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 AT&T'S RESPONSE TO U S WEST'S SECOND MOTION TO DISMISS

I.INTRODUCTION

1. AT&T Communications of the Pacific Northwest, Inc. ("AT&T") responds to the Motion to Dismiss filed by U S WEST Communications, Inc. ("U S WEST") at the close of AT&T's case[1], brought pursuant to WAC 480-09-426.

2. U S WEST contends that, based upon the facts and the law, AT&T has shown no right to relief when measured against the "standards" U S WEST defines. U S WEST attempts to limit the Commission's consideration to certain, specific orders: those placed only under the state tariffs[2]. U S WEST admits that there were such orders, *U S WEST Memorandum at 5;* that such orders were "held" for lack of facilities,

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[1] U S WEST had filed a Motion to Dismiss with its Answer, which Motion the Commission denied on November 12, 1999, in its Third Supplemental Order. U S WEST subsequently filed, on December 15, 1999, a Petition for Declaratory Ruling with the FCC and a Motion to Hold the Schedule in Abeyance Pending FCC Resolution of Jurisdictional Issues. The Commission denied U S WEST's Motion on January 19, 2000 in its Eighth Supplemental Order.

[2] As Ms. Field explained at hearing, the U S WEST tariffs in Washington do not exactly mirror the federal access tariffs. *T. at 262, 264.* In fact, the section on ordering conditions appears only in the switched access tariff and is not included in the private line tariff, WN U-33. In the federal tariff, the Section 5 provisions on ordering apply to both switched and special access services. *T. at 266.* It is not clear from the tariff, how orders for private line service could be placed under the state tariff.

U S WEST Memorandum at 8; and, that other such orders were “missed”, that is, not provided on the dates to which U S WEST committed, *Id. at 10*.

3. However, U S WEST then argues that AT&T must satisfy a second "standard": AT&T must prove that there are substantial amounts of intrastate traffic involved. U S WEST admits that exchange access facilities carry both intrastate and interstate traffic and that about 20% of switched access traffic is intrastate, *Ex. 501-T, at 15-16*. U S WEST did not dispute Ms. Field's testimony that about 30% of the traffic over special access circuits provided to AT&T's end-user customers was intrastate. *Ex. 5, at 10.* Instead, U S WEST, relying upon its view that circuits deemed interstate "don't count" despite this mix of usage, rejects this evidence.

4. AT&T's case is about the adequacy—or, rather, the lack thereof--of U S WEST's exchange access service in Washington. It is not, as U S WEST maintains, about specific individual orders, but rather about U S WEST's practices in providing erratic, unreliable, unreasonable and inadequate exchange access service in violation of its own tariffs and of state statutes.

5. The network facilities over which these services are provided are the same—whether the services are priced through the intrastate or interstate tariff. The ordering and provisioning process utilized by U S WEST is the same irrespective of the pricing. Indeed, the facilities are the same ones which U S WEST uses to provide retail services and which U S WEST must unbundle and make available to competitive local exchange companies pursuant to federal and state law. And, the ordering processes used are the same ones used by competitive local exchange providers to obtain local interconnection trunks.

6. Service quality—as evidenced in the Commission's rules for retail services and the performance levels reported by U S WEST to AT&T—is determined by

examining parameters important to the process such as delivery of order confirmations or average installation intervals. This Commission has broad authority to protect the public interest. The FCC has not preempted the field concerning service quality. Ruling by this Commission will not conflict with action of the FCC. This Commission should reject U S WEST's narrow view of the case, deny the Motion to Dismiss and grant the relief sought.

II.ARGUMENT

A. THIS COMMISSION HAS JURISDICTION TO ENFORCE STATE LAW REGARDING THE QUALITY OF EXCHANGE ACCESS SERVICE.

7. As the Commission noted in denying U S WEST's initial Motion to Dismiss, "the parties cite no clearly pertinent or binding statute, decision or rule providing that the FCC has exclusive, preemptive jurisdiction over the subject of the complaint." Third Supp. Order, at 5. In this situation, the Commission, consistent with its broad authority to regulate in the public interest, should proceed to continue its role in promoting the development of competition during this transition period by assuring that the incumbent provides quality exchange access service.

1. <u>The Commission has broad authority and should act to promote the transition to a competitive marketplace</u>.

8. The Commission has on several occasions rejected "rigid and mechanistic" readings of its enabling legislation. The Commission recently addressed the issue of its authority in the context of the merger between GTE and Bell Atlantic:

> The Commission's jurisdiction resides generally in the Legislature's delegation of power under RCW 80.01.040. Subsection (3) of that statute provides:
>
> > The utilities and transportation commission

> shall [r]egulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, . . . telecommunications companies . . ..

> RCW 80.01.040 expresses the Legislature's intent that the Commission should exercise broad authority to regulate the practices of public utilities. *Tanner Electric Corp. v. Puget Sound Power & Light,* 128 Wn.2d 656, 666, 911 P.2d 1301 (1996). *In the Matter of the Application of GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the Merger,* WUTC Docket No. UT-981367 et al., Third Supplemental Order, at 13 (December 16, 1999).

The Commission found that a "rigid and mechanistic reading" would subvert the purposes underlying the Commission's delegated powers." *Id. at 15-16*. Similarly, the Commission rejected, as "unreasonably restrictive," the "legalistic approach" put forth by U S WEST and other incumbents in support of their interconnection proposals where, again, the Commission's authority was purported to be very limited. *Washington Util. & Transp. Commn. v. U S WEST et al,* Docket Nos. UT-941464 et al, Fourth Supp. Order at 15 (October 31, 1995)[3]. The Commission's authority to proceed under state law and to "regulate in the public interest" is clear.

2. <u>The Commission and the FCC Share *Concurrent* Jurisdiction Over the Adequacy of U S WEST's Exchange Access Service in the State of Washington</u>.

9. Concurrent jurisdiction is "[t]he jurisdiction of several different tribunals,

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[3] In that proceeding, obviously pre-dating the Telecommunications Act of 1996, the WUTC concluded that it had authority to determine various issues concerning the emergence of local competition, including the rates and terms of local interconnection, collocation and access to and unbundling of network elements.

each authorized to deal with the same subject-matter at the choice of the suitor. Authority shared by two or more legislative, judicial, or administrative officers or bodies to deal with the same subject matter." *Black's Law Dictionary* 153 (5th abridged ed.). In considering the issue of state court jurisdiction over a federal cause of action, the Supreme Court of Washington began with "the presumption that state courts enjoy concurrent jurisdiction", as set forth in *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 477-78 (1981). *Rice v. Janovich*, 742 P.2d 1230, 1233 (Wash. 1987). The Court reasoned:

> This rule is premised on the relation between the States and the National Government within our federal system. See The Federalist No. 82 (Hamilton). The two exercise concurrent sovereignty, although the Constitution limits the powers of each and requires the States to recognize federal law as paramount. Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws. 453 U.S. at 478.

As the Washington Court stated:

> the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. *Rice v. Janovich*, 742 P.2d at 1233, citing 453 U.S. at 478.

10. This same standard has been applied in determining the appropriate relationships of state and federal agencies in *Louisiana Public Service Commission v. FCC*, 475 U.S. 355 (1986). The Supreme Court recognized the "system of dual state and federal regulation over telephone service," and considered whether the FCC had

exclusive jurisdiction to issue rules governing depreciation methods applied by local telephone companies. *Id.* at 360. The Court found that the FCC did not, holding that § 152(b) of the Communications Act of 1934 denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes. *Id*. at 373. The Court explained:

> While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional denial of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. Thus, we simply cannot accept argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy . . ..

Id. at 374-375 (citations omitted); *compare, AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 380-381 (1999).

11. In the instant case, the "explicit statutory directive" confirms concurrent jurisdiction. The Telecommunications Act of 1996 expressly reserves states' rights over the provision of "exchange access." That is, the Act explains that the FCC <u>does</u> <u>not</u> <u>have</u> exclusive jurisdiction over exchange access; it states:

> <u>§ 261(b)</u> – (b) EXISTING STATE REGULATIONS.—Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

§ 261(c) – (c) ADDITIONAL STATE REQUIREMENTS.—Nothing in this part, precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service ***or exchange access***, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 U.S.C. § 261 (b) & (c) (emphasis added). Therefore, the Commission may enforce the state's utility laws as long as they are consistent with the federal law.

12. The FCC has, in its ruling concerning inter-carrier compensation for traffic bound to an Internet Service Provider ("ISP"), addressed a situation where the two agencies have concurrent jurisdiction. The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."[4] It found that the interstate nature of the traffic was not dispositive of the interconnection issue of reciprocal compensation. *Id. at ¶20.* The FCC noted that the state commission authority over interconnection agreements extends to both interstate and intrastate matters. The ruling stated that "the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process."[5] *Id. at ¶25.* The FCC decided that there was "no reason to interfere with state commission findings", *Id" at ¶21,* and held

> neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's

[4] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket No. 96-98, Declaratory Ruling at ¶1 (Feb 26, 1999).

[5] At footnote 80, the opinion notes that "sections 251 and 252 'address both interstate and intrastate aspects of interconnection, services, and access unbundled network elements.'"

> decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism. *Id. at ¶26.*

Indeed, in reliance upon this decision, this Commission concluded that it had authority to resolve the issue of reciprocal compensation pending the FCC's rule and found that ISP-bound traffic should remain subject to reciprocal compensation. *17th Supp. Order, Docket Nos. UT-960369 et al., at ¶ 34.*

13. The FCC has not developed rules governing exchange access service adequacy. As in the area of reciprocal compensation, this Commission needs to resolve a dispute in the absence of any federal rule. It should do so with a view to the regulatory regime appropriate to this transitional period in the development of competition. While U S WEST's Petition for Declaratory Ruling seeks a ruling that the FCC has pre-empted this area, U S WEST recognizes that the FCC has not done so. Moreover, the basis for those arguments does not comport with the new regulatory paradigm embodied in the Telecommunications Act of 1996. Indeed, interexchange carriers *should* be able to purchase "unbundled network elements" in order to interconnect their networks to the local exchange networks and to complete their customers' calls. The only reason that AT&T must currently still purchase these facilities through access service tariffs is because of the historical pricing far in excess of cost to support universal service.[6]

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[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999).

Obviously, this Commission has the authority to establish—and is currently considering--service quality standards[7] for unbundled network elements. It is, accordingly, appropriate in this case to take responsibility for service quality issues.

14. Nor is this approach precluded by the "mixed use facilities" rule relied upon by U S WEST. As noted in its filing to the FCC[8], this rule is codified at 47 C.F.R. § 36.154(a) Subcategory 1.2.[9] This section establishes the "jurisdictional separations procedures", the "standard procedures for separating property costs, revenues, expenses, taxes and reserves for telecommunications companies." As the FCC stated in adopting this rule, the separations process determines "the scope of state and federal *ratemaking* authority."[10] The FCC agreed with the Joint Board's conclusion that the "tariffing implications of the new separations rule (i.e., that some interstate traffic will be carried over state tariffed lines and vice versa)" [11] were consistent with the Communications Act and the applicable Supreme Court holdings. As the Joint Board explained:

> The fundamental principles of separations were described by the Supreme Court in *Smith v. Illinois Bell Telephone Co.,* 282 U.S. 133 (1930) (*Smith*) which holds that the separation of telephone company plant is necessary to proper rate regulation. The Court stated that "this subject [separations] requires consideration, to the end that by some practical method the different uses of the property

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[7] *In the Matter of Carrier-to-Carrier Service Quality Rulemaking*, WUTC Docket No. UT-990261.

[8] Petition for Declaratory Ruling, at 7, fn. 9 (December 15, 1999)(attached to U S WEST's Motion to Hold the Schedule in Abeyance Pending FCC Resolution of Jurisdictional Issues).

[9] The rule provides that "[t]his subcategory shall include …private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line."

[10] *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Decision and Order, 4 FCC Rcd 5660, 5661 (rel: July 20, 1989)(emphasis added).

[11] Id.

may be recognized… .” 282 U.S. at 151. The Court also
stated that “extreme nicety is not required only reasonable

> measures being essential… ." *Id*. at 150. While separations procedures often reflect usage, this is not always the case. *In the Matter of MTS and WATS Market Structure,* CC Docket No. 78-72, 4 FCC Rcd 1352, 1357, at ¶33 (rel: Feb. 7, 1989).

15. Further, Justice Rehnquist's concurring opinion in *AT&T Corp. v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S.Ct. 1956 (1998) clarifies the role of tariffs. He stated, in pertinent part:

> The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose on petitioner to refrain from intentionally interfering with respondent's relationships with its customers *by means other than failing to honor unenforceable side agreements*, or to refrain from engaging in slander or libel, or to satisfy other contractual obligations. The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. *It does not serve as a shield against all actions based in state law.*

Id. at 1966-67 (emphasis added). The tariff is not to serve as a "shield" against the statutory requirement that U S WEST provide reasonable and adequate service.

B. THE EVIDENCE OF RECORD SHOWS THAT U S WEST HAS FAILED TO PROVIDE SERVICE IN ACCORDANCE WITH ITS TARIFF AND HAS FAILED TO PROVIDE ADEQUATE FACILITIES AND SERVICES.

16. AT&T has addressed, in its Post-Hearing Brief, the applicable law for each of its claims and the evidence establishing that U S WEST has failed to provide service in accordance with its tariff and that U S WEST has failed to provide adequate facilities and service as required by state law. AT&T incorporates the arguments of its brief in response to U S WEST's Memorandum.

Respectfully submitted on March 23, 2000.

AT&T COMMUNICATIONS OF
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