BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of :	)	DOCKET NO. UT-990391
	)	
Exploring the need for rules governing	)	
procedural and substantive requirements to	)	
implement Section 252(i) of the federal	)	

INITIAL COMMENTS OF U S WEST

On October 29, 1999, the Washington Utilities and Transportation Commission (Commission) filed with the Code Reviser its notice of intent to conduct this inquiry. As the basis for this inquiry, the Commission stated in its Preproposal Statement of Inquiry (CR-101) that:

> The Commission has issued a Draft Interpretive and Policy Statement, in Docket UT-990355, in order to establish guidelines for parties seeking to "pick and choose" terms and conditions pursuant to Section 252(i) of the Telecom Act and FCC Rule 51.809. The Commission may formally adopt the Interpretive and Policy Statement after giving consideration to all comments. The Federal Communications Commission specifically requires that the incumbent carrier shall make available provisions of any interconnection agreement "without unreasonable delay". The Commission may use the principles set forth in its Interpretive and Policy Statement in the development of its opinions and judgements regarding interconnection agreements that come before it. Currently, the Commission does not have rules specifically addressing the pick and choose provision of the Telecom Act. This inquiry is intended to determine

> whether there is a need for Commission rules on the subject in light of the Commission's Interpretive and Policy Statement and if so, what the rules should provide.

In its *Notice of Opportunity to Comment*, dated October 29, 1999, the Commission allowed that "[I]n the event the comments filed by interested persons are similar or identical to comments filed in the response to the draft Interpretive and Policy Statement in Docket UT-990355, commenters may reference the appropriate comments. Accordingly, U S WEST requests that its comments in UT-990355 of July 16, 1999, and November 10, 1999, be incorporated into this rulemaking by reference.

As noted in its November 10, 1999 *Supplemental Comments,* U S WEST believes that the Interpretive and Policy Statement regarding implementation of Section 252(i) of the Telecom Act, recently adopted by the Commission on November 30, 1999, correctly interprets the applicable law as set forth in 47 C.F.R. § 51.809 and the FCC's Memorandum Opinion and Order in CC Docket No. 99-154, dated August 3, 1999. In those comments U S WEST provided recommended changes that it believes will add clarity and reduce the potential for disputes. If the Commission adopts its Interpretive and Policy Statement as rules, U S WEST proposes that the Commission incorporate these recommended changes in the final rules.

One additional issue, not previously addressed in U S WEST's Comments, which is integral to 252(i) implementation rules, is the principle that carriers not be allowed to opt-in to agreements or individual arrangements that are themselves based on an opt-in from another agreement. The rationale for this principle is contained in the Act itself. Pursuant to Section 252(i), a local exchange carrier is required to make available "any

interconnection, service, or network element provided under an agreement approved under this section . . .." Pursuant to Section 252(e), the only agreements which are to be submitted for approval are those adopted by negotiation or arbitration. Thus, an agreement previously adopted under 252(i) is not one that has been approved under 252(e) and is therefore not available for adoption by others. The District Court for the Northern District of California has considered this very question, and reached this same result, stating:

> The court finds, however, that section 252(i) itself protects incumbent LECs from the possibility that the original approved agreement would exist in perpetuity. Section 252(i) only requires incumbent LECS to make available agreements approved by the State commission under the requirements of section 252(e). Therefore, a requesting carrier could not request the same terms and conditions of a MFN agreement entered into under section 252(i) because such an agreement is not an agreement approved under section 252(e). See *47 U.S.C. § 252*(i); 47 C.F.R. § 51.809(a).

Airtouch Paging of California v. Pacific Bell, 1999 U.S. Dist. LEXIS 16615 (N.D. Cal. May 10, 1999) at *43. Thus, U S WEST believes that there is authority for establishing this principle, and recommends that the Commission incorporate this finding into any rules it may adopt.

Ultimately, U S WEST believes that the Commission's Interpretive and Policy Statement, amended as recommended above, provides sufficient guidance for the 252(i) process. Although U S WEST is not certain that rules are necessary in light of the Commission's recent adoption of the Interpretive and Policy Statement, U S WEST will not oppose incorporating the statement, as discussed above, into formal rules.