BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NEXTLINK WASHINGTON, INC.,	)	
	)	Docket No. UT-990340
Petitioner,	)	
	)	NEXTLINK REPLY ON
v.	)	SECTION 252(i) ISSUES
	)	
U S WEST COMMUNICATIONS, INC.,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Third Supplemental Order in this docket, NEXTLINK Washington, Inc. ("NEXTLINK"), provides the following Reply to the Answer of U S WEST Communications, Inc., to NEXTLINK's Memorandum on issues relating to 47 U.S.C. ? 252(i) and 47 C.F.R. ? 51.809 as applied through Article XXVII (Most Favorable Terms and Treatment) of NEXTLINK's interconnection agreement with U S WEST. Once again, U S WEST contends that NEXTLINK failed to negotiate or identify the applicable provisions of the MFS Agreement, despite the undisputed evidence to the contrary and the lack of any requirement to negotiate prior to exercising Section 252(i). Not content to quote selectively only from the Eighth Circuit's decision, U S WEST now uses the FCC's language out of context in a futile attempt to support its unilateral and unreasonable restrictions on NEXTLINK's ability to obtain the same compensation for terminating Local Traffic that U S WEST provides to other carriers. The Commission should reject U S WEST's arguments and should compel U S WEST to comply with the parties'

Agreement by incorporating the reciprocal compensation provisions of the MFS Agreement.

DISCUSSION

A. NEXTLINK Properly Notified U S WEST of the MFS Agreement Provisions NEXTLINK Seeks to Incorporate Into the Parties' Agreement.

U S WEST continues to contend that NEXTLINK failed to negotiate with U S WEST or to specify the provisions of the MFS Agreement NEXTLINK asserts should be included in the parties' Agreement. U S WEST's contentions lack legal and factual support and represent nothing more than an improper attempt to reargue an issue that has already been decided in the Third Supplemental Order.

NEXTLINK notified U S WEST that NEXTLINK sought to incorporate the interconnection compensation provisions of the MFS Agreement into its current agreement, and prior to filing its Petition for Enforcement, NEXTLINK attempted to negotiate a resolution to U S WEST's refusal to make those provisions available. U S WEST's own witness refutes U S WEST's contentions that NEXTLINK never identified the applicable provisions of the MFS Agreement and that U S WEST "believed the parties to be involved in little more than a billing dispute." USWC Section 252(i) Answer at 2-3. Mr. Paulson declared that on March 10, 1999, a NEXTLINK representative "faxed me selected pages from the MFS/U S WEST arbitrated agreement, indicating that those rates and provisions applied." Paulson Decl. ? 5. Mr. Paulson declared that the next day, another NEXTLINK representative "told us that NEXTLINK believed that it was entitled to compensation under the MFS Agreement." *Id.* ? 6. U S WEST cannot plausibly maintain that it did not know which provisions of the MFS Agreement NEXTLINK

intended to incorporate into its Agreement with U S WEST under these circumstances.

U S WEST also repeats its claim that NEXTLINK failed to negotiate with U S WEST, but the Third Supplemental Order has already resolved this issue. Moreover, nothing in the Telecommunications Act of 1996 ("Act") or FCC rules require negotiations as a prerequisite to taking advantage of Section 252(i) or Rule 809. Federal law provides only that U S WEST "*shall make available* any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. ? 252(i) (emphasis added); *accord* 47 C.F.R. ? 51.809. As part of Commission-approved interconnection agreements, such "interconnection, service or network element" provisions already have been negotiated or arbitrated and require no "negotiation" to apply them to another carrier. To the contrary, negotiation implies that U S WEST may refuse to make available part or all of the requested provisions, which conflicts not just with the plain language of Section 252 but with the Act's fundamental prohibition on discriminatory treatment. *E.g.*, 47 U.S.C. ? 251(c)(2).

Nor can U S WEST legitimately contend that NEXTLINK implicitly concedes that it made no request under Section 252(i) because NEXTLINK believes that the reciprocal compensation provisions of its Agreement are self-executing. Section 252(i) is incorporated by reference in the Agreement, along with the requirement that a Commission-approved alternate compensation plan will replace bill and keep in the event of a significant traffic imbalance. Both provisions are self-executing, and whether characterized as a Section 252(i) election or

implementation of the only available Commission-approved alternate compensation plan, NEXTLINK's position is, and always has been, that the reciprocal compensation provisions of the MFS Agreement are or should be incorporated into the parties' Agreement.

U S WEST nevertheless contends that it did not know NEXTLINK's position until early March 1999, rather than December 1998 as stated in the Third Supplemental Order. This timing discrepancy is irrelevant. Whether NEXTLINK raised the issue of reciprocal compensation with U S WEST six weeks prior to filing its Petition or sixteen weeks, the undisputed facts are that NEXTLINK notified U S WEST of NEXTLINK's position, U S WEST unequivocally rejected that position, party representatives attempted unsuccessfully to resolve the issue, and only then did NEXTLINK seek Commission resolution. U S WEST's inherently incredible argument that these facts do not represent "negotiations" does not become any more credible upon repetition.

B. NEXTLINK Has Complied With the Requirements of Section 252(i) and FCC Rule 809.

NEXTLINK demonstrated its compliance with Section 252(i) and FCC Rule 809 in its Memorandum. U S WEST, however, seeks to impose conditions on NEXTLINK's ability to request provisions from the MFS Agreement based on selective quotes from the FCC *Local Competition Order* and a restrictive interpretation of the "reasonable period of time" requirement in 47 U.S.C. ? 51.809(c). Neither of these conditions find support in the language or intent of federal law, and accordingly U S WEST has failed to provide the Commission with any legitimate grounds for denying NEXTLINK's Petition for Enforcement of the parties' Agreement.

1. NEXTLINK Is Not Precluded From Adopting Provisions From the

MFS Agreement Because It Was Approved Prior to NEXTLINK's Agreement With U S WEST.

Neither Section 252(i) nor Rule 809 place any temporal conditions on the Commission-approved agreement provisions that incumbent local exchange carriers ("ILECs" or "incumbent LECs") must make available to requesting carriers, other than the FCC's requirement that those provisions must be available for a "reasonable period of time." In determining that a carrier with an existing agreement is entitled to "most favored nation" status, the FCC stated that this would enable such a carrier to "avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier . . . ." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order ? 1316 (Aug. 8, 1996) ("*Local Competition Order*"). U S WEST would have the Commission interpret this language as a limitation on the applicability of Section 252(i), but the Act, Rule 809, and the *Local Competition Order* are not subject to such an interpretation.

U S WEST quotes only a portion of paragraph 1316 of the *Local Competition Order*, despite U S WEST's prior criticism of NEXTLINK for quoting less than the entirety of Rule 809. In contrast to NEXTLINK, however, U S WEST omits key language from paragraph 1316, which provides in full,

> 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. *Congress's command under section 252(i) was that parties may utilize **any** individual interconnection service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement.*

> 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. *We believe the approach we adopt will maximize competition by ensuring that carriers' [sic] obtain access to terms and elements on a nondiscriminatory basis.*

(Emphasis added.) This paragraph reflects the FCC's intent to maximize competitors' access to the most favorable terms and conditions contained in Commission-approved interconnection agreements, as Congress intended, which includes allowing carriers with existing agreements to modify those agreements to reflect preferable terms and conditions provided to other carriers. The reference to "subsequently negotiated" agreements is merely an illustration of how the Act applies to existing agreements. This language does not limit the agreements available to requesting carriers any more than the FCC's reference to "negotiated" terms and conditions could be interpreted to exclude arbitrated provisions.

U S WEST also ignores the historical, as well as textual, context of the *Local Competition Order*. The Order requires that carriers be permitted to incorporate terms and conditions from other agreements as part of its own interconnection agreement during the negotiation or arbitration process. *Id.* ?? 1309-15. The Eighth Circuit, however, stayed and eventually vacated that requirement, and until the Supreme Court overturned the Eighth Circuit's decision, U S WEST permitted carriers only to opt into entire agreements. U S WEST now would take advantage of that historic anomaly by contending that NEXTLINK is precluded from adopting provisions of the MFS Agreement because it was approved before NEXTLINK

executed its Agreement with U S WEST, even though NEXTLINK never had the option of selecting those provisions without also taking the entire MFS Agreement. U S WEST's "heads I win, tails you lose" position lacks any semblance of reasonableness, as well as any support in either the language or intent of federal law.[1]

2. NEXTLINK's Request Complies With the Reasonable Time Requirement in Rule 809.

The only aspect of Rule 809 with which U S WEST contends that NEXTLINK's request does not comply is subsection (c), which requires that agreements remain available for use by other carriers "for a reasonable period of time." U S WEST states that "the FCC does not define how long a reasonable period of time is," USWC Section 252(i) Answer at 6, but inexplicably does not reference, much less quote, the FCC's discussion of this issue. The FCC stated,

> We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical compatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.

[1] Indeed, even if U S WEST's hypertechnical and misleading interpretation were adopted, NEXTLINK would simply request to opt into the identical provisions of one of the carriers that opted into the MFS Agreement after NEXTLINK's agreement was approved.

Local Competition Order ? 1319. The FCC's requirement of a "reasonable period of time" is intended to address issues of "technical compatibility" and changes in pricing and network configurations, not simply to establish an arbitrary cut-off date for electing interconnection agreement provisions.

The reciprocal compensation provisions NEXTLINK has requested from the MFS Agreement raise none of these issues. "U S WEST is not claiming that the costs and technical feasibility of reciprocal compensation are different between NEXTLINK and MFS," USWC Section 252(i) Answer at 6, n.2, nor does U S WEST contend that any changes in pricing and network configurations have occurred since the MFS Agreement was approved. Indeed, U S WEST has continued to make the entire MFS Agreement available to requesting carriers and the pricing in the MFS Agreement, like the pricing in all interconnection agreements, is subject to modification based on the Commission's final order in Docket Nos. UT-960369, *et al*. The term "reasonable," moreover, denotes flexibility to accommodate individual circumstances, not the rigid and unilaterally imposed deadlines U S WEST has proposed for the first time in this proceeding. As NEXTLINK explained in its earlier Memorandum, the lack of any other Commission-approved alterative to bill and keep and principles of nondiscrimination support the reasonableness of NEXTLINK's request to adopt the reciprocal compensation provisions of the MFS Agreement.[2]

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[2] U S WEST also erroneously contends that NEXTLINK's request is untimely because the MFS Agreement allegedly has expired. Although the initial 2 1/2 year term may have expired, Article XXXIV, Section V of the MFS Agreement provides that following that initial term, "the Agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of

U S WEST erroneously suggests that the FCC's interpretation of Section 252(i) remains subject to dispute and that the Eighth Circuit's decision retains some continuing viability. The Supreme Court's decision did not merely uphold "the FCC's jurisdiction to interpret Section 252(i) and to promulgate Rule 809," USWC Section 252(i) Answer at 7, but held that Rule 809 is a lawful interpretation of Section 252(i):

> [I]t is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language almost exactly. . . .
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> The FCC's interpretation is not only reasonable, it is the most readily apparent. Moreover, in some respects the rule is more generous to incumbent LECs than ? 252(i) itself. . . . Section 252(i) certainly demands no more than that. And whether the [FCC's] approach will significantly impede negotiations (by making it impossible for favorable interconnection, service, or network element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the [FCC] and eminently beyond our ken. We reverse the Eighth Circuit and reinstate the rule.

AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 738 (1999). Rule 809, therefore, is binding federal law, and the Commission may not reinterpret Section 252(i) as if the FCC's interpretation were open to question, as U S WEST suggests.

U S WEST also contends that "[n]o 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." USWC Section 252(i) Answer at 7. U S WEST's

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this Agreement, becomes effective between the parties." No such replacement agreement has been submitted to the Commission for its approval, and therefore the MFS Agreement continues in full force and effect.

disagreement is with Congress, the FCC, and the Supreme Court, not with NEXTLINK. Most of the CLECs authorized to provide service in Washington have adopted interconnection agreements with U S WEST that were arbitrated by AT&T, TCG, or MFS, as a means of facilitating more rapid and nondiscriminatory market entry with efficient use of company and Commission resources. The Act and Rule 809, as affirmed by the Supreme Court, expressly authorize requesting carriers to obtain the same terms and conditions U S WEST and other ILECs provide to other carriers, as well as the rights of CLECs to negotiate, and if necessary arbitrate, terms and conditions that differ from those that are currently available to other carriers. Congress and the FCC thus have already struck the proper balance between negotiation/arbitration and "most favored nation" treatment, and the Commission cannot now rebalance those interests as U S WEST proposes.

NEXTLINK has requested nothing more than the reciprocal compensation scheme that U S WEST currently provides to other CLECs, and federal law unambiguously requires U S WEST to comply with that request without further negotiation or arbitration. U S WEST, however, apparently would require all CLECs in general, and NEXTLINK in particular, to waste time and limited resources on negotiation and arbitration to obtain the same terms and conditions U S WEST already provides to other carriers. U S WEST obviously would benefit from the ability to impose such unwarranted costs and delays on competitors -- particularly when U S WEST recovers its own such costs from captive ratepayers -- but the Commission should not condone, much less encourage, such anticompetitive behavior, especially when U S WEST's

proposal conflicts with the language and intent of the Act and FCC Rules.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Memorandum, Petition, and subsequent proceedings in this docket, the Commission should require U S WEST to permit NEXTLINK to incorporate into their Agreement the MFS Agreement's reciprocal compensation provisions that are applicable to Local Traffic, including ISP traffic.

DATED this 14th day of July, 1999.

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