BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| NEXTLINK WASHINGTON, INC.,<br><br>Complainant,<br><br>v.<br><br>U S WEST COMMUNICATIONS, INC.,<br><br>Respondent. | ) | DOCKET NO. UT-990340<br><br>U S WEST's ANSWER ON SECTION 252(i) ISSUES |

Pursuant to the Administrative Law Judge's order and the agreement of the parties, U S WEST Communications, Inc., (U S WEST) hereby files the following answer to Nextlink's memorandum on Section 252(i) issues.

Nextlink asserts that it is entitled to the reciprocal compensation provisions of the MFS/U S WEST interconnection agreement pursuant to Section 252(i) and FCC Rule 809 (47 C.F.R. § 51.809), as applied through Nextlink's own interconnection agreement. Nextlink is incorrect for several reasons. First, Nextlink did not properly request or attempt to negotiate different provisions under 252(i). Second, under the circumstances presented here, Nextlink is not entitled to any provisions of the MFS agreement because Nextlink's request is untimely. Nextlink

is attempting to elect terms in a contract that was already approved and available in April 1997 when Nextlink opted into a different contract. This is not permitted under the Act or the Rule. Nextlink is also attempting to opt into terms in a contract that is now expired. The original term of the MFS contract expired on July 7, 1999. The MFS contract was available for a reasonable period of time after its approval, but cannot be opted into more than two years after it was approved and within a few months of its expiration.

**A. Nextlink has Never Properly Requested an Amended Contract Under Section 252(i) and Did Not Negotiate With U S WEST**

Nextlink has failed to follow any sort of reasonable procedure in attempting to avail itself of relief under Section 252(i) and has failed to give U S WEST notice of its request for amended contract provisions. Nextlink never properly requested an amended contract under Section 252(i) and did not negotiate with U S WEST regarding the provisions it was requesting.

This latter point is most clearly evidenced by the fact that the Third Supplemental Order, dated June 23, 1999, requires Nextlink to "file a memorandum, . . . stating: (1) what specific provisions in the Agreement it requests to replace with what specific provisions in the MFS agreement . . . ." If Nextlink had sought in any way to negotiate with U S WEST, this question would not need to be asked, because Nextlink would have stated as a part of the negotiations, or the request for negotiations, what provisions of another agreement it sought. Nextlink utterly failed to do so, and the parties and the Commission are thus left more than six months later wondering how exactly Nextlink seeks to modify its agreement.

U S WEST notes that the issue of whether Nextlink negotiated with U S WEST is discussed in the Third Supplemental Order. There, the Administrative Law Judge determines that Nextlink did negotiate in good faith. However, that decision is premised on a fundamentally wrong assumption, and cannot stand. In the Third Supplemental Order, at pages 2 and 4, the Administrative Law Judge states that Nextlink's first billing statement was in December 1998.

From this he concludes that Nextlink negotiated in good faith, stating:

> There is no hard and fast rule by which to determine whether a party has negotiated in good faith, and each case must be evaluated on its own merits. In this case the Commission takes into account that U S WEST became aware of NEXTLINK's claim for reciprocal compensation in December, 1998, communications between the two companies ensued regarding the claim, yet Nextlink did not file its petition until nearly five months later.
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> Third Supplemental Order at p. 4.

What is fundamentally incorrect here is that U S WEST was *not* aware of Nextlink's claim in December 1998, because Nextlink did not notify U S WEST of its "claim" until Nextlink sent its first billing statement in March 1999, covering the period from December through February. Nextlink filed its claim less than six weeks later. U S WEST did not believe that the parties had negotiated this issue, nor was U S WEST aware that Nextlink was making a claim under Section 252(i). U S WEST's declarations, filed with its answer on May 12, 1999, support this.

The Third Supplemental Order notes that the invoices Nextlink submitted were substantial and constituted constructive notice to U S WEST that local traffic was being measured and was out of balance. This may be true, but it did not constitute notice of a 252(i) election in any way shape or form. Nextlink tacitly admits that it never intended a request under 252(i) when it states in its June 30 filing that it continues to adhere to its (original) position that the reciprocal compensation provisions of its own agreement are self-executing (footnote 1).

Indeed, in March and April U S WEST believed the parties to be involved in little more than a billing dispute, since Nextlink was billing U S WEST under a contract that clearly provided for "bill and keep", not reciprocal compensation. This is evidenced by the response Nextlink sent in March (included herein as Attachment A) when U S WEST asked why Nextlink was billing U S WEST. Nextlink's response clearly indicated that it was relying on its own contract, not imported provisions under 252(i). U S WEST properly relied on its interconnection agreement with

Nextlink, which stated that an alternate compensation arrangement would have to be approved by the Commission, when it told Nextlink that no reciprocal compensation was due under the parties' agreement.

If these actions by Nextlink constitute a "negotiation", or if this type of "notice" is sufficient to elect different terms and conditions under Section 252(i), U S WEST remains convinced that such an interpretation of the Act will provide no incentive for CLECs to actually negotiate at all -- they will merely need to claim that they did, to the detriment of the ILEC, and the negotiation process itself.

**B. Section 252(i) and Rule 809 Do Not Permit the Type of "Opt-in" that Nextlink Is Requesting.**

The language in Rule 809 and the FCC's First Report and Order[1] clearly indicates that no carrier has free rein to unilaterally amend its agreement at any time if it believes that other provisions would work better for it. In fact, the limitations on the right to pick and choose operate here to preclude Nextlink from selecting the reciprocal compensation provision from the MFS agreement.

In its First Report and Order, the FCC further clarified the circumstances under which a carrier may avail itself of the "pick and choose" provisions of the Act and the Rule. In paragraph 1316 of the First Report and Order, the FCC stated:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements . . . . This means that any requesting carrier may avail itself of more advantageous terms and conditions *subsequently* negotiated by any other carrier for the same individual interconnection, service, or element once the *subsequent* agreement is filed with, and approved by, the state commission. (Emphasis added.)

It is clear from this discussion that Nextlink may only opt into terms and conditions which

[1] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996. CC

came into existence *after* it entered into its agreement with U S WEST. Nextlink's claim to the MFS provisions must thus fail in the first instance, as the reciprocal compensation provisions from the MFS agreement were approved effective January 7, 1997, *before* Nextlink entered into an agreement with U S WEST. Nextlink did not enter into an agreement with U S WEST until more than three months later, giving Nextlink ample opportunity to evaluate both the TCG and the MFS agreements. Nextlink did not seek the MFS terms at the time it opted in to the U S WEST/TCG agreement. Nextlink cannot claim that the MFS terms and conditions were contained in a subsequent agreement, and Nextlink is thus not entitled to those terms and conditions under Section 252(i).

Nor does the FCC rule give Nextlink any right to the MFS terms and conditions. U S WEST believes that the above-quoted language from paragraph 1316 of the First Report and Order ought to put an end to the inquiry of whether Nextlink's request is permissible, and the Commission should not need to rule on whether Nextlink satisfies the other requirements of the Rule. However, in response to Nextlink's claim that it meets the requirements of Rule 809, U S WEST provides the following discussion, showing that Nextlink fails other requirements as well. The Rule provides as follows:

> **§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.**
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> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i. e., local, access, or interexchange) as the original party to the agreement.

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Docket No. 96-98, First Report and Order (August 8, 1996).

> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
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> (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
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> (2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.
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> (c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

It is U S WEST's position in this case that 809(c) would preclude Nextlink from attempting to claim the reciprocal compensation provisions from the MFS agreement.[2] A reasonable period of time has already passed from the time the approved MFS agreement has been available for public inspection, and Nextlink did not attempt to claim any portions of this agreement within that time. U S WEST's policy, implemented since the Supreme Court ruling in January, is that carriers seeking new interconnection agreements may avail themselves of terms and conditions from previously negotiated agreements for six months after they are approved, or so long as the agreement has at least 12 months left before its expiration. Nextlink's claim fails under either test. The MFS agreement was over two years old in March 1999, and had less than a year until expiration.

Although the FCC does not define how long a reasonable period of time is, U S WEST submits that its policy meets that requirement. Clearly, the FCC does not require that the agreements or the terms and conditions from the agreements be available for the entire term of the agreement -- if this is what the FCC had intended, it would have been easy enough to write that

[2] U S WEST does not contend that 809(b) precludes Nextlink's claim, as U S WEST is not claiming that the costs and technical feasibility of reciprocal compensation are different between Nextlink and MFS. However, Nextlink must meet the requirements of all three subsections of the rule, not just one or two of them.

into the rule. Instead, the rule requires a reasonable period. Nextlink offers no guidance in its filing as to how one might determine a reasonable period. On the other hand, U S WEST's policy offers a generous amount of time in which to opt-in, while avoiding the impractical and inefficient result of having to implement a contract which is close to expiration.

There is no reason whatsoever that Nextlink could not have opted into the MFS agreement in April 1997, when it chose instead to opt into the TCG agreement. Now, Nextlink has apparently decided that it makes business sense to have a different kind of agreement, and believes it can shop from a smorgasbord of provisions from every other agreement. However, it is exactly this type of CLEC change of heart about what terms and conditions make business sense that led the 8th Circuit to conclude that a free-for-all of pick and choose would gut the provisions of the Act that provide for voluntary, good faith negotiations. While the Supreme Court ultimately upheld the FCC's jurisdiction to interpret Section 252(i) and to promulgate Rule 809, both of these provisions must be interpreted and applied in a way which does not undermine the other provisions of the Act, particularly Section 252(a) and (b) which provides for voluntary negotiations and arbitrations of interconnection agreements. No CLEC would have any incentive to negotiate in good faith or even to present its best case in arbitration if it knew it could always get the best provisions that anyone else has, without limit. Yet that is exactly the outcome that Nextlink advocates in this case. U S WEST urges the Commission not to reach this result, and to preserve the integrity of the negotiated and arbitrated agreements in effect in Washington.

For the foregoing reasons, as well as the reasons stated in U S WEST's answer and other pleadings, the Commission should reject Nextlink's claim under Section 252(i) and should hold that Nextlink is not entitled to the reciprocal compensation provisions of the MFS/U S WEST agreement.

Respectfully submitted this 8th day of July, 1999.

U S WEST Communications, Inc.

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