.F.R. sec. 51.305 (e).

U S WEST admits that interconnection at its access tandem is technically feasible, that it has exchanged traffic through its access tandem when network capacity issues prevented interconnection in its local network for another CLEC, and that it has sent traffic from U S WEST customers to MCImetro through the access tandem (one-way transit). Exh. C-8 and C-9. The access network provides a technically feasible alternative when facility shortages restrict access to the local network. Exh. T-1 at 15-16; Exh. T-7 at 4-5; Exh. C-8.

The mere fact that an interconnection agreement between U S WEST and one CLEC expressly provides for the conditional exchange of traffic through its access tandem does not absolve U S WEST from its legal duty to other CLECs. Tandem interconnection is crucial to the implementation of local competition. U S WEST has developed traffic standards that dictate when tandem trunking should be replaced by direct end office trunking. However, when capacity is exhausted at the local tandem, the only option for CLECs is to interconnect with one end office at a time. CLECs should not implement DEOT plans prior to exceeding network standards unless by choice. Furthermore, the fact that U S WEST does not normally route local traffic through its access tandem is overshadowed by the fact that it is capable of doing so when necessary, and has done so in the past.

Decision. U S WEST has unreasonably delayed the transmission and delivery of MCImetro's messages by failing to route traffic through its access tandem when capacity is exhausted at its local tandem in violation of RCW 80.36.200. RCW 80.36.200 does not require that the Commission conclude that U S WEST has engaged in discriminatory conduct. U S WEST cannot delay interconnection to its network on non-technical criteria such as "prudent planning."

H. Did U S WEST Cause Call Blockage and Violate Its Agreements or Law?

In December 1996, U S WEST confirmed that some call blocking was occurring within its network. Iannotta, T-40 at 12. U S WEST admits that the demand for interconnection has caused blockage problems. Aguilar, T-87 at 13. Furthermore, U S WEST used its access tandem to relieve call blocking originating in its central offices on a prior occasion. Exh. C-8. U S WEST has acknowledged its obligation to comply with the Commission's regulations, and there is no evidence to suggest that these call blocking violations were intentional.

MCImetro customers also reported blockage in January 1997. Exh. 22. While these reports credibly establish that blocking occurred, they do not prove that U S WEST violated the standards in WAC 480-120-515. CLECs are at a disadvantage because they have limited means to measure call blockage occurring on U S WEST's network.

MCImetro also alleges that U S WEST has breached Part A, Section 1.2 of the Definitive Agreement and violated state law by allowing call blockage to occur. In response to an MCImetro data request, U S WEST produced a spreadsheet with

blockage data that U S WEST recorded on trunk groups originating from U S WEST's Seattle local tandem. Exh. HC-123. The purpose of the document was to determine the actual busy hour (a networking benchmark), to validate call holding time data resident on the network, and to assess performance on trunk groups. TR (sealed) 854-855.

For the trunk group designated to terminate at MCImetro's local switch, U S WEST experienced an average blockage level that exceeded the agreed upon standard in the Definitive Agreement. TR (sealed) 841-842. U S WEST admits that HC-123 shows some blocking on MCI's trunk group, but argues that there is no evidence to establish when blocking occurred or what caused it.

Exh. HC-123 incorporates data collected in 1997. TR (sealed) 852-853. The Definitive Agreement became effective August 20, 1997. There is insufficient evidence in the record to establish that the 18-day sample period in Exh. HC-123 occurred after that date. MCImetro has not proven that call blocking on U S WEST's network violates the Definitive Agreement; however, the data regarding blockage on MCImetro's trunk group is alarming.

Decision. U S WEST has caused call blocking in violation of WAC 480-120-515. U S WEST must employ every possible means to immediately alleviate call blocking when it occurs, including routing local traffic through its access tandem until capacity problems are resolved. Because CLECs have limited means to measure call blockage occurring within U S WEST's network, U S WEST must provide monthly reports of call blockage on CLEC trunk groups to the Commission.

I. What Relief Should the Commission Order?

1. MCImetro's Request for Damages.

MCImetro argues that its interconnection agreements authorize the Commission to determine and assess compensatory damages against U S WEST. MCImetro also argues that the Commission is authorized to assess damages for willful or intentional misconduct. MCImetro does not cite any case or statutory authority.

U S WEST argues that the Commission has no authority to assess any measure of damages under the interconnection agreements or any other provision of law.

Decision. The Commission does not have jurisdiction to award money damages. Sharad M. Bhatnagar v. U S WEST Communications, Docket No. UT-900603, Second Supplemental Order (June 1991).

2. MCImetro's Request for Penalties.

MCImetro and Commission Staff argue that the Commission should impose penalties on U S WEST. Commission Staff proposes that penalties be imposed for each MCImetro service order that was not provisioned within 45 days of the request date. MCImetro agrees in principle, but argues that penalties should be calculated based upon the standard interval provisions in its agreements and suggests that every single incident of facilities exhaust should be subject to penalty. Neither

Commission Staff nor MCImetro present a thorough analysis of violations subject to penalties.

For example, MCImetro refers to exhibits summarizing 68 orders submitted during a one-year period; however, these summaries include 19 orders for end office trunking which were processed as a special order by U S WEST. MCImetro did not present evidence to dispute their classification or provisioning on an individual case basis.

Furthermore, U S WEST's contractual breaches do not automatically constitute violations of law.

The record in this case reflects the fundamental complexity in structuring a cooperative enterprise between competing entities. U S WEST plans increases to its network when use of facilities exceeds 90 percent of capacity, and jobs are engineered to last 18 to 24 months. TR 781. The process to increase capacity requires approximately seven months to complete. MCImetro has no obligation to place orders based upon forecasts. Exh. 11, §3.9(b). U S WEST is not obligated to reserve capacity for MCImetro. TR 241. U S WEST is obligated to provide facilities when MCImetro orders capacity in excess of forecasts. Exh. 11, §3.1. MCImetro claims that it engineers its network for six months in advance; however, MCImetro usually submits service orders when sales are pending. Iannotta, T-40 at 418-419; Londgren, Exh. T-20 at 4. U S WEST maintains similar relationships with other CLECs and provisions facilities on a first-come, first-served basis.

Another indication of the complexity of forecasting and provisioning is that MCImetro and U S WEST entered into three successive interconnection agreements within 24 months. Each successive agreement modified and expanded terms for forecasting and provisioning facilities. These agreements demonstrate an evolving process to establish predictable and reliable business operations.

MCImetro and U S WEST have repeatedly pledged to use their best efforts to cooperate. This commitment should not be relegated to contractual boilerplate; it is a tacit acknowledgment that the parties cannot anticipate every problem that will arise. The resolution of unforseen problems requires flexibility. Both parties have narrowly interpreted their obligations to forecast, provision, and order facilities in a manner that is inconsistent with their best efforts. Both parties need to improve their approach to finding solutions that make financial and technical sense.

Decision. Penalties are not appropriate at this time.

3. MCImetro's Request for Other Relief.

Many of the complaints in this proceeding result from the denial of access to information essential to making strategic network decisions. U S WEST unsuccessfully has attempted to comply with its duties to MCImetro without sharing this information. Having failed, U S WEST must now make relevant information available to MCImetro. Access to this information will minimize MCImetro's dependence on U S

WEST by enabling MCImetro to make its networking decisions based upon the same information that is available to U S WEST. MCImetro's other complaints should be resolved by requiring interconnection at the access tandem when capacity is exhausted at the local tandem or when call blocking occurs.

Decision. Other relief requested is appropriate, as follows:

1. U S WEST must devote the resources and personnel necessary to deliver existing interconnection facilities within the standard intervals provided for in the Definitive Agreement or MCImetro's requested due date, if later;

2. U S WEST must use its best efforts to deliver interconnection facilities subject to the individual case basis interval as soon as possible;

3. U S WEST must devote the resources and personnel necessary to deliver all interconnection facilities pursuant to MCImetro Access Service Requests by the due date established in the firm order commitment;

4. U S WEST must provide MCImetro with forecasts and notice of major network projects in full compliance with the Definitive Agreement;

5. U S WEST must provide MCImetro with all information regarding current or forecasted capacity exhaust at any facility where MCImetro is interconnected or has forecasted requirements on an ongoing basis;

6. U S WEST must provide sufficient capacity within its own network which guarantees that the blocking probabilities set forth in WAC 480-120-515 will not be exceeded. In the event that blockage occurs due to a lack of capacity at its local tandem,
U S WEST shall route local traffic through its access tandem to whatever extent and for however long necessary in order to alleviate blockage;

7. U S WEST must allow MCImetro to route local traffic through its access tandem whenever capacity is exhausted at its local tandem to whatever extent and for however long is necessary in order to alleviate the lack of capacity;

8. U S WEST must provide a monthly review of traffic data at all facilities where MCImetro is interconnected or has forecasted requirements in order to enable MCImetro to make forecasting, ordering, and provisioning decisions based upon the same information as is available to U S WEST;

9. U S WEST must provide to the Commission a monthly report for a period of one year that shows time lines for the installation of local interconnection services used to connect MCImetro's customers to its network; and

10. U S WEST must provide the Commission with a monthly review of traffic related to call blockage, and to include all trunk groups that interconnect with CLECs.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

2. U S WEST Communications, Inc. (U S WEST) and MCImetro Access Transmission Services, Inc. (MCImetro) are each engaged in the business of furnishing telecommunications service within the state of Washington as a public service company.

3. U S WEST was, until recently, the exclusive provider of switched local exchange service in its respective Washington exchanges, and currently is the dominant provider of switched local services within its respective Washington exchanges.

4. MCImetro presently provides limited switched local exchange service in certain of the exchanges of U S WEST, in competition with that incumbent.

5. To provide switched local exchange service, MCImetro and other competitive local exchange companies (CLECs) must interconnect with U S WEST's switched networks.

6. The provision of interconnection between two local exchange networks for the purpose of terminating local traffic is an essential service which is not available from any other provider.

7. On June 24, 1997, MCImetro filed at the Commission a complaint against U S WEST alleging, among other things, that U S WEST failed to provide adequate interconnection facilities to accommodate the interconnection of the two parties' telecommunications networks. MCImetro also alleged that U S WEST subjected it to undue prejudice and discrimination.

8. The Commission has jurisdiction over the parties and the subject matter of this case.

9. Technically and economically efficient interconnection of ILEC and new entrant CLEC networks is essential to the development of a competitive local exchange market. Denial of technically and economically efficient interconnection arrangements creates a barrier to entry.

10. Interconnection between MCImetro and U S WEST is necessary to exchange calls between the networks. Without interconnection, MCImetro customers cannot call or receive calls from U S WEST customers. In addition, if sufficient

capacity does not exist in a party's network or the facilities that connect the networks, telephone calls may be blocked, which means callers will receive a fast busy signal when placing a call. U S WEST is responsible for providing and maintaining the interconnection facilities on its side of the meet point and the network capacity requested by MCImetro.

11. MCImetro and U S WEST entered into three interconnection agreements for the State of Washington. The first interconnection agreement was an Interim Interconnection and Compensation Agreement, effective as of September 1, 1995 (Initial Agreement).

12. The second interconnection agreement was the Stipulation and Agreement for Interim Interconnection, effective August 26, 1996 (Interim Agreement).

13. The third interconnection agreement was the Agreement for Local Wireline Network Interconnection and Service Resale, effective August 20, 1997 (Definitive Agreement). The parties entered into this agreement after an arbitration initiated by MCImetro pursuant to the Telecommunications Act of 1996 (Telecom Act), in WUTC Docket No. UT-960310. The Commission approved the Definitive Agreement in the Commission Order Approving Interconnection Agreement dated August 18, 1997.

14. Exh. C-94 is a network planning document to increase the trunk capacity at the Seattle East tandem switch that was prepared in late 1996.

15. Official statements of U S WEST corporate policy are not issued in common funding documents; nevertheless, statements of corporate policy in Exhibit C-94 (and Exh. C-117) are credible and reliable.

16. U S WEST believed it could satisfy CLEC requirements with existing trunk capacity in 1996.

17. MCImetro and U S WEST used similar approaches to estimate initial demand. MCImetro based its estimate on its own marketing sales projections due to the lack of historical data, and U S WEST based its estimate on loss of market share projections.

18. U S WEST also required MCImetro to submit trunking forecasts as a prerequisite to placing orders in 1996.

19. The policy statements in Exh. C-94 are consistent with U S WEST's belief that existing capacity could satisfy demand.

20. U S WEST changed its forecasting processes to include MCImetro's estimates in April 1997.

21. At the same time that MCImetro claims that U S WEST has behaved more egregiously than other ILECs (forcing MCImetro to scale back its sales

operation), MCImetro also reports that the Northwest Territory was its top performing sales and service organization in 1997.

22. Forecasting demand is important in telecommunications. However, forecasts, by their nature, will rarely be exact.

23. U S WEST failed to disclose that its system did not accept CLEC forecasts at the same time that it required MCImetro to submit forecasts as a precondition to provisioning facilities.

24. U S WEST did not rely upon or consolidate MCImetro's estimates into its forecasts prior to April 1997. U S WEST's inability to provision MCImetro's orders from existing capacity should have called its practices into question much sooner.

25. U S WEST's failed to disclose that it did not rely upon MCImetro's forecasts prior to April 1997. MCImetro reasonably believed that U S WEST's network capacity would be based upon its forecasts and that facilities would be provisioned in a timely manner.

26. U S WEST's argument that MCImetro's forecasting practices were responsible for the unavailability of facilities is without merit because U S WEST did not rely on those forecasts in any meaningful way prior to April 1997.

27. U S WEST historically augments its network capacity after facilities become 90% exhausted. This provides for 10% of capacity to meet interconnection needs during the seven-month process to complete an increase in capacity.

28. This existing capacity should have been sufficient to meet MCImetro's relatively small percentage of DS1s in both the Seattle and Tacoma areas. U S WEST's projected loss of market share for 1996 and 1997 should have been sufficient to absorb MCImetro's forecasts as well as total CLEC DS1s at the end of 1997.

29. The rapid growth of the Internet has been known for years. Minimal research would have provided U S WEST with sufficient information to estimate Internet growth on the part of all providers and respond to that growth in its network planning. U S WEST Advanced Technologies had referred to the growth of the Internet at rates of ten percent per month at least five years ago.

30. U S WEST's claim that it was caught off guard by the growth of the Internet is neither reasonable nor credible.

31. MCImetro's requirements for additional interconnection facilities in the interconnection agreements emphasized tandem interconnection.

32. MCI's requests to interconnect at the tandem or other locations specified in the agreements should not have been a surprise to U S WEST. U S

WEST's suggestion that it should not have anticipated interconnection at the tandem is not credible.

33. There is no credible evidence that actual CLEC interconnection has placed a significant capacity strain on U S WEST's network.

34. U S WEST began planning for permanent number portability (PNP) in July 1996, increasing its signaling system seven links for the PNP database later that year, and began deployment of its equipment in April 1997.

35. The requirements to deploy number portability were foreseeable and did not impair U S WEST's ability to forecast capacity to meet MCImetro's service orders.

36. The reasonableness of U S WEST's forecasts must take all foreseeable factors into account. While the actual demand caused by the Internet, CLEC interconnection, and PNP may have been difficult to predict, they were foreseeable.

37. It was unreasonable for U S WEST to forecast that it could meet all foreseeable demand for facilities (including MCImetro) through excess capacity.

38. MCImetro interconnected to U S WEST's Seattle tandem in September 1995, and acquired additional capacity in May and June 1996.

39. On April 15, 1996, MCImetro prepared and transmitted a trunk forecast for 1996 and 1997.

40. On August 19, 1996, MCImetro informed U S WEST that it required facilities at the U S WEST Seattle tandem in mid-September.

41. U S WEST informed MCImetro that Seattle tandem capacity was exhausted and that it was unable to provide service.

42. The Seattle tandem capacity exhaust was caused by U S WEST's failure to reasonably forecast demand for facilities.

43. MCImetro provided a forecast dated April 24, 1997, to U S WEST.

44. U S WEST requires approximately seven months to perform augments to increase network capacity.

45. U S WEST initiated numerous network engineering jobs to increase network capacity which were impacted by MCImetro's forecast. The vast majority of those engineering jobs were scheduled to be in service nine months or later from the date of MCImetro's forecast.

46. U S WEST did not timely initiate augments to increase capacity based upon the consolidated forecasting process.

47. U S WEST failed to communicate information regarding the exhaust of capacity impacted by MCImetro's forecast.

48. During the effective dates of the Interim and Definitive Agreements, U S WEST failed to complete numerous projects on the requested due date for existing facilities, and failed to complete projects on their scheduled due date.

49. U S WEST could not efficiently or effectively plan and manage its own network without foreknowledge of facilities exhaust.

50. U S WEST does not discuss capacity issues with MCImetro until an implementation planning meeting conducted prior to accepting a service order. The only time MCImetro received notice of a lack of interconnection facilities was when it submitted service orders.

51. The scope of "major network projects" includes facilities exhaust because MCImetro needs to make appropriate arrangements to minimize the impact on its business and customers.

52. MCImetro does not have access to U S WEST's network capacity monitoring systems, and is totally dependent upon U S WEST to provide notice when tandem exhaust is forecasted or occurs.

53. U S WEST was obligated to notify MCImetro of known or forecasted tandem exhaust, but did not provide any notices.

54. U S WEST was obligated to notify MCImetro of the impact of its permanent number portability project on network capacity.

55. permanent number portability in the first quarter of 1998. TR at 753.

56. U S WEST gave the permanent number portability precedence over other network growth jobs such as MCImetro's requested interconnection facilities.

57. MCImetro may have had foreknowledge of U S WEST's mandate to implement permanent number portability, but it had no way of knowing its impact on network capacity.

58. U S WEST's practices subject MCImetro to undue disadvantage because it provides notice of the availability of facilities only after MCImetro submits a service order.

59. U S WEST grants an undue advantage to itself by making strategic networking decisions based upon foreknowledge of the availability of facilities.

60. U S WEST operates two separate networks. The first network is the access network from which U S WEST provides interconnection services to interexchange carriers such as MCI Telecommunications (access network). The

second network is its local network (local network). The local network is used to provide local calling services and is smaller than the access network. U S WEST's local network is engineered to exchange its traffic through direct end office trunking.

61. For a new entrant, interconnection at the local tandem provides greater access to U S WEST customers. U S WEST has direct end office trunking between each of its end offices and uses the tandem for overflow.

62. Capacity problems at the local tandem have a minimal impact on U S WEST.

63. Interconnection at U S WEST's access tandem is technically feasible, U S WEST has exchanged traffic through its access tandem when network capacity issues prevented interconnection in its local network for another CLEC, and has sent traffic from U S WEST customers to MCImetro through the access tandem (one-way transit).

64. The access network provides a technically feasible alternative when facility shortages restrict access to the local network.

65. Tandem interconnection is crucial to the implementation of local competition.

66. MCImetro requested to terminate traffic through the access tandem on several occasions when the local tandem was exhausted and U S WEST refused.

67. U S WEST has developed traffic standards that dictate when tandem trunking should be replaced by direct end office trunking.

68. CLECs should not implement direct end office trunking plans prior to exceeding network standards unless by choice.

69. In December 1996, call blocking occurred within U S WEST's network, and the demand for interconnection has caused blockage problems.

70. CLECs are at a disadvantage because they have limited means to measure call blockage occurring on U S WEST's network.

71. Call blocking has occurred on MCI's local interconnection trunk group.

72. The data regarding blockage on MCImetro's trunk group is alarming.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.

2. U S WEST has not engaged in willful or intentional misconduct.

3. U S WEST may have slowed MCImetro's implementation of local service in this region, but it has not denied MCImetro entry into the market in violation of the Telecom Act.

4. U S WEST has a duty to reasonably forecast facilities demand to meet MCImetro's requirements.

5. The 1995 Initial Agreement was effective from September 1, 1995 until the 1996 Interim Agreement went into effect on August 26, 1996.

6. USWC breached Section 1.5 of the Initial Agreement by failing to use its best efforts to cooperate and install, and make available, services ordered by MCImetro. U S WEST failed to reasonably forecast facilities which resulted in a lack of network capacity. Furthermore, U S WEST failed to communicate notices of tandem exhaust and failed to inform MCImetro that it did not rely on its forecasts. This conduct falls short of "best efforts."

7. The 1996 Interim Agreement became effective on August 26, 1996, and remained in effect until the 1997 Definitive Agreement went into effect on August 20, 1997.

8. U S WEST breached Section 2.3 and 3.9(b) of the Interim Agreement, and Attachment 4, Section 8.4.2, and Part A, Section C of the Definitive Agreement. U S WEST failed to reasonably forecast facilities which resulted in a lack of network capacity. U S WEST also failed to provide existing facilities on MCImetro's requested due date and failed to complete other projects on their scheduled due date.

9. The local exchange market must be open in order to be competitive. In Order to establish an open market, full and complete disclosure of incumbent network traffic data is necessary.

10. The scope of "major network projects" includes facilities exhaust.

11. U S WEST's failure to provide notices of major network projects or capacity exhaust constitutes a breach of Sections 2.5, 3.4(c), and Appendix B - Section 3.3(a) of the Interim Agreement, and Attachment 4, Sections 10.2, 10.2.2, 10.4.1, Part A, Section 29.1 and Part A, Section B of the Definitive Agreement.

12. U S WEST's failure to provide MCImetro notices of current and forecasted facilities exhaust violates RCW 80.36.170 which prohibits U S WEST from subjecting MCImetro to any undue or unreasonable prejudice or disadvantage.

13. U S WEST's failure to provide MCImetro notices of current and forecasted facilities exhaust violates RCW 80.36.186 which prohibits U S WEST from making or granting any undue or unreasonable preference or advantage to itself.

14. U S WEST's refusal to allow CLECs to interconnect and exchange local traffic through its access tandem when capacity is exhausted at the local tandem violates RCW 80.36.200 by delaying the delivery and transmission of MCImetro's messages.

15. U S WEST has caused call blocking in violation of WAC 480-120-515.

O R D E R

IT IS ORDERED That:

1. U S WEST must devote the resources and personnel necessary to deliver existing interconnection facilities within the standard intervals provided for in the Definitive Agreement or MCImetro's requested due date, if later.

2. U S WEST must use its best efforts to deliver interconnection facilities subject to the individual case basis interval as soon as possible.

3. U S WEST must devote the resources and personnel necessary to deliver all interconnection facilities pursuant to MCImetro Access Service Requests by the due date established in the firm order commitment.

4. U S WEST must provide MCImetro with forecasts and notice of major network projects in full compliance with the Definitive Agreement.

5. U S WEST must provide MCImetro with all information regarding current or forecasted capacity exhaust at any facility where MCImetro is interconnected or has forecasted requirements on an ongoing basis.

6. U S WEST must provide sufficient capacity within its own network which guarantees that the blocking probabilities set forth in WAC 480-120-515 will not be exceeded. In the event that blockage occurs due to a lack of capacity at its local tandem,
U S WEST shall route local traffic through its access tandem to whatever extent and for however long necessary in order to alleviate blockage.

7. U S WEST must allow MCImetro to route local traffic through its access tandem whenever capacity is exhausted at its local tandem to whatever extent and for however long necessary in order to alleviate the lack of capacity.

8. U S WEST must provide a monthly review of traffic data at all facilities where MCImetro is interconnected or has forecasted requirements in order to enable MCImetro to make forecasting, ordering, and provisioning decisions based upon the same information as is available to U S WEST.

9. U S WEST must provide to the Commission a monthly report for a period of one year that shows time lines for the installation of local interconnection services used to connect MCImetro's customers to its network.

10. U S WEST must provide the Commission with a monthly review of traffic related to call blockage, and to include all trunk groups that interconnect with CLECs.