BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Inc. Against U S WEST Communications, Inc. Regarding Provisioning of Access Services	Docket No. UT-991292 U S WEST'S REPLY BRIEF TO THE POST-HEARING BRIEF OF AT&T

INTRODUCTION

1. U S WEST Communications, Inc. ("U S WEST") submits its Post-Hearing Brief, in reply to the brief of AT&T of the Pacific Northwest, Inc. ("AT&T"). AT&T has asserted three alleged violations by U S WEST. AT&T asserts that U S WEST has failed to provision access services to AT&T, that U S WEST has failed to timely provision the access services that it does provide to AT&T, and that U S WEST discriminates in the provisioning of access services. U S WEST demonstrates in this filing that AT&T is entitled to none of the relief requested.

2. Hearings were held in this matter on February 1, 2, 3 and 4, 2000. At the close of the complainant's evidence, U S WEST moved to dismiss the complaint on the

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basis that the complainant had not established facts or law establishing that it is entitled to relief. The Commission heard oral argument on the motion, and took the matter under advisement. U S WEST then presented its evidence. At the close of the hearing, a briefing schedule was established. U S WEST submitted its brief on the motion to dismiss on February 29, 2000, and now files its reply to AT&T's post-hearing brief on the merits.

3. AT&T presents a moving target in this matter, which it now styles as a complaint about service quality. That has not always been the case. Initially, AT&T could be heard to claim that U S WEST had failed to meet certain AT&T DMOQs (direct measures of quality) and that such failure was actionable on a breach of contract theory. U S WEST responded that it could not be held to AT&T's DMOQs to the extent those DMOQs were different from or in addition to the performance standards set forth in U S WEST's state and federal tariffs. This was a defense that was familiar to AT&T, since AT&T had only recently, and successfully, presented the same defense to the Supreme Court, resulting in the decision in *AT&T v. Central Office Telephone*, 118 S. Ct. 1956 (1998).

4. When it became clear that AT&T could not prevail on the breach of contract theory, AT&T claimed that U S WEST had indeed failed to perform in accordance with the requirements in its tariffs. This also has been shown to be an unsubstantiated claim, as AT&T's evidence is devoid of any support for any tariff violations, and U S WEST's evidence affirmatively demonstrates that it does provision in accordance with its tariffs. Thus, AT&T now advances its third theory, stating

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generally that the Commission should consider this as a general service quality docket and order remedies based on AT&T's assertions that service quality is insufficient. AT&T fails on this third theory as well.

5. The exhibits and testimony produced at the hearing establish: (1) that the scope of U S WEST's undertaking is circumscribed to provisioning to AT&T and other customers only to the extent facilities are available or can be made available with reasonable effort; (2) U S WEST's undertaking is conditioned upon provisioning for its basic local exchange network first; (3) AT&T could not show there was a problem with U S WEST's provisioning when facilities are in place and U S WEST makes more than a reasonable effort to provision services to AT&T when facilities are not in place; (4) the tariffed interval for provisioning service to AT&T when facilities are not in place is ICB or Individual Case Basis; (5) ICB, under the Service Interval Guide incorporated by reference in FCC No. 5 (and the State tariff), expressly contemplates a service interval of six months or longer; (6) virtually all of AT&T's access service requests are filled within that time frame; (7) even if U S WEST fails to meet its due date commitment, AT&T's remedy is expressly limited under the tariff to waiver of the total nonrecurring charge for the service (under the Service Guarantee section of the Tariff, Section 5.2.1 and the Service Interval Guide) or, at most, the proportionate charge for the service for the period during which the service was affected (under the general limitation of liability section, Section 2.1.3.B); (8) U S WEST has in fact paid the charges waived when required; and (9) AT&T has not come close to establishing a prima facie case of unlawful discrimination.

6. U S WEST has shown that for the services over which this Commission has

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jurisdiction, U S WEST provisioned in accordance with its tariffs and within reasonable intervals under the circumstances. For the FCC orders, U S WEST again urges the Commission that the FCC has jurisdiction over the provisioning of these services. This is true regardless of whether the circuits purchased out of the FCC tariff carry intrastate traffic or not. U S WEST has explained at length in its motion to dismiss how AT&T has utterly failed to establish any such traffic, and will not repeat those arguments here. Nevertheless, even if intrastate traffic were present on the interstate circuits, the services purchased from the FCC tariff are provisioned in accordance with the terms and conditions of that tariff, and AT&T's proposal in this case would have the Washington Commission order changes to U S WEST's FCC tariff. This relief simply cannot be granted, and no other relief is warranted either.

II.JURISDICTION

7. U S WEST agrees that the Commission has jurisdiction to hear a complaint by one public service company against another under the provisions of RCW 80.04.110. However, the subject matter of the complaint must also be one over which the Commission has jurisdiction, the issues must be ones that the Commission has authority to decide, and the relief requested must be relief which the Commission has authority to impose. None of those elements is present in this case

8. AT&T attempts to distinguish between the price under the FCC tariff, and all of the other terms and conditions of provisioning. AT&T suggests that the FCC only has pricing jurisdiction, arguing that the fact that services are priced under the FCC tariff is irrelevant to this Commission's jurisdiction to control the terms and conditions of

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provisioning. AT&T knows full well that price is simply one aspect of the terms and conditions. The Supreme Court recognized this as well, reversing a decision by the Ninth Circuit that had held the filed-rate doctrine inapplicable to a claim against AT&T. The Ninth Circuit thought the filed-rate doctrine inapplicable because that case did not involve rates or rate setting, but rather involved provisioning of services and billing. *AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S. Ct. 1956, 1963 (1998). The Supreme Court flatly rejected the Ninth Circuit's holding. According to the Court, "***even provisioning*** and billing are, in the relevant sense, ***'covered' by the tariff***." *Id.* at 1964 (emphasis added). Indeed, price is just one aspect of the terms and conditions. For AT&T to request superior provisioning performance under either tariff is the same as asking for a rate reduction.

9. AT&T's evidence shows that virtually all of the circuits ordered were ordered out of U S WEST's FCC Tariff No. 5. U S WEST has already raised and argued the jurisdictional issue in its motions to dismiss, filed in September 1999 and February 2000.

U S WEST does not agree with AT&T's jurisdictional theory, (that intrastate traffic carried on interstate circuits confers state jurisdiction), but even under that theory, AT&T has not established that intrastate traffic was implicated in this case in anything more than a de minimis way.

10. AT&T had three rounds of testimony in which to introduce evidence of intrastate traffic, and yet wholly failed to do so. The evidence presented by AT&T with regard to either intrastate services or intrastate traffic was scant. Indeed, AT&T's

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witness noted that with regard to services purchased out of the intrastate tariff, "[w]e [AT&T] haven't ordered a significant amount of service under that tariff." (Tr. 272). Yet, AT&T persists in asserting in its brief that "it is undisputed that the amount of intrastate traffic is substantial." Brief at paragraph 7. This is patently incorrect. U S WEST has disputed the amount of intrastate traffic, and has contended that AT&T failed to establish that any interstate circuits at issue in this complain carry intrastate traffic. U S WEST explained above, and in its February 29 motion, that there was no proof of any significant amounts of intrastate traffic or impact.

11. In spite of AT&T's assertions that intrastate traffic may travel over interstate circuits, the more compelling evidence shows that when all the traffic is known to be intrastate, the service is in fact purchased out of the state, not the federal tariff. Ms. Field was asked if a dedicated circuit for intrastate traffic between Tacoma and Seattle could be purchased out of the interstate tariff and she responded "no." (Tr. 255).

12. AT&T relied, throughout this proceeding, on the allegation that circuits purchased from the interstate tariff *could* carry intrastate traffic. This is true, but it is also true that the usage may indeed be 100% interstate. AT&T has never clarified if it wants the Washington Commission to order remedies that apply to wholly interstate circuits, or how one tells the difference if not by reliance on the tariff under which the service was purchased.

13. This Commission's jurisdiction is limited to Washington. If the Commission grants AT&T the relief it seeks, the Commission would necessarily impose a provisioning standard different from that which customers in other states could expect by

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purchasing under the same federal tariff. This simple fact requiring uniformity rests at the heart of the filed-rate doctrine and underscores the inappropriateness of granting AT&T any relief in this docket for facilities and services purchased under FCC No. 5. The option available to AT&T is to file a complaint with the FCC to argue the merits of this case regarding provisioning of access services bought out of the federal tariff.

14. Finally, AT&T again asserts that because the physical facilities are in Washington, the Commission has jurisdiction over all the services in the complaint. (Brief at paragraph 8). AT&T's argument must be rejected. Adopting AT&T's position would divest the FCC of any jurisdiction over any services. This argument is also absolutely contrary to the FCC's mixed-use facilities rule, 47 C.F.R. § 36.154.[1]

15. It is well established law that the location of the facility is irrelevant to a determination of the regulatory jurisdiction. Rather, case law involving facilities and services used for both interstate and intrastate communications indicate that the nature of the communications determines the regulatory jurisdiction and even a physically intrastate facility, used to terminate an end-to-end interstate communication, is an interstate facility subject to FCC regulation. *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

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[1] The mixed – use facilities rule is set forth succinctly in a recent decision by the FCC concerning the FCC tariffing of GTE's DSL services:

> The mixed-use facilities rule was introduced in a 1989 proceeding involving the re-examination of the separations treatment of "mixed-use" special access lines. Specifically, in the *MTS/WATS Market Structure Order*, the Commission adopted the Joint Board's recommendation that "mixed-use" special access lines (*i.e.*, lines carrying both intrastate and interstate traffic) are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction. The Commission found that special access lines carrying more than *de minimis* amounts of interstate traffic to private line systems should be assigned to the interstate jurisdiction. Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line (internal citations omitted).

GTE Tel. Operating Cos. GTOC Transmittal 1148, CC Docket No. 98-79, paragraph 23 (Opin. and Order rel. October 30, 1998).

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Certainly, AT&T is aware of this decision and knows that its argument on this issue is not well founded.

16. The relief AT&T really seeks is the creation of a new special provisioning standard for its wholesale access services. However, assuming, *arguendo*, that the Commission were not barred in fashioning a new standard for provisioning access services out of the federal tariff, the creation of such a standard should not be awarded in a complaint docket, or based on the absence of proof in this case.

STATEMENT OF FACTS

17. AT&T begins with a statement of facts in paragraphs 9-13 of its brief, which contains a generally accurate description of access services. However, AT&T's generalized descriptions of access service do little to shed any light on the issues in this complaint. Indeed, AT&T's descriptions lead one to believe that AT&T is not discussing the hearing in Washington at all, because much of what is stated does not relate to the record that was created before the Commission in this proceeding. For example, AT&T describes switched access service at paragraphs 10-12, yet there are no switched services at issue in the complaint. Further, AT&T describes DS0 circuits at paragraph 13, yet no DS0 orders are at issue in this case. (See, generally, U S WEST's motion to dismiss, Exhibits 5, C-118, and Tr. 194, 635).

18. In fact, for the 12-month time period from October 1998 through September 1999, with well over 1000 DS1 service orders at issue[2], AT&T could only identify a few hundred "held" and "missed" orders where AT&T alleged provisioning problems. All of

[2] U S WEST's evidence shows more than double that number of DS1 orders for 1999. Exhibit C-214-T, fn. 1.

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these were for special access, not switched access. Of that subset, AT&T could only identify six orders for special access that were purchased out of the intrastate tariff, and all of those had been filled by the time of the hearing. Thus, AT&T's claim that U S WEST fails to provide facilities at all is without merit. Moreover, AT&T produced ***no evidence*** that U S WEST is failing in provisioning switched access, the red herring AT&T relied upon to defend against the initial motion to dismiss.

19. AT&T claims that "problems" with U S WEST's provisioning have been ongoing for years, and that in recognition of these problems, AT&T's practice is to place orders with a requested due date that is at least 10 business days from the order date. (Brief at paragraph 14). However, AT&T did not provide enough information to verify whether this is indeed the case, and the evidence it did provide affirmatively shows that not to be the case. In a case where AT&T has specifically made provisioning intervals an issue, this is indeed a significant omission.

20. The first report in exhibit C-118, which contains the largest data set that AT&T analyzed, does not contain the order date and the requested due date, both of which are required to calculate the interval between the order date and the requested due date. On the other hand, exhibit C-119, an exhibit which AT&T designated as showing "missed orders", specifically shows that on 19 out of the 98 orders, AT&T requested a due date of less than the standard interval. AT&T's witness had previously stated that such an event occurred "only rarely". (Exhibit 101-T, p. 9). However, he would not agree that approximately 20% of the time was a rare occurrence. (Tr. 338). The exhibit further shows that fully 31 of the 98 orders were placed with a desired due date of less than 10

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calendar days, contrary to AT&T's assertions at paragraph 14 of its Brief.

21. Thus, on the specific set of orders that AT&T chose to look at and describe to the Commission, a full 20% of those orders were placed with a shorter due date than AT&T now claims as the standard. Notably, the only criteria that AT&T used to select these orders for this report is the fact that U S WEST did not meet AT&T's requested due date, without any regard to whether there was any obligation for U S WEST to do so (Tr. 333-4). Now, AT&T asserts unequivocally in its brief, in total disregard of this evidence, that its practice is to request a 10 day interval. This misleading presentation of evidence pervades AT&T's entire case, and the presentation should be discounted accordingly. As will be shown below, U S WEST has met the requirements in its state and federal tariffs for provisioning services, and it has provided tariffed remedies when it has failed to do so.

22. AT&T claims that it is not requesting special treatment, or provisioning standards that are higher than what is required in the tariff. AT&T's advocacy belies the fact that it is, indeed, seeking to have the Commission establish special provisioning requirements and special provisioning intervals based on AT&T's DMOQs. Specifically, all of the measurements and intervals that AT&T cites at paragraphs 14-17 of its brief are based on AT&T's DMOQs.

23. For example, AT&T continues to measure and criticize U S WEST on a 24-hour FOC (Brief at paragraphs 16, 48), even though no tariff requirements for a 24-hour FOC exist anywhere. Furthermore, as will be discussed in detail below, AT&T's data is so seriously and fundamentally flawed as to be unreliable, and AT&T failed to perform a proper analysis on that data, routinely including in its calculations orders that were held or

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missed for customer reasons, and orders that were subject to negotiated due dates rather than the standard provisioning intervals.

24. AT&T's criticism of U S WEST's on-time provisioning (Brief at paragraph 14) can only be made by using AT&T's measures. AT&T continues to claim that those DMOQs do not establish special requirements, but they clearly do. Curiously, AT&T cites to ex. C-117 in support of its claim that U S WEST only met the standard interval a small percentage of the time. However, that exhibit does not support that conclusion, as it purports only to show "FOC response days", not how often a particular interval was met. Thus, U S WEST is unable to even verify if the record supports AT&T's allegations in paragraph 14.

25. Conversely, U S WEST has shown that to the extent performance measures are relevant, U S WEST's own measures present a very different picture from AT&T's. While U S WEST recognizes AT&T's DMOQs as AT&T's method of measuring provisioning performance, DMOQs do not measure on time provisioning. Rather, they measure a date that has been established as a desired date by AT&T. U S WEST also has measures that are used to quantify the output of its provisioning process. U S WEST's performance measures, Designed Services Provisioning Quality (DSPQ) indicators, track U S WEST's on time performance.

26. Unlike AT&T's DMOQs which track provisioning performance based on the "customer's desired due date," regardless of the interval requested, U S WEST tracks performance based on the availability of facilities. For example, if facilities are available, U S WEST can establish a 5-day service interval for provisioning DS1 service. If

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facilities are not available, the due date is established on an individual case basis. This method of establishing due dates is based on the provisioning requirements in the intrastate and interstate tariffs and Service Interval Guide. (See, e.g., FCC No. 5, Section 5.2.1). From the inception of AT&T's DMOQs in 1994, U S WEST has stated that it will try to cooperate with AT&T and provide information in accordance with the DMOQs. However, neither U S WEST's internal processes nor its tariffs support provisioning on the "customer desired due date." (Ex. 201-T, pp. 16-17).

27. For example, when on-time provisioning performance is measured based on a 24-hour FOC and in accordance with AT&T's expectation that service be installed on the customer's desired due date, U S WEST's performance during the month of October 1999 was 55%. During that same time frame U S WEST's on-time performance using a 48-hour FOC (FOC issued after design of the circuit has been completed), reflecting a due date established, after design of the circuit has been completed and availability of facilities has been established, U S WEST's performance was 83%. (Id. at 25).

28. An additional example of how important it is to use the proper measurements is shown in exhibit C-211. While this data is not Washington specific, it clearly shows that under U S WEST's measurements, U S WEST consistently provided service to AT&T which at least met the level of service that was being provided to other customers. Significantly, the data show that U S WEST's on time performance (how often U S WEST met its originally committed due date) is in the 90% range for DS0 services and at 74% for DS1 services. This data was as of October 1999. U S WEST attempted to introduce current Washington data, but AT&T objected to the inclusion of that information

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in the record. (Tr. 575).

29. AT&T goes on to bemoan the fact that it has few alternatives to U S WEST, citing the difficulty that CAPs have in entering the market (Brief at paragraphs 18-20). Again, AT&T only tells part of the story. In reality, a significant number of AT&T's orders are in wire centers where this Commission has made a determination that DS1 and DS3 services are subject to effective competition. (Docket No. UT-990022, Exhibit 508-T, p. 2-4). Furthermore, it is clear from AT&T's own testimony that AT&T routinely seeks out competitive providers of access service – AT&T routinely looks to TCG (ALS) first in making its provisioning decisions. (Tr. 235-6). Only then does AT&T turn to U S WEST for provisioning. One might infer that AT&T keeps the easy, low cost or profitable orders for itself; the rest of the orders it sends to U S WEST. However, in circumstances where facilities are not available to U S WEST, AT&T is equally able to provision those facilities, or to obtain them from another carrier.

30. AT&T suggests, at paragraph 23, that it is only reluctantly that it comes before the Commission seeking assistance in resolving its issues with U S WEST. Again, this is slightly disingenuous of AT&T, especially in light of the fact that it filed the same complaint in five states on the same day, held press conferences about the issues, and never once advised U S WEST that it would file the complaint, or specifically approached U S WEST to discuss the matter in advance of filing.

31. U S WEST recognizes that AT&T is a very large access customer, a customer who does millions of dollars of business with U S WEST each year. To that end, U S WEST provides AT&T with tremendous support and customer service, dedicating

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significant resources to serving AT&T, including maintenance of an "AT&T account team" dedicated to serving only AT&T. Thirty-five people are assigned to this team, along with numerous employees in other departments that do nothing but focus on AT&T. These employees work with many departments in AT&T, including the sales and service organizations, the billing and collections groups, the network and engineering organizations along with the supplier management group that reports to Charlotte Field. U S WEST works diligently to proactively address AT&T's needs. (Exhibit 201-T, p. 3).

32. As will be shown herein, AT&T's complaint is a misplaced effort to obtain special provisioning and to attempt to obtain revisions to the FCC tariff at the hands of the Commission. U S WEST will show that it complies with the FCC requirements for provisioning interstate services, and with Washington tariff requirements for provisioning intrastate services. U S WEST will also show that it does not discriminate against AT&T, and that AT&T has not established any discrimination on this record. Finally, U S WEST will show that the relief requested by AT&T cannot and should not be granted.

III.ARGUMENT

U S WEST HAS PROVIDED SERVICE IN ACCORDANCE WITH ITS TARIFFS.

33. First, it is important to remember that U S WEST and AT&T now agree that this case is about whether U S WEST has met the requirements of its tariffs in provisioning services. Thus, the tariff language itself is critical to a determination of what the tariff obligations are. However, AT&T largely ignores the tariff language, because it contains significant limitations on U S WEST's obligations, and neither permits nor requires much of what AT&T is asking for. These limitations are inconsistent with AT&T's advocacy in

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this case, but they are the law which is applicable, and the tariffs cannot be ignored.

34. AT&T quotes the general statutes that authorize and direct the Commission to regulate in the public interest, citing provisions which require "reasonable and adequate service" and "adequate facilities". U S WEST does not agree with AT&T that it is free to quote general statutory language regarding the obligations of all telecommunications carriers and then conclude that U S WEST's provisioning practices are in violation of those statutes.

35. The statutes are necessarily broadly and generally written, because what they are doing is not establishing specific requirements, but rather are describing the scope of the Commission's regulatory authority, and setting forth policies, not specific practices. The statutes are given effect by the rules and tariffs that are adopted within the statutory scheme. Thus, the statutes describe the general obligation to provision adequate facilities, but the Commission has specified that obligation in various rules, such as WAC 480-120-515 which sets forth certain network standards that must be met.

36. Thus, AT&T's performance measurements cited throughout its brief are irrelevant unless they are linked to a tariff requirement, and they are not. For example, AT&T would require that there be no held orders, but that is not a requirement in the tariff. AT&T would also require U S WEST to provision within the standard interval in virtually every case, but that is not a requirement in the tariff, and is in fact expressly contrary to U S WEST's tariffs. In short, AT&T would read many of U S WEST's tariff provisions out of existence. The Commission should neither endorse nor adopt such advocacy.

1. U S WEST's Access Tariffs and Service Interval Guide Establish the Provisioning Process U S WEST Must Follow.

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37. Special access services are provided by U S WEST under tariff, both at an interstate and intrastate level. These tariffs, approved by the Commission and having the force and effect of law, recognize that there are limits on U S WEST's obligation to provide special access services. AT&T states that U S WEST "has a fundamental duty to provide service on demand." (Brief at paragraph 27). However, contrary to this assertion, U S WEST's tariffs set forth a somewhat different obligation.

38. The tariffs make it clear that U S WEST will provide the services listed in the tariff, subject to availability of facilities. U S WEST's FCC Tariff No. 5 governs provision of interstate switched and special access. It governs the provisioning of 1069 of the 1075 orders identified in this complaint. It contains the following provision:

> 2.1.4 Provision of Services
>
> The Telephone Company, to the extent that such services are or can be made available with reasonable effort, and after provision has been made for the Telephone Company's telephone exchange services, will provide to the customer upon reasonable notice service offered in other applicable sections of this Tariff at rates and charges specified therein.

In other words, the FCC tariff indicates that U S WEST is not obligated to undertake unreasonable effort to provide access service. Nor is the Company to give precedence to an order for carrier access service over an order from an end-user customer for basic telephone exchange service.

39. Similarly, the Washington private line intrastate tariff, WN U-33, Sections 2.1.2 B. and C. states:

> B. Subject to compliance with the above mentioned rules, where a shortage of facilities exists at any time either for temporary or protracted periods, the services offered herein will be provided to customers on a first come, first served basis.

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> C. The furnishing of service under this Tariff will require certain physical arrangements of the facilities of the Company *and is therefore subject to the availability of such facilities*. (Emphasis added)

Thus, U S WEST's obligation to provide facilities to serve AT&T's special access customers is subject to the availability of facilities, and is most certainly not an unfettered obligation to provide service on AT&T's demand. The Washington private line tariff is essentially the only tariff that is relevant to this case, because there are no allegations, and there is no proof, regarding intrastate switched access services, and the FCC tariff is under the jurisdiction of the FCC. Nevertheless, U S WEST will discuss the provisions of all three tariffs to assure the Commission that in fact no violations have occurred.

40. The Commission has recognized that U S WEST's obligation to provide service, as set forth in its tariffs, is more limited for access services than for other types of services. For example, when U S WEST filed its first interconnection tariff (Docket No. UT-941464, et al.) U S WEST wanted to place the interconnection provisions in a separate section within the access tariff. The Commission rejected that proposal, stating that local interconnection was a carrier to carrier relationship that was different from the carrier/customer relationship that U S WEST has with IXCs as access customers. The Commission's discussion shows that the Commission clearly recognized that the obligation to provide access is circumscribed by the tariff limitations.[3]

[3] "The existing switched access tariff has requirements and limitations in USWC's relationship with its customers that are not appropriate in its relationship with co-carriers. For example, the revised tariff states in Section 2.1.4 that USWC will provide access service only after provision has been made for its own telephone exchange service. This may be an appropriate distinction when 'access services' are limited to toll access [but is not appropriate for local interconnection . . . . Liability provisions in the switched access tariff *are appropriate* for IXCs as customers but not for ALECs as co-carriers." (emphasis added, 9th Supplemental order at p. 16)

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41. In Washington, U S WEST has separate tariffs for switched access and special access. Special access services are offered in the Private Line Transport Services tariff, (WN U-33). Section 1.1 of that tariff contains the following language:

> The Company will make every reasonable effort to provide the services delineated in Section 5, following, upon reasonable notice of request for the service from the customer. All rates and charges shown in this Tariff provide for the furnishing of service, where suitable facilities are available. Where special construction of channel facilities is necessary, special construction charges may apply.

42. The intrastate private line tariff (cited above) contains the relevant language for the orders at issue in the complaint. However, the switched access tariff (WN U-37) contains similar language in section 2.1.2, as follows:

> B. The installation and restoration of services shall be subject to the regulations set forth in section 13, following, concerning the Telecommunications Service Priority (TSP) System.
>
> C. Subject to compliance with the rules mentioned in B., Preceding, the services offered therein will be provided to customers on a first-come, first-served basis.

Thus, the Washington tariffs also refer to reasonableness of the effort required and do not set forth a specific tariff requirement that U S WEST build facilities.

43. Time intervals between placing an order and provisioning service are contained in the tariff sections that deal with the ordering process. In fact, the tariffs contain lengthy instructions concerning the ordering process, including the obligations of the Company and the carrier customer. Sections from the interstate and Washington state access tariffs appear as exhibits 505, 506, and 507.

44. In the interstate tariff, Section 5.2.1 governs Access Order Service Date Intervals. This tariff section refers to the U S WEST Communications Service Interval Guide as the document that provides tables of service date intervals. After referring to the

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Service Interval Guide, the interstate tariff goes on to say:

> To the extent the Access Service can be made available with reasonable effort, the Company will provide the Access Service in accordance with the customer's requested interval, subject to the following conditions:

45. The tariff then goes on to describe procedures for determining standard intervals, according to the Service Interval Guide, and the conditions under which Negotiated Intervals will apply. Specifically, when The Service Interval Guide provides for Standard Intervals (generally referred to throughout this record as 5 and 8-day intervals) when there are "Facilities in Place," and when service orders are of a certain size. Exhibit 402. When there are no "Facilities in Place," the service interval for provisioning is "ICB" or "Individual Case Basis." Individual Case Basis is defined in the Service Interval Guide and expressly provides that the interval will be determined by U S WEST's Service Delivery Center and Capacity Provisioning Center taking into consideration "the individual circumstances of the service request." Exhibit 402, page 3.

46. The Service Interval Guide also contains a definition of "Facilities in Place." That definition provides that ***all*** facilities must be in place to constitute "Facilities in Place." Exhibit 402, page 3 (Facilities in Place requires "facilities (cable or fiber) and repeater apparatus cases are in place up to the Main Point of Presence

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(MPOP); including spare capacity in the associated multiplexer."). Facilities are not in place if a necessary component is missing or not functioning appropriately to provide the requested service without modification. As Ms. Halvorson explained, a lack of facilities can mean many different things, including availability of the local loop, and availability of various components in the central office or on the customer premise (Tr. 578). A lack of available facilities can take different amounts of time to remedy, depending upon what facility is not available.

47. FCC No. 5, Section 5.2.1 provides a limitation on the duration of a Negotiated Interval: six months plus the Standard Interval Service Date, or, when there is no Standard Interval, the Company offered Service Date.[4] Accordingly, FCC No. 5 contemplates that ICB or Negotiated Intervals can take many months, which belies AT&T's assertion that it can obtain access service essentially on demand.

48. The Washington switched access tariff contains the following language in Section 5.1.1:

> The time required to provision the service (i.e. The interval between the Application Date and the Service Date) is known as the service interval. Such intervals will be established in accordance with the service date interval guidelines as set forth in the Service Interval Guide mentioned in 5.2.1, following, and, where possible, will reflect the customer's requested service date.

This is the language upon which AT&T relies to claim that U S WEST is obligated to

[4] A six months or 180 day additional time frame is not unreasonable, particularly when design and construction are involved.

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provide a FOC within 24 hours. However, this provision is contained only in the switched access tariff, not the special access (private line transport) tariff. AT&T initially claimed that the language was identical in both tariffs, but AT&T's witness was unfamiliar with the Washington tariff and had to change her testimony when her assumption was shown to be incorrect. This is telling, not because the witness was mistaken – that can happen to anyone – but because AT&T's witness was wholly unfamiliar with what AT&T claims is the cornerstone of its case, U S WEST's tariffs. This highlights that AT&T continues to seek enforcement not of U S WEST's tariffs, but of AT&T's DMOQs.

49. Finally, the tariff not only sets forth the limitations on U S WEST's obligation to serve and various other provisioning requirements, it provides remedies to customers if U S WEST does not meet the tariffed requirements. The special access tariff contains the following language in Section 3.2.2 (L):

> The Company assures that all provisioning requests for DDS, DS1 and DS3 Service will be installed on the customer requested service date (due date) providing it is equal to or greater than the standard intervals published in the Service Interval Guide.

The remedy is waiver of nonrecurring charges, and the remedy has been applied where appropriate.

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2. U S WEST Complies with its Tariffs

50. AT&T claims that U S WEST has failed to meet standard intervals, has failed to meet committed due dates, and has failed to deliver timely and accurate firm order confirmations. These allegations are either incorrect, or, where they are correct, do not state a basis for relief. For example, as explained in more detail below, AT&T may generally be correct in alleging that on one or more orders U S WEST did not meet the standard interval. However, U S WEST is not obligated to meet the standard interval in every case, only in cases where facilities are available and the customer requests the standard interval. A second example is a failure to meet a committed due date. It may well be that U S WEST was unable to provision one or more orders on the committed due date, but that does not establish a basis for any relief other than the specific remedies set forth in the tariff, which is a waiver of nonrecurring charges. U S WEST will show that AT&T has failed to establish any tariff violations, and that AT&T has received tariff remedies where those remedies were applicable.

(a) U S WEST Provides Service in Accordance with Tariff Requirements.

51. As discussed above, U S WEST does provide service within the standard interval when that interval is requested by the customer and facilities are available. The problem with AT&T's data is that it does not provide sufficient information to distinguish between orders where facilities are available and where they were not. A determination of compliance or non-compliance with the tariff mandates such information.

52. What is critically important here is that AT&T will only discuss this issue from a general perspective, referencing in paragraphs 39-41 its complaints about long

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provisioning intervals. Notably, AT&T has failed to provide evidence of even one single order where facilities were available, the standard interval was requested, and U S WEST failed to provision the service on the date requested. However, those are the elements necessary for proof of non-compliance with the tariff.

53. In fact, AT&T's witness agreed that for most of the 70 held orders that AT&T initially had at issue, there was a lack of facilities issue in connection with many of them. Thus, the interval is not 5 or 8 days, but rather ICB.

54. AT&T claims, at paragraph 38, that U S WEST fails to advise AT&T when facilities are not available. This is not correct. Mr. Wilson, who makes this claim, had no first hand knowledge upon which to base this claim. U S WEST established that AT&T is informed when facilities are unavailable. In accordance with the critical interval process, U S WEST checks the status of the order at RID (Record Issuance Date) plus one business day. If U S WEST is unable to complete the design of the order, U S WEST will monitor the order over a period of seven days. Within that period of time, U S WEST will FOC a due date that reflects the RFS (Ready for Service Date) plus the standard interval. (Exhibit 214-T, p. 12).

55. AT&T's exhibits also demonstrate that U S WEST did in fact provide AT&T with due dates, and that U S WEST notified AT&T when orders would be delayed, and gave the reason for that delay. (Exhibits 5 and C-118 (third report)). Even in instances where the "reason" column on exhibit C-118 states that no reason was given, that is not evidence that U S WEST violated any requirements. For example, the 16th listed order on the third report of exhibit C-118 (PON PWS01810368) shows that U S WEST did not

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provide a reason. However, that order was placed with a requested installation interval of only two days. The information shows that U S WEST committed to a due date of 8-5-99 and met that due date. Of course there is no "reason," because the order was not missed or delayed. Additionally, the data included in this report was data from AT&T's records, and only indicates whether AT&T recorded a reason, not whether a reason was given. (Tr. 335, 601).

56. AT&T's analysis of how long it takes to provision omits several critical factors. Specifically, AT&T did not consider orders that had long intervals due to delays from AT&T or their end user customer. AT&T also did not consider negotiated intervals. For example, the average due date intervals outlined in exhibit C-211 include all AT&T projects and engineering service orders where the due dates are negotiated with AT&T on an individual case basis. Therefore, if the average interval seems long, it does not necessarily mean that U S WEST missed the due date. It simply means that U S WEST and AT&T agreed to a longer interval to accommodate the time frame negotiated for each project, or that facilities problems necessitated the longer interval. (Ex. 214-T, p. 8).

57. On the other hand, U S WEST's analysis found DS1 orders had an average interval of receipt to completion of 22 days, while the median time for the same order is only 14 days. (Ex. 214-T). This study included both orders where facilities are in place and those where facilities are not. Contrary to AT&T's assertions, U S WEST's data includes orders held for no facilities and has median intervals of 14 days for DS1s.

58. Finally, even in the face of AT&T's lack of evidence, U S WEST would agree that it does indeed sometimes miss the committed due date for various reasons.

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U S WEST's data shows that year to date in October 1999, it had met its own committed due date 74% of the time for DS1 provisioning. Failure to meet the date can be due to many reasons, including the fact that facilities which were originally thought to be available might not be. For example, the facilities between the customer premises and the central office (the loop) could turn out to be defective, or used by another customer, even though it originally appeared that the loop would be available. Under those circumstances, U S WEST might miss the committed due date. Additionally, U S WEST might miss a due date because of workforce issues, where technicians who would be involved in provisioning are unexpectedly called to perform maintenance functions. (Ex. 214-T, p. 2). However, what is important is that U S WEST also complies with its tariffs when it misses the due date. U S WEST waives non-recurring charges in accordance with tariff requirements as a remedy for the missed due date. AT&T has received those credits. (Ex. 201-T, p. 33).

(b) U S WEST's Installation of Services in Accordance with the Due Date.

59. In this section of its brief, paragraphs 43-46, AT&T accuses U S WEST of failing to meet the due date on half its orders region-wide, and on 80% of Washington orders. This analysis fails because it does not rest upon a correct determination of U S WEST's obligation to meet the due date.

60. AT&T's analysis is premised on inaccurate data and incorrect assumptions. AT&T averages the requested due date for all orders, and then concludes that because that average number of days requested is longer than the Standard Interval, U S WEST is obligated to provision on the customer due date in each case. This is incorrect. An average

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does not provide meaningful information.

61. For example, assume AT&T had a total of 20 orders – 10 orders had a requested interval of 2 days, and 10 orders had a requested interval of 24 days. The average interval would be 13 days. However, U S WEST would not be obligated to fill the first group of 10 on the requested due date, because 2 days is less than the standard interval. U S WEST would also not be required to fill the second group of 10 within the standard interval, because the requested interval is longer. AT&T would go back to the average interval requested, which is 13 days, and assert that because the average interval exceeded the standard interval, U S WEST was obligated to meet the standard interval on all orders. AT&T would conclude from this data that U S WEST failed to meet the standard interval 50% of the time, i.e., the 10 orders that requested a longer due date. AT&T would also conclude that on the other 50%, U S WEST failed to meet the customer due date – in spite of the fact that U S WEST had no obligation to do so on those specific orders. The fallacy of this analysis is evident, yet that is the precise analysis upon which AT&T relies in its exhibits 105-C, 109-C, 110-C and 116-C, and upon which AT&T premises its discussion.

(c) U S WEST's Obligation to Provide a 24-Hour FOC

62. In paragraphs 47-51of its brief, AT&T takes another run at holding U S WEST to AT&T's performance measurements and requirements which require superior service to that which is required by the tariff. Earlier in the brief, AT&T candidly admits, at paragraph 32, that U S WEST's tariff and service interval guide do not state explicitly when the FOC must be sent to the wholesale customer. Yet in this section,

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AT&T again claims that U S WEST should be held to a 24-hour interval, stating in paragraph 51 that such an interval is required by the terms of U S WEST's tariffs. Conversely, AT&T's witness agreed that the requirement was not contained in U S WEST's tariffs or service interval guide. (Tr. 287-8).

63. The only language upon which AT&T relies for its claim to a 24-hour FOC is contained in U S WEST's FCC tariff at Section 5.1.1, not its intrastate private line tariff, and reads as follows:

> The Company will establish a Service Date (Due Date) when the customer has placed an order of service with all the appropriate information to allow for processing of the Access Order. The date on which the Service Date is established is considered to be the Application date.

FCC Tariff No. 5 Section 5.1.1.

64. AT&T claims that the date it sends in its application triggers the requirement to complete the design layout record (DLR) the next day, which is the records issue date (RID) which would allow issuance of a FOC that same day. AT&T's interpretation of this language is mistaken. Establishment of the Service Date is conditioned upon receipt of a complete and accurate application. AT&T's analysis of intervals in this case always considers the Application date to be the date that AT&T sent the order, but this is not the correct way to look at it. AT&T's applications are replete with errors – they are either inaccurate or incomplete, or both 79% of the time. Ex. 201-T. When the application is complete, and when U S WEST is able to establish a service date, that date is *considered to be* the Application date. Thus, the Application date is established only with reference to events which happen after the application is submitted.

65. AT&T has not established that it is entitled to a FOC within 24 hours, either

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by virtue of tariff language or by inference or implication from that language. U S WEST provides other carriers with FOCs within 48 or 72 hours, and this interval allows for the provision of a more accurate due date, which is what AT&T says that it wants. For example, as discussed above in paragraph 27, U S WEST's performance was markedly better with a 48-hour FOC.

(d) U S WEST's Provisioning of the Six Intrastate Orders

66. U S WEST stated in its motion to dismiss that it would discuss the specifics of the six intrastate orders in this reply brief. However, AT&T did not discuss those orders specifically in its brief, and it is unclear whether AT&T contends that the provisioning of any of those six orders in particular was in violation of U S WEST's tariffs. What is clear is that all six orders were filled as of the date of hearing, suggesting that U S WEST engaged in efforts to fill those held orders, and that those efforts were successful.

67. Based on the testimony presented at the hearing, U S WEST was able to determine that AT&T claims that the provisioning of PON VWS01790560 was in violation of the tariff because, in AT&T's view, the 3 month interval necessary for completion of this order was *per se* unreasonable. Yet this is contradicted by the fact that AT&T is now asking the Commission to establish a standard which allows a maximum interval of 90 days, suggesting that 90 days might be reasonable under some circumstances. (Brief at paragraph 82).

68. U S WEST's provisioning of the 6 intrastate orders can be summarized as follows: Exhibit C-118 contains three reports, the third report shows three intrastate orders, PONs VWS01790560, VWS01790562, and VWS01806101. Of those, all three

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were held for facility availability, and two of the three were held due to independent company reasons (i.e., one end of the circuit is provided by U S WEST, the other end of the circuit is provided by another company outside U S WEST's service area). Two of the orders were filled in less than 90 days, and the third in approximately 120 days. These intervals are well within the six month interval contemplated by the tariff.

69. The second report in exhibit C-118 (identified separately as exhibit C-119) also shows three intrastate orders, numbers 56, 83, and 96. Order number 56 (PONVWS01790563) can also be found on page 15 of the first report contained in exhibit C-118. That report shows that this order was completed only five days after the requested due date, and shows that one end point is not a U S WEST central office, indicating that another company is involved. Order number 83 (VWS01790559) shows that there was a "defective cable pair", indicating a lack of facilities. This order can also be found on page 17 of the first report in C-118. That report shows that the order was filled less than 60 days after the requested due date. Order number 96 (PON VWS01803988) can also be found on page 17 of the first report in C-118. That report shows that provisioning took four weeks, and similar to order number 56, another company was involved. These intervals are well within the six month interval contemplated by the tariff, and are also within the 90 days that AT&T would find acceptable. (Brief at paragraph 82). Thus, no tariff violations have been established.

B. U S WEST'S PROVISIONING OF SERVICES AND FACILITIES IS "ADEQUATE" AS REQUIRED BY LAW.

70. In paragraphs 52-65, AT&T details its allegations that U S WEST has failed to provide timely and adequate service. U S WEST discussed this issue in some detail in

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its motion to dismiss, at pages 11-13, and will not repeat those arguments here. For example, U S WEST discussed at length the applicability of RCW 80.36.260 and WAC 480-120-500, and neither entitles AT&T to any relief. U S WEST believes that it has established that AT&T is not entitled to relief under any of the provisions of Washington law.

71. AT&T cites various state laws and rules under which it claims it is entitled to relief. However, in order for those laws and rules to even apply, the services at issue must have been purchased out of tariffs to which those laws apply. For all but six orders, the FCC tariff applies, and that tariff and federal law govern what is required. For the six orders which are purchased under Washington law, there had clearly been no showing that service was either untimely or inadequate. All six intrastate orders had been filled by the time of the hearing, so there is also no basis upon which to claim that U S WEST fails to provision intrastate service. (Exhibit C-118).

72. Of the original 70 held orders, four were still held as of January 2000, one for customer reasons. (Exhibit 214-T, p. 3). AT&T presented no evidence about any of the three other orders. Indeed, it was U S WEST's witness who updated the status of the 70 held orders, not AT&T. Id. Thus, there is no basis upon which to conclude that U S WEST has acted unreasonably in provisioning service with regard to any of the 70 orders.

73. On the other hand, there is ample basis to conclude that U S WEST's practices in general are very reasonable. Ms. Halvorson testified at length about the efforts U S WEST undertakes to fill an order. Where facilities are available, U S WEST fills the

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order (Tr. 534). Where facilities are not available, U S WEST's usual practice would be to consider the following options to fill an order: look for grooming opportunities, try to find spare pairs, look to see if disconnects are coming up that will free up facilities, build, or reroute the facility (Tr. 535). Clearly, this is a reasonable response, especially since AT&T did not propose other solutions or options that U S WEST was not already considering.

74. The only option AT&T did propose, which is clearly not reasonable, is that U S WEST proactively build out each and every central office so that there is never a held order, or at least so that held orders only occur less than 5% of the time. (Tr. 618, 623-5). AT&T's expectation is that U S WEST will be able to forecast AT&T's demand, when AT&T itself cannot do that.[5] However, Mr. Wilson clearly said that U S WEST should put in enough capacity so that capacity is always available, even if AT&T and other access customers do not purchase all the capacity and the cost burden for that build-out falls on U S WEST's retail customers. (Tr. 647-8).

1. Timely Provisioning

75. AT&T's claim at paragraphs 55-61 regarding timely provisioning is simply another attempt to obtain extra-tariff provisioning requirements as set forth in AT&T's DMOQs. AT&T's entire premise in these paragraphs is that U S WEST's self-reported data measuring CDDD (customer desired due date, an AT&T DMOQ) shows U S WEST not to be meeting AT&T's standard. Again, without a link to a tariff requirement, this argument does not provide a basis for relief.

[5] Mr. Wilson claimed that AT&T provided U S WEST with end user forecasts, but had not ever seen one, and could not identify any end user information in the one forecast that AT&T provided to U S WEST in discovery. Tr. 627-31 and Exhibit 127.

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76. Further, AT&T misrepresents the data upon which it relies to allege untimely provisioning. AT&T states that AT&T's orders establish a due date of 10 days for high density areas and 12 days for low density areas, citing Ms. Field's testimony at page 39. (Brief at paragraph 56.) However, when that assertion is tested against the data AT&T submitted in this case, it appears to be false. Exhibit C-119 illustrates 98 orders that AT&T selected as ones where U S WEST allegedly missed the due date. Although portions of that exhibit were stricken, the data that remains show that 31 of the 98 orders established a due date of less than 10 calendar days.[6]

77. Finally, AT&T relies heavily on regional data (Brief at paragraph 55), including the "Best in Class" report included as exhibit 8. There are many problems with relying on regional data in a Washington proceeding, not the least of which is that it contains nothing that is Washington-specific. It is AT&T's burden to establish state-specific information, not regional information. Additionally, U S WEST has reason to believe that the data in that report is not comparable for U S WEST and some of the other carriers. AT&T admitted that it allows other carriers to change or modify the parameters, which calls into question the comparability of the measurements in that report. (Exhibit 20, p. 223).

2. Adequate Facilities

78. AT&T next complains that U S WEST is not providing adequate facilities. This is a puzzling allegation, because AT&T has made it clear that this complaint is only about provisioning, not performance or maintenance after the facility has been provided.

[6] Order numbers 9, 11, 12, 17, 18, 22, 28, 29, 32, 45, 50, 55, 59, 65, 67-69, 71-73, 76-81,90, 92, and 96-98.

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What AT&T appears to be contending here is that U S WEST's facilities are not "adequate" because a certain number of orders are held for a lack of facilities before they are filled.

79. AT&T's claim is without merit. U S WEST does have adequate facilities, or obtains those facilities if it can do so with reasonable effort. This is evidenced by the fact that U S WEST fills AT&T's orders. AT&T admitted that there is no backlog of orders accumulating and that orders that are held at any given point in time are later filled. AT&T's witness agree that AT&T's orders were in fact filled in approximately the same number as were placed each month. (Tr. 666).

80. AT&T states that "unfortunately, there is always a pool of held orders" (Brief at paragraph 63), suggesting that there should never be any held orders. However, AT&T stated a number of times on the record, and in its brief, that some number of held orders was acceptable, citing a 5% figure. Even with only 5% held orders, which is what would be acceptable to AT&T, AT&T's complaint that there will always be a pool of held orders would still be true.

81. AT&T notes that U S WEST stated in a data request response that there have been approximately 2300 AT&T held orders since 1995. This is correct, but should be read in the context of the number of orders submitted, which was over 20,000 since 1996. (Exhibit 309). Thus, if there were approximately 5,000 orders per year, (20,000 orders in 4 years) and approximately 460 held orders each year (2,300 in 5 years), then the held order percentage is less than 10%. AT&T confuses held orders with missed due dates, and exaggerates the number of orders that were "held" by including orders where the due

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date might have been missed but the order was not necessarily held.

82. AT&T concludes by stating that they may not be able to define "adequate service", but paraphrases the famous standard of Justice Stewart and states that they will "know it when they see it". This is indeed a curious standard to suggest for this case. Unlike obscenity, which is the "it" to which Justice Stewart was referring, service *is* susceptible of measurement. Yet AT&T does not propose any reasonable standards, and AT&T does not measure service provisioning in a way that provides meaningful results.

C. U S WEST IS NOT DISCRIMINATING AGAINST AT&T

83. At paragraphs 66-79 of its Brief, AT&T claims that U S WEST's failure to provision necessary access facilities or to timely provision facilities subjects AT&T and its customers to unreasonable and unlawful disadvantage and prejudice in violation of state law. AT&T specifically claims that U S WEST has violated RCW 80.36.170 (undue or unreasonable preference or advantage, or prejudice or disadvantage prohibited) and RCW 80.36.186 (unreasonable preference or disadvantage prohibited with regard to access to non-competitive services). U S WEST will show that there is no merit to any of AT&T's claims with regard to preferential or discriminatory treatment.

1. U S WEST's Wire Center Designation Is Not Discriminatory

84. AT&T claims, at paragraphs 68-73 of its Brief, that U S WEST's wire center designation (the gold/silver/bronze designations) is discriminatory. AT&T bases this claim entirely on the testimony of Mr. Wilson.

85. AT&T has two main contentions regarding gold/silver/bronze designations.

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First, AT&T contends that the gold and silver wire centers are being prioritized for funding in an improper way, and that bronze wire centers are not treated equally. Second, AT&T contends that "bronze" wire centers received slower provisioning than others. Both of these contentions are without merit.

86. U S WEST did use the shorthand reference of gold/silver/bronze as wire center designations for some time. It no longer does, but obviously, in a world with limited capital budgets, U S WEST must find a way to allocate resources in a way that allows it to meet service requirements and that makes business sense. U S WEST attempts to do so by determining which wire centers will experience the most growth, and then planning to meet those needs. Indeed, this seems to be exactly what AT&T wants U S WEST to do – to anticipate demand and have facilities to meet that demand.

87. Ms. Retka explained U S WEST's wire center designation process, describing that those wire centers identified as high growth and/or with the potential for other growth-related significant activities were designated as gold or silver; gold wire centers were those with the highest growth, and silver were those with high growth and/or the potential for other growth-related significant activities. Other offices/wire centers were designated as bronze. The designations were open to reevaluation based on growth-related changes. However, regardless of designation, U S WEST remains committed to striving to modernize and maintain all wire centers, irrespective of designation, at levels which meet or exceed state service level requirements. (Exhibit 303-T, p. 3).

88. As Ms. Retka explained during the hearings, the process of identifying wire centers as high growth took into account the projected growth for both wholesale and retail

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services, and access services were considered as part of the wholesale forecast. (Tr. 771-2). Ms Retka also pointed out that the gold/silver/bronze designations had nothing to do with provisioning, and that she was unable to find the correlation between provisioning intervals and wire center designation that Mr. Wilson claims. (Tr. 774).

89. AT&T's analysis with regard to the provisioning intervals was based on a data set (exhibit C-118) which did not identify or distinguish between inter and intrastate orders, or inter and intrastate traffic. Additionally, the data did not identify which orders had long provisioning intervals for customer reasons and which ones had long intervals because a long interval was requested or negotiated. (Tr. 326-7). Thus, AT&T not only fails to establish that AT&T received disparate treatment from U S WEST's retail customers, it fails to establish that any intrastate orders were provisioned in a discriminatory manner.

90. AT&T's only state specific claim regarding discrimination is really just an allegation that U S WEST provisions more quickly in some wire centers than others. This does not establish discrimination. First, this allegation, even if true, does not show that AT&T received any disparate treatment in any location that might constitute an undue or unreasonable disadvantage compared to the service that retail customers received. Further, different provisioning intervals for different geographic locations are not in and of themselves discriminatory. U S WEST's tariff and service interval guide sets up standard intervals of five days in "high density" (urban) areas, eight days in "low density" areas. (Tr. 328). This is not undue or unreasonable discrimination, and AT&T does not claim that it is.

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2. U S WEST's Provisioning to Its Retail Customers is Not Preferential and is Not Discriminatory to AT&T.

91. AT&T next claims, at paragraphs 75-77, that U S WEST provisions service to its retail customers more rapidly than to AT&T. AT&T claims that this establishes discrimination by U S WEST. AT&T's entire discrimination claim in this section of its brief rests on region-wide data (U S WEST's discovery response number 18, admitted as exhibit C-211), which is not state-specific and which does not differentiate between interstate circuits and intrastate circuits. On it face, exhibit C-211 appears to show that U S WEST's average interval for retail markets is shorter than the average interval for AT&T. However, U S WEST's data includes projects and engineering service orders and other orders not included in AT&T's self reporting criteria. (Exhibit 214-T p. 12). In many instances the due dates associated with these types of orders are negotiated with AT&T on an individual case basis. Therefore, the fact that the average interval is longer for AT&T than it is for U S WEST retail markets is irrelevant. However, the same exhibit C-211 does clearly show that on a percentage basis, a greater percentage of AT&T's orders are completed on time than for U S WEST retail and wholesale markets.

92. There is no separate order or provisioning flow for retail orders only, as insinuated by Mr. Wilson. AT&T cannot point to any facts or evidence whatsoever that shows that in Washington, AT&T has been disadvantaged relative to other customers.

93. Nor does the Iowa Utilities Board order, cited at paragraph 77 of AT&T's Brief, have any bearing on this complaint. Clearly, what McLeod was able to establish in Iowa (regarding local service) can have little relevance to an AT&T complaint in Washington regarding access service. If AT&T wishes to cite to decisions

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from other states, U S WEST would recommend the Commission to the Administrative Law Judge's order in this same AT&T complaint in Colorado. The ALJ recommended dismissal of AT&T's complaint on the grounds that AT&T's claims for relief for access services provisioned out of the federal tariff should be deferred to the FCC for adjudication, and that AT&T's claims of discrimination and unreasonable and inadequate service were not proven. *AT&T v. U S WEST*, Docket No. 99F-404T, Decision No. R00-128, February 7, 2000 (Colorado).

3. U S WEST Provisions Service Where Facilities Are Available; Wire Centers Where Capacity is Available May Still Have Held Orders For Other Reasons.

94. AT&T's final claim, at paragraphs 78 and 79 of its Brief, is that U S WEST had held orders in wire centers where spare capacity exists. For the most part, this argument is irrelevant to the complaint. This argument deals solely with capacity issues associated with Inter-Office Facilities (IOF), and the vast majority of AT&T's orders that are held due to a lack of facilities, are held for Outside Plant facilities and not IOF facilities. (Exhibit 303-T, p. 3). In fact, U S WEST was unable to verify that there were any held orders for IOF as described in Mr. Wilson's testimony, because he never identifies any orders by number which would allow that verification.

95. Furthermore, even if this argument were relevant, the analysis in evaluating the IOF capacity situation is wrong. AT&T is confusing the issue of facility capacity with trunk utilization. U S WEST provided a listing of IOF facilities at 80% or greater utilization. However, this report indicates the percentage utilization of facilities that are already in use by customers. For example, a customer utilizing only 12 trunks of a 24-

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trunk DS1 circuit would register as 50% utilization for that circuit, but this does not mean that U S WEST has access to the unused portion of the circuit. (Exhibit 303-T, pp. 3-4).

96. Thus, U S WEST is not refusing service where facilities exist and are available. U S WEST has no reason to do so; it receives revenue from provisioning service, and avoids complaints such as this when it is able to fill orders as requested.

REQUEST FOR RELIEF

97. AT&T asks the Commission to (1) order U S WEST to comply with its tariffs; (2) immediately fill all of AT&T's held orders; and (3) file monthly reports with regard to provisioning. AT&T also asks the Commission to adopt service standards for access services. AT&T states that this relief should be granted because it is the same type of relief that was ordered in the MCI case, Docket No. UT-971063. AT&T's relief should not be granted, for a number of reasons.

98. First, it is clear from the evidence and the applicable tariffs that AT&T's claims must be decided by reference to U S WEST's federal tariff, and that U S WEST complies with that tariff. The scope and extent of U S WEST's obligation and liability outlined in FCC No. 5 cannot be changed. "'[F]ederal tariffs are the law, not mere contracts.'" *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (citation omitted).

99. U S WEST again points to its argument, made in prior filings, that the Commission should dismiss AT&T's claims. *AT&T v. Central Office Telephone Co.*, 118 S. Ct. 1956 (1998), was a provisioning case, and it controls in this docket. A careful review of *Central Office*, particularly those parts of the opinion discussing AT&T's provisioning tariff (which practically mirror the provisioning sections of FCC No. 5 at

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issue here), leaves no doubt that the filed-rate doctrine bars AT&T's claims in this forum. Alternatively, as the ALJ in Colorado found, the doctrine of primary jurisdiction should also operate to cause the Commission to decline to rule on provisioning standards under the FCC tariff.

A. AT&T's Proposal that the Commission Adopt Access Service Standards Is Not Well Founded and Should Be Rejected.

100. It is not at all clear what AT&T proposes in terms of adoption of service standards. If AT&T is proposing that the Commission adopt rules of general applicability in this case, then the issue should be taken up in a rulemaking, not a complaint. If AT&T is proposing specific provisioning requirements for U S WEST, U S WEST submits that there is no factual record to support the need for these service standards, and there are significant unanswered questions regarding implementation and jurisdiction which should cause the Commission to reject these proposals.

101. Another concern with AT&T's proposal is that U S WEST's DS1 services in six wire centers have been competitively classified. This means that those services are subject to effective competition in those wire centers. There is no basis for imposing disparate requirements on one competitor in the marketplace, and imposition of service standards as recommended by AT&T could skew the market, by either holding U S WEST to a higher standard than the market demands, or creating costs for U S WEST that others do not incur.

102. Additionally, it is unclear whether AT&T proposes that these service standards apply only to services ordered out of the intrastate tariff, or if AT&T would have these standards apply to the FCC tariff as well. If that is the case, AT&T is essentially

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asking this Commission to order modifications to an FCC tariff, which U S WEST does not believe the Commission has authority to do. Further, it is unclear how AT&T would treat the circuits ordered out of the FCC tariff that have 100% interstate traffic on them. If these standards apply to all access services, then they would apply to all services, even those that have no jurisdictional connection to the state. In essence, the Commission would be ordering modifications to U S WEST's FCC tariff.

103. As to the specific standards that AT&T proposes, they simply illustrate that these standards are not supported by U S WEST's existing tariffs, and that AT&T is seeking special treatment. At paragraph 81, AT&T asks the Commission to impose a requirement that U S WEST meet the CDDD 95% of the time. There is no evidence supporting such a requirement, nor is there any evidence establishing whether such a standard is reasonable. In effect, imposition of this standard would require U S WEST to delete a number of provisions in its tariffs, including all of the provisions that limit U S WEST's obligation to reasonable efforts, availability of facilities, and provisioning of telephone exchange service before provisioning access. The affected provisions include, but are not limited to: FCC Tariff No. 5, Sections 2.1.4 and 5.2.1; WN U-33, Sections 1.1 and 2.1.2; WN U-37, Sections 2.1.2 and 5.1.5.

104. At paragraph 82, AT&T asks the Commission to impose other related requirements on orders that do go held. It is unclear what these requirements mean, how they would be implemented, or what the basis for them is.

105. At paragraphs 83 and 84, AT&T asks the Commission to impose special standards for FOCs. AT&T asks that 100% of all FOCs be returned in 24 hours, and that

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95% of them be accurate. AT&T further requests that 24-hour notification be given if an order is held for lack of facilities. These recommendations have no basis in the record, and in fact are entirely contrary to U S WEST's testimony about the unreasonableness of a 24-hour FOC, and U S WEST's inability to determine facilities availability within 24 hours. Additionally, U S WEST's testimony establishes that the shorter interval for the FOC negatively impacts the accuracy of the FOC, so AT&T's proposal is doubly unreasonable.

B. The Commission Should Deny the Relief Sought In the Complaint

107. The Commission should deny the relief requested. There is insufficient factual basis on the record to support any of the requested relief, and there is no legal basis upon which to order the actions requested by AT&T.

1. The Commission should not order U S WEST to immediately fill all of AT&T's held orders. There is no requirement that U S WEST have zero held orders for access service, and there has been no showing why such a requirement should be imposed in this case. Indeed, the fact that U S WEST has filled all but three of AT&T's over 2,000 orders for DS1s in 1999 indicates that no such requirement is necessary.

2. Responding to the requests for relief at sub-paragraphs 2-5 of paragraph 85, U S WEST believes that the Commission should not order any additional reporting. U S WEST voluntarily provides AT&T with significant amounts of self-reported data. Exhibits 6, 8, 9-C, C-26, C-224, and 309 are all examples of information U S WEST already provides to AT&T. Additionally,

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AT&T is given significant amounts of information on held orders and other performance, as evidenced by the data AT&T placed in the record in the form of exhibits 5, 8, and C-118. AT&T also has Ms. Field's organization, which monitors U S WEST's performance, and the AT&T account team, which includes a significant dedication of resources to providing service to AT&T. No additional reports should be ordered.

3. There is no basis on the record to assess penalties. RCW 80.04.380 provides that penalties may only be imposed upon a showing of violation of law, or a violation of a Commission rule or order. No such showing is present here, and AT&T does not identify any "violations" for which penalties may be imposed.

CONCLUSION

108. This case should be dismissed. In the alternative, the Commission should find that AT&T has failed to meet its burden on its claims in this docket, and deny the requests for relief.

DATED this 24th day of March, 2000.

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