, Inc.
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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 TO AT&T'S AND STAFF'S RESPONSES TO U S WEST'S MOTION TO DISMISS

I. INTRODUCTION

1. On February 29, 2000, U S WEST filed its motion to dismiss and memorandum in support thereof in accordance with the schedule previously established by the Commission. On March 24, 2000, AT&T Communications of the Pacific Northwest (AT&T) and Commission Staff (Staff) filed responses to that motion. TRACER filed a response concurring with Staff's position. Under the schedule adopted at the close of the hearing, U S WEST submits its response to those filings.

2. AT&T and Staff take very different approaches in their responses, and their comments and arguments do not lend themselves to a consolidated discussion. Indeed, AT&T

focuses on why the Commission should take jurisdiction over all the services U S WEST provides to AT&T, including all of those provisioned under the FCC tariff. Staff, on the other hand, takes a more limited approach, suggesting that AT&T has shown a sufficient level of intrastate traffic to warrant the Commission's consideration of the complaint and that evidence of U S WEST's performance under the FCC tariffs is relevant to whether there were state law violations. Because the positions of the two parties, and the discussion in their pleadings are so dissimilar, U S WEST will reply to them separately, as set forth below.

II. REPLY TO AT&T

3. AT&T begins its response by repeating its earlier arguments, in the hope that they sound stronger on repetition. AT&T first claims that it is undisputed that 20% of *switched* access traffic is intrastate. While this is true, and is not disputed by U S WEST, it is also true and undisputed that not a single order in this case was identified as an order for switched access. All of the orders that were specifically placed at issue in the testimony of Ms. Field and Mr. Wilson were orders for dedicated, not switched services. There is no evidence in the record whatsoever that identifies or calls into issue U S WEST's provisioning of switched facilities.

4. AT&T next claims that U S WEST did not dispute that 30% of the traffic over dedicated facilities was intrastate. AT&T must have attended a different hearing than U S WEST did, because in the Washington hearings, U S WEST most certainly did dispute that allegation. (See, e.g., U S WEST's February 29, 2000 Motion to Dismiss, T-501 (PIU on interstate services always identified as 100% interstate), and Tr. 676). Clearly, AT&T knows that it has failed in meeting its burden to produce evidence of intrastate traffic, because its entire focus in its response is on the argument that the Commission and the FCC have concurrent jurisdiction over

the interstate circuits, an argument which will be discussed and refuted below.

A. The Commission's Jurisdiction to Enforce State Law Regarding the Quality of Exchange Access Service.

5. AT&T suggests, at paragraph 7, that the Commission should "proceed to continue in its role in promoting the development of competition during this transition period by assuring that the incumbent provides quality exchange access service." It is unclear what AT&T is referring to when it talks about a transition period. The issues in this complaint are not local competition issues, but rather are exchange access issues, for which competition has existed for many years. This Commission is in fact promoting competition by relaxing regulations where competition exists (see, Docket No. UT-990022, granting U S WEST competitive classification for certain access services in certain wire centers). Additionally, the Commission may certainly regulate intrastate services. However, AT&T is asking the Commission to regulate FCC services, and to confer upon AT&T a competitive advantage in this highly competitive market. The Commission should decline to do so.

1. The Commission's Authority to Support the Transition to a Competitive Market.

6. AT&T next claims that the Commission has broad regulatory authority, and should act to promote the transition to a competitive marketplace. AT&T further states that the Commission has rejected "rigid and mechanistic" readings of its enabling legislation, citing various recent decisions. This is all true, and is all well and good, for *intrastate* services. However, the vast majority of services at issue in this complaint are not intrastate. As U S WEST has argued in prior filings in this docket, there is no room for the Commission to exercise jurisdiction over interstate services. State law authority, however broad, does not extend

to services that are provisioned in accordance with federal tariffs and which are not provisioned under state law.

7. AT&T states that the Commission's authority to proceed under state law and regulate in the public interest is clear. (Response at paragraph 8). This is not a novel concept, nor is it incorrect with regard to intrastate services. It is, however, patently wrong with regard to interstate services. U S WEST does not recommend a restrictive reading of the Commission's enabling legislation, nor does U S WEST's position in this case seek to limit the Commission's authority. However, even a broad reading of the enabling legislation must take into account the difference between interstate and intrastate jurisdiction.

8. The Commission's lack of jurisdiction over federally tariffed services is clear under Washington law. RCW 80.36.250 (copy attached) authorizes the Commission only to investigate interstate services and to *complain to the FCC* about a carrier's interstate rates and charges, classifications, or rules or practices. This is both a grant of authority (to investigate and complain) and a clear limitation on authority. If the Commission had state law authority to regulate interstate services, as AT&T suggests, it would be entirely unnecessary for there to be a grant of authority allowing the Commission to complain to the FCC. Further, the grant of authority is clearly a limitation as well – complaining to the FCC is *all* that the state commission may do under RCW 80.36.250. The Commission has no other authority with regard to interstate services.

2. The Commission Does Not Have Concurrent Jurisdiction with the FCC Over Interstate Services.

9. AT&T's main contention, newly advanced in its response, is that this Commission and the FCC have concurrent jurisdiction over U S WEST's exchange access

services in Washington. (Response at paragraph 9, et seq.). This contention is wrong as set forth above with regard to the lack of jurisdiction or authority under state law. The contention is also wrong under federal law.

10. The Communications Act of 1934 sets up a clear jurisdictional separation between state commissions and the FCC. Pursuant to Sections 1 and 2(a), the FCC has jurisdiction over all *interstate* and foreign communication by wire or radio.[1] Section 2(b) goes on to specifically state that (except as specifically provided in other sections) nothing in the Act gives the FCC authority with regard to intrastate communications.[2] 99% of the services at issue in this case are purchased out of the interstate tariff that much is undisputed. Although those services may be used for some intrastate traffic (a fact not established in this case), under the mixed use facilities rule, those services are interstate, and purchased under tariffs filed with the FCC. Section 203 of the Act requires all carriers to file tariffs of their charges for interstate wire services, and prohibits carriers from providing services on terms other than those contained in the tariff. Section 204 provides for FCC review of those tariffs. Sections 201 and 202 vest the FCC with jurisdiction to define unjust and unreasonable practices and to address undue preference in connection with federally tariffed services, and Sections 207 and 208 provide specific procedures and remedies for customers to assert claims that service has not been provided in accordance with the terms of the tariff.

11. Further, the Communications Act is clear that state commissions are empowered to regulate only intrastate communications. 47 U.S.C. 153(41) defines State commission as the commission, board, or official (by whatever name designated) which under the laws of any

[1] 47 U.S.C. 151 and 152(a).

State has regulatory jurisdiction with respect to *intrastate* operations of carriers. (Emphasis added).

12. AT&T s discussion of concurrent jurisdiction assumes that the state has jurisdiction over federally tariffed services, a proposition AT&T fails to establish. The discussion of whether state courts enjoy concurrent jurisdiction with federal courts is clearly not on point. That discussion relates to the jurisdiction of two sovereign entities, the state and the federal government, and is not shown to apply to the FCC and state commissions with regard to exchange access. More importantly, the application of the doctrine of concurrent jurisdiction is critically dependent upon the condition precedent that both courts (or agencies) are *authorized* to deal with the same subject matter. That is clearly not the case here, as the FCC is authorized to deal with interstate services and the state is authorized to deal with intrastate services. Thus, the subject matter is not the same, and the doctrine of concurrent jurisdiction is not applicable.

13. Even if the doctrine of concurrent jurisdiction were presumptively applicable, that presumption is rebutted in this case. A 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*, 109 Wn. 2d 48, 52 (1987). Here, there is the explicit statutory directive in the Act, conferring interstate jurisdiction to the FCC and intrastate jurisdiction to the state commissions. A statutory directive exists in state law as well. RCW 80.36.250 gives the Commission limited authority over federally tariffed services, and stops well short of authorizing the Commission to order remedies with regard to FCC services.

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[2] 47 U.S.C. 152(b).

14. There is also a clear incompatibility between state jurisdiction and federal interests. Section 1 of the Act[3] states a clear national purpose, which may only be carried out through a national, uniform, set of regulations. Allowing a state to impose particular state-law based requirements on interstate services would clearly defeat that purpose. Under AT&T's theory, concurrent jurisdiction would allow the Commission to impose provisioning requirements on FCC services in Washington that do not apply in any other state, defeating the uniformity sought under the Act.

15. The Court of Appeals for the Fourth Circuit affirmed the idea that there is separate jurisdiction over inter and intrastate services and facilities, not concurrent jurisdiction. In a decision regarding FCC preemption of state regulation of terminal equipment which was used for both inter and intrastate calls, the Court found that federal regulation had primacy over state regulation. Discussing the issue for the second time in two years, the court referred often to its earlier decision, stating:

> First, the Court pointed out that the Communications Act's primary purpose of establishing an efficient interstate communications network "with adequate facilities at reasonable charges", see *47 U.S.C.A. § 151*, would be jeopardized if federal regulation of jointly used equipment could be countermanded by state rules. Second, the Court found that other provisions of the Communications Act establish federal primacy where the control of facilities used for both interstate and local communication is concerned.

North Carolina Utilities Commission v. FCC, 552 F.2d 1036, 1043 (4th Cir. 1977). Thus, it is clear that there is no room for state regulation of interstate access services, which would interfere with the federal regulatory requirements. It is no answer that the FCC may not have the specific service requirements desired by AT&T and that the state therefore has room to do something

[3] 47 U.S.C. 151

which is not inconsistent with federal regulation. Imposition of additional requirements in and of itself is inconsistent with the established federal regulatory scheme, which establishes prices and detailed terms and conditions in individual tariffs.

16. AT&T next cites *Louisiana Public Service Commission v. FCC* in support of its argument. This case, which held that the FCC had no authority to prescribe depreciation methodology for intrastate services, does not support AT&T's contention. In fact, this case supports the exclusive jurisdiction of the states to regulate for purposes of intrastate ratemaking. By implication, it also supports the converse proposition – that the FCC has exclusive jurisdiction over interstate services. There is nothing in passage quoted at paragraph 10 of AT&T's response, or anywhere else in that decision, that supports the proposition that the state has concurrent jurisdiction with the FCC over federally tariffed services.

17. Attempting to find support for the idea of concurrent jurisdiction, AT&T next relies on Section 261 of the Act. Section 261 was enacted as part of the Telecommunications Act of 1996, and the relevant portion reads as follows:

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

AT&T neatly reads the phrase "for intrastate services" right out of this statute. If the section applied to all exchange access, inter and intrastate, there would be no need for the modifier "intrastate services." However, since that term is in the statute, it must mean something, and it seems to be a clear limitation on the imposition of additional state requirements to intrastate services.

18. AT&T is also incorrect that the FCC's discussion of ISP traffic is a case where there is concurrent jurisdiction. (Response at paragraph 12). The FCC's ruling does not state that it has concurrent jurisdiction with state commissions, but rather states that although the traffic is interstate, it may be addressed by state commissions in the context of arbitration proceedings under Sections 251 and 252 of the Act. Notably, those sections confer exclusive jurisdiction on the states to arbitrate interconnection agreements, and allow the FCC to act only if a state fails to do so. Additionally, Sections 251 and 252 are not implicated in this complaint, which AT&T has repeatedly described as being about access services, not local interconnection. The FCC's ruling has now been reversed by the D.C. Circuit Court of Appeals and remanded to the FCC, but even if upheld, the decision does not support the "concurrent jurisdiction" theory.

19. AT&T next claims that because the FCC has not developed specific service requirements for interstate access service, the state Commission should act, just as it was permitted to act in establishing reciprocal compensation. However, the premise is incorrect, and the analogy does not hold up. While there may not be specific FCC rules that address AT&T's desired requirements, that is largely because there is no need for them – U S WEST's FCC tariffs for interstate access services set up the requirements for provisioning access service. Tariffs control the rights and obligations of the carrier and the purchaser, and the courts have uniformly held that federal tariffs are more than contracts, they are the law.[4] U S WEST's tariffs are detailed and voluminous. The FCC tariff has multiple sections dealing with ordering and provisioning, and that contain repair and service guarantees. Thus, there is no need for separate FCC regulations once tariffs are in place. AT&T's other claim (Response at paragraph 13), that

[4] *Carter v. AT&T*, 365 F.2d 486, 486 (5th Cir. 1966); *Marcus v. AT&T*, 138 F.3d 46, 56 (2d Cir. 1997).

the Commission should regulate interstate access because AT&T *should* be allowed to purchase unbundled network elements to provide access is without support in the law and should be rejected out of hand. AT&T is not allowed to do so, and AT&T clearly prosecuted this complaint as a complaint against tariffed services, not under its interconnection agreement.

20. The mixed-use facilities rule, cited and discussed in various earlier filings, does in fact establish the tariff out of which the service is purchased and the jurisdiction under which the service is regulated, not merely the price of the service. U S WEST's intrastate and FCC Tariffs both state that a change in the percentage of interstate traffic above or below 10% requires a change in *jurisdiction,* and requires the customer to submit an order reflecting that change. See, Section 2.3.11 of FCC Tariff No. 5 and WN U-33. Even AT&T's own price list in Washington (correctly) notes that only intrastate services purchased under the intrastate price list are subject to the Commission's jurisdiction (AT&T's Price List Schedule 4, Custom Network Services, page 2, release 2, effective September 7, 1999 – Official Notice requested 2/7/00).

21. AT&T's final argument, at paragraph 15 of its Response is really an attempt to distance itself from its successful advocacy in *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998). AT&T relies upon the concurring opinion of Justice Rehnquist, which states that, in his opinion, the filed rate doctrine is not a shield against all actions based in state law. However supportive of AT&T's position this comment is, AT&T cannot escape the fact that the portion it quotes is not in the majority opinion, which seven justices signed. This is not even dicta in the majority opinion, but rather is a separate concurring opinion by one justice, who was not joined by any others. This portion of the decision has no force and effect, and certainly cannot be considered the governing law.

22. What is telling is that AT&T is unable to locate any support for its position in this case in the majority opinion in *AT&T v. Central Office*. That is because there is none. The court clearly held that AT&T's filed tariff barred any state law claims, a result that AT&T now seeks to avoid when it is the plaintiff. The court rejected arguments that the filed rate doctrine applies only to rates, reasoning rates do not exist in isolation and have meaning only when one knows the services to which they are attached. The court further held that even provisioning of services (as claimed in this case) is "covered" by the tariff, and state law claims alleging inadequate provisioning are barred. *AT&T v. Central Office* at 223 and 225.

23. Finally, U S WEST would like to reiterate that its position on this motion to dismiss is twofold. First, it is clear that even if AT&T were permitted to establish state jurisdiction by virtue of a showing of intrastate traffic over interstate services, AT&T has failed to do so.

24. Second, the FCC has exclusive jurisdiction over services purchased under the interstate tariff. AT&T recognized this in Illinois, arguing in late 1997:

> [I]f the interstate traffic on the dedicated access circuit constitutes more than 10% of the total traffic, the service is classified as interstate and subject to the interstate jurisdiction of the FCC -- in its entirety and for all purposes.

Illinois Bell Telephone Company d/b/a/ Ameritech Illinois v. AT&T Corp. and AT&T Communications of Illinois, 1998 Ill. PUC LEXIS 139, *28 (Feb. 27, 1998) (outlining position of AT&T). The Illinois PUC hearing examiner agreed, concluding that "[t]hose dedicated access facilities classified as interstate are subject to the exclusive jurisdiction of the FCC." *Id.* * 37. U S WEST first raised the issue of AT&T's inconsistent position last year in its motion to dismiss. AT&T has failed to even mention this issue, much less reconcile the

two positions.

25. AT&T's position in that Illinois case was the correct one, and is well supported by FCC and federal court decisions. For example, 15 years ago, AT&T argued in federal district court that an order of the Wyoming Commission exceeded the Commission's jurisdiction and, because it conflicted with orders of the FCC, violated the Supremacy Clause of the Constitution. That order required AT&T to pay a tariff of 1% of all of its billings, inter and intrastate, to cover the costs of local disconnect service. The court ruled in AT&T's favor, stating, in pertinent part, as follows:

> It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC. In the landmark decision of *Smith v. Illinois Bell Tel Co.*, 282 U.S. 133, 75 L Ed. 255, 51 S Ct. 65 (1930), the Supreme Court required the separation of intrastate and interstate matters. The court stated:
>
> The separation of the intrastate and interstate property, revenues, and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. Id. at 148.
>
> The Smith Court went on to say that the interstate tolls were not a matter for determination by state commissions, but rather were exclusively federal matters. The lower courts have consistently interpreted Smith and its progeny as did the Second Circuit in *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F. 2d 486, 491 (2d Cir. 1968):
>
> Questions concerning the duties, charges and liabilities of telegraph and telephone companies with respect to interstate communications service are to be governed solely by federal law . . . and the states are precluded from acting in this area.[5]

Again, AT&T's position in this case is puzzling in light of the clear statement of the law in this earlier decision. Nothing about the way services are regulated has changed in a way that would make this decision any less valid today than it was 15 years ago.

26. In *NARUC v. FCC*, 746 F. 2d 1492, 1498 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit noted that the dividing line between the regulatory jurisdictions of the FCC and states depends on the nature of the communications which pass through the facilities, not on the physical location of the lines. Citing 47 U.S.C. Sections 152 and 153, the Court went on to state that the Act defines the FCC's jurisdiction in terms of the interstate nature of the communication, and that the Act attaches no significance to the physical location of the facilities used. *Id.* at 1499.

27. Thus, there is no basis in fact or law to support AT&T's contention that the Commission should take jurisdiction over federally tariffed services.

B. The Evidence of Record Supports U S WEST's Position that It Has Provisioned Intrastate Services in Accordance with State Law and Tariffs.

28. AT&T includes a paragraph in its response (paragraph 16) referencing its post-hearing brief, reiterating its position that U S WEST violated its own tariffs and state law in provisioning services. Those issues, as AT&T correctly notes, were addressed in the substantive briefs and need not be discussed again in connection with the motion to dismiss.

III. REPLY TO STAFF

A. AT&T Has Not Demonstrated a Sufficient Volume of Intrastate Traffic to Warrant a Commission Order.

29. Responding to U S WEST's argument that AT&T has not proved a sufficient volume of intrastate traffic, Staff first notes that U S WEST has not argued what volume of traffic would be sufficient. (Response at paragraph 6). U S WEST was responding to the Commission directive in the Third Supplemental Order, which required AT&T to establish a

[5] *AT&T v. Wyoming PSC*, 625 F. Supp. 1204 (D. Wyo. 1985).

sufficient volume of traffic. AT&T complained of only six intrastate orders in the 1075 orders that AT&T chose to present. While there may not be a bright line in terms of what constitutes sufficient, it is clearly more than de minimis, which is all that AT&T has shown to date. Commission Staff agreed that the amount was de minimis (Tr. 683) while nonetheless asserting that it was sufficient for the Commission to look at the issues. U S WEST submits that it is not sufficient, and that reliance on less than one percent of the orders complained of is not the sufficient volume contemplated by the Commission in the Third Supplemental Order.

30. Staff next contends that alleging and proving a single violation regarding a single intrastate facility, AT&T properly invokes the Commission s jurisdiction. The problem with this argument is that AT&T has never proved that single intrastate violation. Of the six intrastate orders, AT&T merely complained that in its view, that they were held and that they took too long to provision. Neither of these claims constitutes a tariff or state law violation, as there is no absolute prohibition against held orders, and U S WEST s standard interval guide permits provisioning to take up to six months, depending on facility availability. As U S WEST explained in its brief, none of these orders took six months: one was provisioned five days after the date that AT&T requested, one took a total of four weeks, two took approximately 60 days, one took 90 days and one took just under 120 days. This is in accord with permissible intervals when facilities are not available. In addition, U S WEST is required to make reasonable efforts to fill the orders. U S WEST did in fact fill all the orders, suggesting that whatever efforts U S WEST undertook were reasonable and there is no evidence from AT&T suggesting to the contrary.

B. Evidence of Interstate Provisioning

31. Staff next claims that the Commission may consider evidence of U S WEST's performance under the federal tariffs, because the intervals are the same under the federal tariffs or the state tariffs. (Response at paragraph 11). U S WEST does not agree that the Commission may properly consider evidence relating to services over which it lacks jurisdiction. However, even more importantly, the evidence that Staff would have the Commission rely upon is seriously, fundamentally, and irretrievably flawed. AT&T presented no evidence whatsoever about U S WEST's ability to meet standard provisioning intervals, because AT&T did not properly segregate its data to consider those orders where U S WEST was obligated to meet the intervals separately from the many orders where U S WEST was not obligated to meet the intervals. This issue is discussed more fully in U S WEST's March 27, 2000 post-hearing brief, at paragraphs 56 and 60-61.

C. Violations of State Law and Rules

32. U S WEST has not violated state laws or rules with regard to provisioning. U S WEST has set forth its position on these issues in its motion and its brief. Here, U S WEST will simply respond to specific arguments made by Staff. However, U S WEST would like to clarify an apparent misapprehension by Staff. Staff apparently believes that U S WEST's February 29, 2000 motion is a 12(b)(6) motion, and that U S WEST is claiming that AT&T has not stated a claim upon which relief can be granted. (Response at paragraph 29). This is incorrect.

33. U S WEST's motion is based on CR 41, and the basis for the motion is that AT&T has not, on the facts and the law in this case, established that it is entitled to relief. This is a critical distinction. A 12(b)(6) motion is brought before the hearing, a motion under CR 41

is brought at the close of the complainant's case. A plaintiff may easily defeat a 12(b)(6) motion by showing that there are facts under which it might be entitled to relief. However, a failure to prove those facts will leave the plaintiff on the losing end of a motion brought under CR 41.

34. U S WEST has not contended that AT&T could not establish a state law claim for intrastate services. For example, U S WEST agrees with Staff that if AT&T could prove unreasonable or undue discrimination with regard to provisioning of intrastate services, AT&T could claim relief from the Commission. However, the crux of U S WEST's motion is that AT&T has not. This is different from the arguments that Staff makes at paragraphs 13-29 of its Response, and U S WEST therefore will respond only to those arguments which bear directly on the CR 41 issues.

1. Failure to Furnish Necessary Facilities

35. Staff discusses AT&T's first cause of action at paragraphs 13-17 of its Response. Staff claims that AT&T may establish a cause of action for failure to furnish facilities if the facilities were furnished in an untimely manner. (Response at paragraph 13). U S WEST disagrees. Staff's interpretation would result in AT&T's first cause of action being identical to its second cause of action – in both, AT&T now alleges untimely provisioning. AT&T's did not show that U S WEST failed to provision facilities in violation of any state statute.

36. Further, Staff's discussion of timely provisioning here begins to beg the questions of what U S WEST's obligation to provide service is, and how one determines what "timely" means. Staff's arguments only have weight if U S WEST has an unconditional obligation to provide access service, which U S WEST clearly does not. U S WEST's approved tariffs contain the express limitation on U S WEST's obligation to provide service only where it can do

so with reasonable efforts. U S WEST further submits that "timely" does not mean anything absent tariffs or rules that define intervals and terms and conditions. U S WEST's tariffs contain those provisions as well, which is why it is so important for AT&T to have linked its claims to U S WEST's tariffs, and why it is fatal to AT&T's complaint that it did not.

37. Staff claims that the Commission could find that U S WEST's provisioning was in violation of the policy set forth in RCW 80.36.300. However, Staff does not explain how or why this could be true, and U S WEST therefore has no specific allegation here to respond to. U S WEST reiterates that this statute contains a general policy statement and imposes no specific duty on any carrier, does not describe what sort of provisioning would be considered a violation, and does not state what performance would be required under this statute.

38. With regard to RCW 80.36.160 and .260, U S WEST merely notes that Staff has only stated hypothetically that these statutes could establish a cause of action – U S WEST does not disagree, but that is not what U S WEST argued in its February 29, 2000 motion. U S WEST argued that AT&T has not established the factual predicate for the cause of action under these statutes. With regard to WAC 480-120-500, U S WEST merely notes that its position is set forth in its motion and U S WEST disagrees with Staff. There is simply no language in the rule which allows AT&T to claim relief under that rule.

2. Failure to Reasonably Furnish Requested Telecommunications Services

39. Staff discusses AT&T's second count at paragraphs 18-21 of its response. Again, U S WEST does not dispute that under certain facts, not proved here, a carrier could establish a cause of action under the cited statutes. AT&T has simply not established that it is entitled to relief under any of the cited provisions of the law.

40. Staff claims that U S WEST has misstated the requirements of RCW 80.36.080 (Response at paragraph 19), and that the requirements of the statute are independent of the company's tariffs. Staff is incorrect. RCW 80.36.080 requires that all rates and charges and rules and regulations of a company must be fair, just, reasonable and sufficient. RCW 80.36.100 requires all rates, charges, rules and regulations to be set forth in the company's tariff. RCW 80.36.110 and 80.04.130 limit a company's ability to change its tariffs. RCW 80.36.130 requires that the company only charge its tariffed rates. Thus, the requirement under RCW 80.36.080 to perform in a "prompt, expeditious and efficient manner", can only have meaning when linked with the company's tariffs.

3. Prejudice and Disadvantage to AT&T

41. Staff discusses AT&T's third count at paragraphs 22-26 of its response. U S WEST does not dispute the plain language of 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), both of which state that the Commission has primary jurisdiction to determine whether the statutes have been violated. Again, U S WEST would point to RCW 80.36.250, and suggest that the direction to the Commission in that statute plainly means that its "primary jurisdiction" in connection with these statutes references only intrastate services. U S WEST believes that it has addressed the substance of the claims under these statutes in its other filings and will not repeat those arguments here.

IV. CONCLUSION

42. AT&T has failed to meet its burden of proof, and has failed to establish that on the facts and the law it is entitled to any relief. The complaint should be dismissed with prejudice.

DATED this 4th day of April, 2000.

U S WEST Communications, Inc.

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Lisa A. Anderl, WSBA No. 13236